LEGISLATIVE ASSEMBLY OF QUEENSLAND

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

Review of the Queensland Constitutional Review Commission's recommendations regarding entrenchment of the Queensland Constitution

August 2003

Report No 41

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

REPORTS

		DATE TABLED
1.	Annual report 1995-96	8 August 1996
2.	Matters pertaining to the Electoral Commission of Queensland	8 August 1996
3.	Review of the Referendums Bill 1996	14 November 1996
4.	Truth in political advertising	3 December 1996
5.	The Electoral Amendment Bill 1996	20 March 1997
6.	Report on a study tour relating to the preservation and enhancement of individuals' rights and freedoms and to privacy (31 March 1997—14 April 1997)	1 October 1997
7.	Annual report 1996-97	30 October 1997
8.	The Criminal Law (Sex Offenders Reporting) Bill 1997	25 February 1998
9.	Privacy in Queensland	9 April 1998
10.	Consolidation of the Queensland Constitution – Interim report	19 May 1998
11.	Annual report 1997-98	26 August 1998
12.	The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?	18 November 1998
13.	Consolidation of the Queensland Constitution: Final Report	28 April 1999
14.	Review of the *Report of the Strategic Review of the Queensland Ombudsman* (parliamentary Commissioner for Administrative Investigations)	15 July 1999
15.	Report on a study tour of New Zealand regarding freedom of information and other matters: From 31 May to 4 June 1999	20 July 1999
16.	Review of the Transplantation and Anatomy Amendment Bill 1998	29 July 1999
17.	Annual report 1998-99	26 August 1999
18.	Issues of electoral reform raised in the Mansfield decision: Regulating how-to-vote cards and providing for appeals from the Court of Disputed Returns	17 September 1999
19.	Implications of the new Commonwealth enrolment requirements	2 March 2000
20.	The Electoral Amendment Bill 1999	11 April 2000
21.	Meeting with the Queensland Ombudsman (parliamentary Commissioner for Administrative Investigations) regarding the Ombudsman's *Annual Report to Parliament 1998 – 1999*	19 April 2000
22.	The role of the Queensland Parliament in treaty making	19 April 2000
23.	Issues of Queensland electoral reform arising from the 1998 State election and amendments to the *Commonwealth Electoral Act 1918*	31 May 2000
24.	Review of the Queensland Constitutional Review Commission's recommendations relating to a consolidation of the Queensland Constitution	18 July 2000
25.	Annual report 1999-00	19 July 2000
26.	The *Report of the strategic management review of the Offices of the Queensland Ombudsman and the Information Commissioner*	19 July 2000
27.	Review of the Queensland Constitutional Review Commission's recommendation for four year parliamentary terms	28 July 2000
28.	The prevention of electoral fraud: Interim report	14 November 2000
29.	Annual report 2000-01	2 August 2001

		DATE TABLED
30.	Progress report on implementation of recommendations made in the *Report of the strategic management review of the Offices of the Queensland Ombudsman and the Information Commissioner*	8 August 2001
31.	Review of the Members' oath or affirmation of allegiance	25 October 2001
32.	Freedom of Information in Queensland	20 December 2001
33.	The Electoral (Fraudulent Actions) Amendment Bill 2001	27 March 2002
34.	Meeting with the Queensland Ombudsman – 12 April 2002	14 May 2002
35.	Annual report 2001-02	23 August 2002
36.	The Queensland Constitution: Specific content issues	27 August 2002
37.	Meeting with the Queensland Ombudsman – 26 November 2002	12 December 2002
38.	Meeting with the Queensland Ombudsman – 29 April 2003	6 June 2003
39.	The role of the Queensland Parliament in treaty making – Review of tabling procedure	17 July 2003
40.	Annual report 2002-03	21 August 2003

PAPERS

	DATE TABLED
Truth in political advertising (Issues paper)	11 July 1996
Privacy in Queensland (Issues paper)	4 June 1997
The preservation and enhancement of individuals' rights and freedoms: Should Queensland adopt a bill of rights? (Issues paper)	1 October 1997
Upper Houses (Information paper)	27 November 1997
Inquiry into issues of Queensland electoral reform (Background paper)	25 November 1999
The role of the Queensland Parliament in treaty making (Position paper)	25 November 1999
Freedom of Information in Queensland (Discussion paper)	8 February 2000
Four year parliamentary terms (Background paper)	11 April 2000
Review of the Queensland Constitutional Review Commission's recommendations relating to a consolidation of the Queensland Constitution (Position paper)	27 April 2000
Inquiry into the prevention of electoral fraud (Issues paper)	8 September 2000
The Queensland Constitution: Specific content issues (Issues paper)	18 April 2002
The Queensland Constitution: Entrenchment (Proposals for Comment)	27 August 2002
Hands on Parliament: A parliamentary committee inquiry into Aboriginal and Torres Strait Islander peoples' participation in Queensland's democratic process (Issues paper)	12 December 2002

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LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

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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*. This committee's predecessor, and now this committee, has been progressively reviewing the QCRC's recommendations. In this report the committee considers the QCRC's recommendations relating to entrenchment of the Queensland Constitution.

The QCRC's report relates to our current system of government, that is, a constitutional monarchy. However, there is considerable support for, and activity directed at, change in our system of government to a republic. A successful Commonwealth referendum on this issue will, practically, require Queensland and each of the other Australian states to take steps to also become republics.

In this light, the committee cannot support referendum entrenchment of provisions of the Constitution which relate to the current monarchical system of government. Further, the committee considers that, unless compelling justification for an earlier constitutional referendum arises, any further consolidation or referendum entrenchment of the Constitution should be delayed until the Queensland Parliament seeks a republic referendum.

Subject to these comments, the committee proposes in this report a test for deciding which provisions of the Constitution should be referendum entrenched. The committee uses this test to identify essential elements of the Constitution which should be referendum entrenched at the appropriate time.

The committee also recommends that the Constitution should be amended as soon as possible by way of ordinary legislative amendment so that four requirements together comprising 'parliamentary entrenchment' apply to the whole Constitution. Parliamentary entrenchment is an important procedural mechanism to ensure that amendments to the Constitution are given detailed consideration and in such a way as to facilitate public input to the proposed amendments.

Invaluable input to this inquiry was received by submitters and participants at the round-table discussion of the committee's consultation paper held on 28 November 2002. This event was hosted by the Queensland Chapter of the Australian Association of Constitutional Law in conjunction with the committee.

The committee is also greatly appreciative of the expert advice of Dr Gerard Carney, Professor of Law, Bond University, and the high quality analysis and written work provided by LCARC secretariat staff in preparing this report to Parliament.

Karen Struthers MP
Chair

19 August 2003

TABLE OF CONTENTS

Page No.

SUMMARY OF RECOMMENDATIONS

Despite certain doubts as to the legal effectiveness of entrenching provisions of state constitutions, the Parliament should nevertheless consider entrenching provisions of the *Constitution of Queensland 2001* as recommended in this report.

While change to a republican system of government remains on the public agenda, there should be no further referendum entrenchment of provisions of the *Constitution of Queensland 2001* which relate to the current monarchical system of government.

As a matter of general principle, the *Constitution of Queensland 2001* should referendum entrench provisions which:

- establish the essential structure of the State's constitutional system; or
- provide for the fundamental principles of the State's constitutional system.

This includes provisions which:

- prescribe a system of representative and responsible government;
- provide for the legislature, the executive and the judiciary as the three arms of government; and
- maintain a balance of power between these arms of government, appropriate for a system of representative and responsible government.

However, for the reasons discussed in chapter 4, the committee does not support referendum entrenching provisions which relate to the current monarchical system of government.

Applying the above test in light of the committee's proviso, provisions (or components thereof) of the *Constitution of Queensland 2001* which should be referendum entrenched concern:

- the Legislative Assembly (s 7);
- members of the Legislative Assembly (s 10);
- division of the State into electoral districts (s 12);
- one member for each electoral district (s 13);
- a minimum sitting requirement for the Legislative Assembly (s 19);
- a maximum limit on the combined number of ministers of the state and parliamentary secretaries (s 43 redrafted as recommended by the committee: see section 5.2.3);
- various provisions relating to the judiciary (ss 57-63);
- the consolidated fund (s 64);
- requirement to pay tax, impost, rate or duty (s 65);
- payment from consolidated fund (s 66); and
- the system of local government (s 70).

The above test should also be used to identify which essential elements of the currently entrenched provisions should be referendum entrenched whether or not Queensland retains its monarchical system of government.

The discussion in section 5.2 and the table in appendix B outlines this aspect of the committee's recommendation in more detail.

Provisions (or components thereof) which the committee recommended in LCARC report no 36 *The Queensland Constitution: Specific content issues* should be included in the *Constitution of Queensland 2001* and which should be referendum entrenched concern:

- the requirement that ministers be members of the Legislative Assembly (recommendation 7);
- a maximum limit on the combined number of ministers of the state and parliamentary secretaries (recommendation 18);
- acting judges (recommendation 31);
- the compulsory retirement age for judges (recommendation 32); and
- certain aspects of the procedure relating to removal of judges from office (recommendation 33).

The discussion in section 5.2 and the table in appendix C outlines this aspect of the committee's recommendation in more detail.

In accordance with recommendation 15 (Future referendum entrenchment), provisions should only be referendum entrenched following approval of that entrenchment by referendum.

The existence of the District Court should not be referendum entrenched. However, judges of the District Court should be given the same protection in the *Constitution of Queensland 2001* in relation to appointment, tenure, removal and salary as judges of the Supreme Court. In appendices B and C the committee recommends referendum entrenchment of relevant provisions.

Some redrafting of provisions in chapter 4 of the *Constitution of Queensland 2001* is required to ensure that referendum entrenchment of the provisions relating to the appointment, tenure, removal and salary of judges of the District Court can not be subverted by amendment of the definition of 'judge' in s 56. In this redrafting process it should also be made clear that s 61 (Removal from office for misbehaviour or incapacity) is subject to s 63 (Protection if office abolished).

While the committee is not advocating an increase in the number of ministers or parliamentary secretaries, the *Constitution of Queensland 2001* should provide that the maximum combined number of ministers of the state and parliamentary secretaries that may be appointed at one time be equal to one-third of the total number of members of the Legislative Assembly. This provision should itself be referendum entrenched.

The statement in s 71(1) of the *Constitution of Queensland 2001* that a local government '*is charged with the good rule and local government of a part of Queensland allocated to the body*' should be incorporated into s 70.

Section 70 (System of local government) of the *Constitution of Queensland 2001*, as amended, should be referendum entrenched. As a consequence, s 78 can be repealed.

The *Constitution of Queensland 2001* should be amended to provide that any bill which seeks to amend or repeal the Constitution, including a referendum entrenched provision:

- cannot be passed within 27 calendar days of being introduced;
- must be the subject of an inquiry and report to Parliament by a committee of the Queensland Parliament before being passed;
- must contain the words 'Constitution Amendment' in its title; and

- must be passed by a majority of the Legislative Assembly equal to a majority of the number of seats in the Assembly (an absolute majority of the Legislative Assembly).

The bill inserting the requirements of parliamentary entrenchment should:

- itself comply with the requirements of parliamentary entrenchment: see recommendation 16 (Future entrenchment other than referendum entrenchment); and
- double entrench those requirements so that their amendment or repeal must follow the same requirements.

To address the possibility of inadvertent non-compliance with the requirements of parliamentary entrenchment, this recommendation is conditional upon the Scrutiny of Legislation Committee of the Queensland Parliament:

- having statutory jurisdiction to scrutinise all bills and amendments to bills for consistency with the Constitution (including compliance with the requirements of parliamentary entrenchment) and constitutional validity;
- having the statutory jurisdiction to scrutinise bills which have received Royal Assent for consistency with the Constitution and constitutional validity (to cover circumstances where a bill or an amendment to a bill has been passed urgently and the Scrutiny of Legislation Committee has not had time to consider the relevant bill or amendment for consistency with the Constitution and constitutional validity); and
- being sufficiently funded to effectively perform the above functions.

Section 4 of the *Legislative Standards Act* should be amended by adding 'consistency with the Constitution and constitutional validity' as an example of a fundamental legislative principle.

The operation of the parliamentary entrenchment requirements should be assessed before the next constitutional referendum is held. At that time, consideration should be given to referendum entrenching the provisions effecting parliamentary entrenchment.

The *Parliament of Queensland Act 2001*, s 87 should be amended to expressly recognise that the Legal, Constitutional and Administrative Review Committee's area of responsibility about constitutional reform includes any bill expressly or impliedly repealing *or amending* any law relevant to the State's Constitution.

Any referendum entrenching provisions inserted in the *Constitution of Queensland 2001* should be drafted:

- specifically to preclude *amendment or repeal* of referendum entrenched provisions of the Constitution without approval at a referendum; and
- so as to invalidate only those provisions of an amending bill which fail to comply with the entrenching provision, rather than the bill as a whole.

Any referendum entrenching provisions inserted in the *Constitution of Queensland 2001* should allow entrenched provisions to be relocated and renumbered, and allow consequential amendments necessary to effect such relocation and renumbering to be made, without approval at a referendum. However, these provisions should not allow the entrenched provisions to be redrafted.

Parliamentary entrenchment requirements should apply to legislation relocating or renumbering any provision of the Constitution.

1. INTRODUCTION

1.1 THE QCRC'S REPORT

On 29 February 2000, the Premier tabled in the Queensland Parliament the report of the Queensland Constitutional Review Commission (QCRC) titled *Report on the possible reform of and changes to the Acts and laws that relate to the Queensland Constitution*.[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 was unable to 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). The passage of these statutes followed not only the QCRC's review, but also reviews by other independent commissions and parliamentary committees over the preceding eight years, namely:

- the Electoral and Administrative Review Commission;[6]
- the Parliamentary Committee for Electoral and Administrative Review;[7] and
- the Legal, Constitutional and Administrative Review Committee of the 48th and 49th Parliaments.[8]

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1 Queensland Constitutional Review Commission (QCRC), *Report on the possible reform of and changes to the Acts and laws that relate to the Queensland Constitution*, Brisbane, Goprint, 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*, Brisbane, Goprint, July 1999 at vi. Available at <www.constitution.qld.gov.au/review/home.htm>.

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

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

8 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 *Constitution of Queensland* and the *Parliament of Queensland Act* commenced on 6 June 2002. With few exceptions, these statutes merely consolidate the various statutes that formerly contained Queensland's constitutional provisions. However, a referendum is required to relocate those provisions entrenched[9] in earlier constitutional legislation, and thereby fully complete the consolidation of Queensland's constitutional legislation.

1.2 THE COMMITTEE'S REVIEW

In February 2002, this committee—the LCARC of the 50th Parliament—resolved to conduct an inquiry into issues of constitutional reform encompassing:

- 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;[10] 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 decided to deal with these issues of constitutional reform in separate stages. The first stage, relating to substantive issues of constitutional reform, was the subject of LCARC report no 36, *The Queensland Constitution: Specific content issues*[12] tabled in the Legislative Assembly on 27 August 2002.

This report finalises the second stage which relates to entrenchment of provisions of the Constitution. In this report the committee considers whether any provisions of the Constitution should be entrenched and, if so, how and when entrenchment should be effected.

The third stage of the committee's inquiry concerns recommendation 5.6 of the QCRC's report that, during this Parliament, the LCARC '*conduct an inquiry into the possibility of special representation for Aborigines and Torres Strait Islanders*'. On 12 December 2002 the committee tabled an issues paper titled *Hands on Parliament – A parliamentary committee inquiry into Aboriginal and Torres Strait Islander Peoples' participation in Queensland's democratic process*.[13]

Finally, the committee will give further consideration to the issue of a preamble for the Constitution.[14]

1.3 THE STAGE TWO REVIEW PROCESS

To commence stage two of its inquiry, the committee formulated proposals on matters relevant to entrenchment of the Constitution. The QCRC's recommendations formed the basis of the committee's proposals. However, in preparing these proposals the committee also took into account: the comments,

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9 As discussed in section 2.1, entrenched provisions are laws enacted by Parliament that may not be repealed or amended expressly or impliedly by Parliament unless it follows a special, additional procedure, such as approval by the majority of electors at a referendum or approval by a two-thirds majority of the Legislative Assembly.

10 This letter is reproduced in full in LCARC, *The Queensland Constitution: Specific content issues*, report no 36, Goprint, Brisbane, August 2002.

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

12 Note 10.

13 LCARC, Goprint, Brisbane, December 2002.

14 In its April 2002 issues paper *The Queensland Constitution: Specific Content Issues* (relating to stage one of its inquiry), 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.

findings and recommendations of the former Electoral and Administrative Review Commission,[15] and the 1999 Queensland Constitutional Convention;[16] and relevant submissions made to previous LCARC inquiries in relation to the consolidation of the Constitution and the QCRC's review.

The committee sought comment on its proposals by preparing and circulating in August 2002 a consultation paper which outlined the proposals and the reasoning behind them.[17] The ultimate position of the committee as expressed in this report differs from that taken in the consultation paper in that the consultation paper referred to entrenchment of the Constitution in its current form, including provisions which relate to a constitutional monarchy.

The committee received 23 submissions in response to its consultation paper. A list of those persons and organisations who made a submission to the committee's inquiry appears as appendix A. (Some matters raised in submissions are outside the terms of reference of this inquiry. For example, a number of submitters commented on recommendations made by the committee in LCARC report no 36. The committee will draw these comments to the attention of the Premier for his consideration in preparing a response to the committee's recommendations.)

In addition, on 28 November 2002, the Queensland Chapter of the Australian Association of Constitutional Law hosted a round-table discussion in conjunction with the committee to discuss the proposals contained in the committee's consultation paper and other relevant issues.[18]

1.4 THIS REPORT

Complex legal and policy issues surround entrenchment of constitutional provisions. Chapter 2 outlines background information relevant to considering the extent to which the Constitution can and should be entrenched, and outlines those provisions of the Constitution which are currently entrenched.

Chapter 3 outlines the QCRC's approach to entrenchment.

In chapter 4 the committee sets out its broad position on issues relating to entrenchment of the Constitution. The committee expands on its position in chapter 5 (regarding referendum entrenchment) and chapter 6 (regarding 'parliamentary entrenchment').

The committee recommends that, in due course, the Constitution should be partially referendum entrenched and identifies the criteria to determine which provisions should be referendum entrenched. Further, the committee recommends certain procedures to entrench *all* provisions of the Constitution. In appendix B the committee recommends specifically how each provision of the Constitution should be entrenched. In appendix C the committee recommends how provisions recommended in its stage 1 report *The Queensland Constitution: Specific Content Issues*[19] should be entrenched. These appendices need to be read in conjunction with the *Constitution of Queensland 2001* which is available on the Internet at <www.legislation.qld.gov.au>.

The committee deals with other matters relating to entrenchment, such as the drafting of provisions effecting entrenchment, in chapter 7.

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15 EARC Issues paper no 21, *Consolidation and review of the Queensland Constitution*, Goprint, Brisbane, February 1993; and EARC's subsequent report, n 6.

16 16 – 18 June 1999, Gladstone. Information on the Queensland Constitutional Convention is available at <www.constitution.qld.gov.au>.

17 LCARC, *The Queensland Constitution: Entrenchment - Proposals for comment*, Goprint, Brisbane, August 2002.

18 The transcript of this round-table discussion is available via the committee's website at <www.parliament.qld.gov.au/Committees/Comdocs/LegalRev/Inquiries/QldConstitEntRoundtable.pdf>.

19 Note 10.

In chapter 8 the committee makes recommendations about how future constitutional change should be effected, and the basis on which future entrenchment of the Constitution should occur.

The committee discusses the timing of a constitutional referendum in chapter 9.

The 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*.

2. BACKGROUND

2.1 MEANING OF ENTRENCHMENT

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

Entrenchment usually occurs by a substantive provision (the 'entrenched provision') being subjected to another provision (the 'manner and form provision'[20] or 'entrenching provision') which states that the substantive provision may not be repealed or amended by any future law without observance of a special additional procedure.

An entrenched provision can be singly or doubly entrenched.

When a particular provision is entrenched, but the entrenching provision is not itself entrenched, the first provision is said to be *singly entrenched*. Thus, a Parliament could amend or repeal the entrenching provision by an Act passed in the ordinary way and then proceed to also amend or repeal the entrenched provision by an Act passed in the ordinary way.[21]

Double entrenchment involves requiring a special, additional procedure to enact laws seeking to amend or repeal the entrenched provision and the entrenching provision. It means that a Parliament cannot repeal the entrenching provision by a simple majority to leave the entrenched provision exposed to repeal or amendment in the ordinary way.[22] Double entrenchment is necessary to effectively bind a future Parliament.

2.2 THE FORM OF ENTRENCHING PROVISIONS

The special, additional procedure which Parliament is required to follow in order to make laws which amend or repeal entrenched provisions can take many forms. Common examples include an entrenching provision which requires laws seeking to amend or repeal the entrenched provision:

- to be approved at a referendum; or
- to be approved by a special majority of the Legislative Assembly (for example, a two-thirds majority).

An additional procedure which purports to deny Parliament its power to legislate, or have this effect in practice (for example, by requiring a bill to be approved by 99% of voters at a referendum), is unlikely to be valid.[23]

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20 The term 'manner and form' is used by some authors to refer to provisions which are enforceable pursuant to the Australia Acts, s 6. See section 2.3.1. for further discussion regarding the Australia Acts, s 6.

21 Carney, G, 'An overview of manner and form in Australia', *Queensland University of Technology Law Journal*, vol 5, 1989, 69-95 at 93.

22 EARC issues paper, n 15 at para 2.126.

23 Carney, n 21 at 82 quoting Friedmann W, 'Trethowan's case, parliamentary sovereignty and the limits of legal change', *Australian Law Journal*, vol 24, 1950 at 103. These comments were made in relation to manner and form provisions under s 6 of the Australia Acts. See also EARC report, n 6 at para 4.31.

Similarly, entrenching provisions which require particular action or endorsement by a body or institution other than Parliament are unlikely to be enforceable.[24] Such provisions have the effect of subjecting Parliament's power to legislate to approval of another body or institution and are therefore inconsistent with parliamentary sovereignty. This situation is distinguished from a referendum,[25] which provides a mechanism through which Parliament can defer to the direct expression of the people's will.

Certain types of entrenching provisions do not seek to restrict the capacity of Parliament to amend or repeal the entrenched provision. For example, an entrenching provision could require laws seeking to amend or repeal the entrenched provision(s):

- not be passed until a certain period (for example, one month) has lapsed since the introduction of the bill; or
- not be passed until they have been the subject of a report by a parliamentary committee.

Such entrenching provisions would enable a future Parliament to expressly amend or repeal the entrenched provisions by simple majority. However, it appears likely that implied amendment or repeal of the entrenched provision would be precluded because the later inconsistent provision would not impliedly amend or repeal the entrenching provision.[26] Such provisions are inserted to ensure more detailed consideration of the implications of the future legislation than would necessarily occur if the legislation was passed in the ordinary way.

Although such provisions do not seek to impinge the power of future Parliaments to enact certain legislation, they do purport to impose binding requirements on future Parliaments as to the form of the legislation or the procedure to be adopted to pass the legislation. Thus, they are likely to be subject to the same legal limitations as entrenchment provisions which seek to restrict the sovereignty of future Parliaments in a more substantial way.[27]

2.3 LEGAL ARGUMENTS REGARDING ENTRENCHMENT

Effective entrenchment is reliant upon Parliament having the legislative capacity to fetter itself and future Parliaments by requiring special procedures to be followed to enact certain legislation.

The Westminster doctrine of parliamentary sovereignty provides, amongst other things, that Parliament cannot bind its successors.[28] State Parliaments, however, only enjoy limited parliamentary sovereignty in that their legislative power can be exercised for the peace, order and good government of the State within the limits imposed on that power primarily by Imperial and Commonwealth law. State Parliaments' capacity to entrench laws must be found within these limits. In other words, a legal basis must be identified to effectively entrench a provision of the Queensland Constitution, and thus restrict the capacity of future Parliaments to amend the provision.

Section 6 of the *Australia Act 1986* (UK) and s 6 of the *Australia Act 1986* (Cth) ('the Australia Acts') is the only clear legal basis on which provisions can be so entrenched. The following discussion explains s 6 and some other possible legal bases.

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24 *Commonwealth Aluminium Corporation Limited v Attorney General* [1976] Qd R 231 at 236. See Carney, n 21 at 84 and Goldsworthy JD, 'Manner and form in the Australian States', *Melbourne University Law Review*, vol 16, December 1987, at 403-429 at 417 in relation to manner and form provisions under s 6 of the Australia Acts.

25 *Attorney-General for New South Wales v Trethowan* (1931) 44 CLR 394 at 421.

26 Carney, n 21 at 93.

27 *The South Eastern Drainage Board v The Savings Bank of South Australia* (1939) 62 CLR 603, Dixon J at 625. See also Carney, n 21 at 72.

28 Carney, n 21 at 70.

2.3.1 Australia Acts, s 6

The only clearly established basis upon which a state Parliament can bind its successors is found in s 6 of the Australia Acts[29] which provides that:

> *Notwithstanding sections 2 and 3(2) above, a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act.*

The Australia Acts empower state Parliaments to make 'manner and form' provisions (that is, entrenching provisions) which prevent laws 'respecting the constitution, powers or procedure of the Parliament' from amending or repealing entrenched provisions without observing special additional procedures. However, a law which amends or repeals the Constitution is not necessarily a law respecting the constitution, powers or procedure of the *Parliament*.[30] Thus, some of the principal features of most constitutions, for example, provisions relating to the executive and judicial branches of government, are unlikely to be protected by s 6 since any law affecting them cannot be characterised within that test. Therefore, other legal grounds are needed to support the effective entrenchment of provisions from being amended or repealed by ordinary laws which do not relate to the constitution, powers or procedure of the Parliament.[31]

2.3.2 Other possible legal grounds

Possible legal grounds other than s 6 of the Australia Acts for enforcing a provision which purports to require a special additional procedure to make certain laws (that is, an entrenching provision) are:[32]

- s 106 of the Commonwealth Constitution;
- the reconstituted legislature argument; and
- the principle in *The Bribery Commissioner v Ranasinghe*.[33]

While there is some support for each of these grounds in Australia, their application to the constitutions of the Australian states remains uncertain in the absence of authoritative judicial determination.

Section 106 of the Commonwealth Constitution. Section 106 of the Commonwealth Constitution provides:

> *The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be**, until altered in accordance with the Constitution of the State***.[Emphasis added.]

There are at least two possible interpretations of the last phrase of s 106.[34] The first is that it '*provides a constitutional guarantee that any manner and form provision prescribed by a State Constitution for its own amendment, must be observed whether or not any other legal basis exists for its enforcement*'.[35] If reliance is placed on this interpretation of s 106, it is essential that the entrenching provision is in the

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29 Section 6 (in conjunction with other sections of the Australia Acts) is of similar effect to a provision previously contained in the *Colonial Laws Validity Act 1865* (Imp). A substantial amount of case law relating to the provision of the *Colonial Laws Validity Act* is relevant.

30 Carney, n 21 at 78.

31 The current manner and form provisions of the Queensland Constitution are considered in section 2.5.

32 Carney, n 21 at 73. See also Goldsworthy, n 24.

33 [1965] AC 172.

34 Carney, n 21 at 92. The Full Court of Western Australia considered the phrase '*until altered in accordance with the Constitution of the State*' in *Wilsmore v The State of Western Australia and Others* (1981) 33 ALR 13.

35 Carney, n 21 at 92.

state constitution, and it regulates a law which amends the constitution itself and not some other law.[36] Difficulties may arise in determining precisely what constitutes the 'state constitution'.

The second possible interpretation of the last phrase of s 106 is that it merely ensures the maintenance of state constitutions as they exist from time to time and subjects them to the Commonwealth Constitution.[37] If this is the correct interpretation of s 106, it does not provide an independent basis for enforcing entrenching provisions in state constitutions.[38]

Reconstituted legislature. There is some judicial support for the proposition that, subject to certain limitations, laws may be entrenched by vesting the power to repeal or amend them in a reconstituted legislature.[39] A referendum requirement is the clearest example of reconstituting a legislature so that the '*newly constituted legislature comprises both houses (or one in Queensland) of the original legislature, the electorate and the Governor. The electorate is added as if it were another chamber*'.[40] The original legislature no longer possesses the necessary power to enact relevant laws and, provided the requirement is doubly entrenched, cannot recall the power.[41]

The principle in *The Bribery Commissioner v Ranasinghe*. This principle provides:

> *… a Legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make laws.*[42]

This principle supports the proposition that once there is a written constitution with a special amendment procedure, the constitution, not the Parliament, is supreme.[43]

Conclusion. Arguably, a general power of the states to entrench their own constitution can be derived from the fact that it must be possible for a democratic polity to give itself a constitution that represents fundamental law.[44] The reconstituted legislature argument, and the principle in *Ranasinghe* discussed above, might simply be specific examples of this broader principle.

Conversely, it has been argued that s 2 of the Australia Acts, which provides that the Parliament of each state has all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of the Australia Acts, limits the application of the principle in *Ranasinghe*.[45]

Thus, the grounds on which provisions of state constitutions can be effectively entrenched, apart from s 6 of the Australia Acts, is currently uncertain.

2.4 POLICY ARGUMENTS REGARDING ENTRENCHMENT

Effective entrenchment of legislative provisions by one Parliament limits the capacity of future Parliaments to amend those provisions. As discussed in section 2.3, there is some question as to the extent to which state Parliaments can legally entrench provisions of their constitutions, and thus restrict the capacity of future Parliaments to legislate. However, even if Parliaments *can* legally bind their successors, the question of whether, and the extent to which, Parliaments *should* bind their successors remains.

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36 Carney, n 21 at 93.

37 Carney, n 21 at 92.

38 Goldsworthy, n 24 at 426-427.

39 *Attorney-General for New South Wales v Trethowan* (1931) 44 CLR 394, Rich J at 419. See also Lumb, RD, *The Constitutions of the Australian States*, 5th edition, University of Queensland Press, 1991 at 128.

40 Carney, n 21 at 86.

41 Carney, n 21 at 86.

42 [1965] AC 172 at 197.

43 EARC issues paper, n 15 at paras 2.136-2.138.

44 Constitutional Centenary Foundation, *The States and a Republic: Background Paper Queensland Constitutional Convention 16-18 June 1999, Gladstone*, at 1.3.

45 EARC report, n 6 at para 4.20.

In essence, the question is whether the Constitution should be an Act capable of amendment only by special procedures, or an Act which the Parliament of the day is able to amend by ordinary statute.

Arguments against entrenchment. The Parliament is democratically elected to represent the people. Thus, it might be argued that restricting the capacity of the Parliament of the day to legislate effectively overrides the will of the people.[46] There is no guarantee that the restrictions on future Parliaments will be in the general public interest.[47]

Arguably, a Parliament should be able to govern unfettered by restrictions imposed at a different time in history. A successor Parliament will possess more experience of the circumstances and necessities amid which citizens currently live than the earlier Parliament.[48]

To some extent these issues can be addressed by ensuring that entrenching provisions are only inserted with the support of a referendum. However, practical considerations also weigh against heavily entrenched constitutions. Most significantly:

- the cumbersome process and cost of amending entrenched provisions by, for example, referendum, reduces the likelihood of changes being made, even where amendments are generally agreed to be necessary, especially if the amendments are merely a matter of form rather than substance;49 and
- unnecessary rigidity may prevent matters evolving over time.[50]

As noted in section 2.2, certain types of entrenching provisions do not seek to restrict the capacity of Parliament to amend or repeal entrenched provisions. Given that such provisions do not seek to impinge upon the sovereignty of future Parliaments, they are less open to objection.

Arguments in favour of entrenchment. Entrenchment of constitutional provisions can be seen as a mechanism for sovereignty of the people if the Constitution is capable of amendment only by some process of reference to the people, such as a referendum.[51] Arguably, the entrenchment of fundamental legal rules which are not subject to abrogation by Parliament alone is appropriate given the reality that the proceedings of Parliament in this state are dictated by the governing party.[52]

The absence of any entrenched fundamental legal rules provides vast power to the governing party in Parliament. For example, it might be possible to suppress political parties, freedom of electoral campaigning or voting rights for particular sections of the community.[53] Democratic election of the Parliament does not necessarily prevent the will of the people becoming distorted in relation to certain issues or the parliamentary system itself being manipulated to disregard the rights of particular groups.

Further, there is no guarantee that Parliament will defend citizens against inappropriate action by the executive. As EARC stated:

> *Parliament no longer fights the executive; since the Ministers who head the executive have to be members of Parliament, Parliament tends to be led by the executive. Party discipline may prevent members from voting according to their consciences. At the worst extreme a party in power may enact laws designed to stifle dissent – but even without any intent by the members of the Parliament to act oppressively, senior permanent public servants may influence their*

46 EARC report, n 6 at para 4.33.
47 Carney, n 21 at 73.
48 *McCawley v The King* [1920] AC 691 at 703.
49 QCRC report, n 1 at 77 and EARC issues paper, n 15 at para 3.25.
50 See submission by (then) Associate Professor Carney to EARC, quoted in EARC report, n 6 at para 4.50.
51 EARC issues paper, n 15 at paras 3.16-3.19.
52 EARC issues paper, n 15 at paras 3.16-3.19 and the submission by R McFadyen to EARC, referred to in EARC's report, n 6 at para 4.53.
53 EARC issues paper, n 15 at paras 2.74-2.76.

> *Ministers to formulate legislation to suit the convenience of the public service and to disregard the rights of citizens.*[54]

This argument is particularly significant in a unicameral Parliament where any legislation need only be passed by a single House.

Entrenchment can protect certain fundamental principles of a constitutional system. A constitution which entrenches by referendum fundamental laws by which Parliament itself is thereby bound enables citizens to define the scope of the power they grant to Parliament. It reflects the principle that ultimate sovereignty is vested in the people, not the Parliament.

2.5 CURRENTLY ENTRENCHED PROVISIONS

2.5.1 The provisions

In Queensland, s 53 of the *Constitution Act 1867* (Qld) entrenches by referendum: the Legislative Assembly (s 1); the '*peace, welfare and good government'* grant of legislative power (s 2); the requirement of Royal Assent to legislation (s 2A); and the office of Governor as the Queen's representative and its powers (ss 11A and 11B).

The *Constitution Act Amendment Act 1934* (Qld) entrenches: the unicameral nature of the Parliament by requiring referendum approval for the introduction of '*another legislative body'* (s 3); and also requires referendum approval for any extension to the three-year term of the Legislative Assembly (s 4).[55]

All of these provisions were doubly entrenched without seeking the people's consent at a referendum.

These entrenched provisions remain in their original Acts. The *Constitution of Queensland 2001* includes signposts where the entrenched provisions are relevant and sets out the provisions in full in attachments.

Section 78 of the *Constitution of Queensland 2001* requires that a bill for an Act ending the system of local government in Queensland be approved at a referendum. This provision does not entrench itself and could be expressly repealed by an ordinary Act of Parliament.[56]

Apart from these entrenched provisions, Queensland's Constitution can be amended by Parliament, either expressly or impliedly, like any other ordinary piece of legislation.

2.5.2 Legal issues

There is a difference of opinion as to the effect of the entrenching provisions discussed in section 2.5.1 on the provisions which are purportedly entrenched. (See section 2.3 regarding the legal grounds for entrenchment.)

Until 1996, s 53 of the *Constitution Act 1867* also purported to entrench s 14 of the *Constitution Act 1867* which vested in the Governor-in-Council the power to make appointments to public offices and to appoint and dismiss ministers. Section 53 provided that a bill which expressly or impliedly in any way affected s 14 was not to be presented for assent until it was approved by a majority of electors at a referendum. Section 146 of the *Public Service Act 1996* amended s 14 and removed the reference to s 14 from s 53. No referendum supporting the amendment was conducted.

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54 EARC issues paper, n 15 at para 3.20.

55 The *Constitution Act Amendment Act 1890* (Qld), s 2 provides that the maximum term of the Legislative Assembly is three years. The *Constitution Act Amendment Act 1934* (Qld), s 4 prevents the term of the Legislative Assembly being extended without the approval of a referendum and referendum entrenches itself.

56 Explanatory notes to the *Constitution of Queensland 2001*, cl 78. This replicates the position prior to the commencement of the *Constitution of Queensland 2001*: see s 56(2) of the *Constitution Act 1867* (now repealed).

The validity of s 146 of the *Public Service Act* depends on the extent to which s 53 of the *Constitution Act 1867* is enforceable in relation to s 14. If reliance is placed on s 6 of the Australia Acts to enforce s 53, it could be argued that because s 146 does not relate to the 'constitution, powers or procedure of the Parliament' s 53 does not render s 146 of the *Public Service Act* invalid. In contrast, if s 53 is enforceable on other grounds such as s 106 of the Commonwealth Constitution, the reconstituted legislature argument or the principle in *Ranasinghe,* s 146 might be found to be invalid.

2.6 ENFORCEABILITY OF ENTRENCHING PROVISIONS

COMMITTEE PROPOSAL 5 – ENFORCEABILITY OF ENTRENCHING PROVISIONS

The Attorney-General should seek to have the legal issues surrounding entrenchment of certain provisions of the Constitution resolved, preferably by the High Court, before completing the consolidation exercise.

In the absence of such clarification, the government should nevertheless proceed to entrench the Constitution by a combination of parliamentary and referendum entrenchment (as proposed in appendices A and B), including provisions which do not relate to the constitution, powers or procedure of the Parliament.

As noted in section 2.3.2, the legal bases on which provisions of state constitutions can be effectively entrenched, apart from s 6 of the Australia Acts, is currently uncertain.

In its consultation paper, the committee proposed that steps should be taken to have the High Court resolve the legal question regarding the extent to which entrenchment of constitutional provisions—especially those whose amendments do not relate to the constitution, powers, or procedure of the Parliament—would be enforceable.[57] However, having considered public input on this issue,[58] the committee considers that it would be practically difficult, if not impossible, to have this legal issue resolved by the High Court.

Even in the absence of such clarification, the committee considers that provisions to entrench the Constitution should nevertheless be inserted. Although there might continue to be some doubt as to whether the entrenchment of provisions would be legally binding, it is to be expected that future governments and Parliaments would find them politically and morally binding, particularly if their entrenchment was approved at a referendum, as proposed in section 8.2. Similarly, it is likely that a court would find entrenchment approved by the people at a referendum to be binding.[59]

2.7 CONCLUSION

The Australia Acts, s 6 empower a state Parliament to make entrenching provisions which prevent laws 'respecting the constitution, powers or procedure of the Parliament' from amending or repealing entrenched provisions without observing special additional procedures. The inherent restriction in s 6 is that the amending law must be characterised within that test. Other legal bases for entrenchment of constitutional provisions which avoid this characterisation test are currently uncertain. However, for the reasons noted in section 2.6 the committee nevertheless recommends that the Parliament should consider entrenchment irrespective of these issues.

Recommendation 1 – Enforceability of entrenching provisions

Despite certain doubts as to the legal effectiveness of entrenching provisions of state constitutions, the Parliament should nevertheless consider entrenching provisions of the *Constitution of Queensland 2001* as recommended in this report.

57 Note 17 at 22.

58 See Ms D Vasta and Mr S Vasta, submission no 12; Leader of the Opposition, submission no 20; and comments made at the round-table discussion: transcript, n 18 at 8-9.

3. THE QCRC'S APPROACH TO ENTRENCHMENT

The QCRC considered that the status of the Queensland Constitution as the fundamental law of the State requires appropriate recognition but opposed referendum entrenchment of the entire text of the Queensland Constitution.[60] Thus, the QCRC recommended two forms of entrenchment:

- referendum entrenchment of the most fundamental aspects of the Constitution (recommendation 12.1); and
- three requirements, together comprising 'parliamentary entrenchment', to apply to all sections of the Constitution (recommendation 12.3).

The QCRC's recommendations are broadly consistent with the Queensland Constitutional Convention at which the following resolution attracted broad support:[61]

> *4. Compliance with special procedures beyond a simple majority vote of the Parliament should be required to change certain parts of State constitutions.*
>
> …
>
> *6. Parts of State Constitutions that may need entrenchment could include:*
>
> - *a democratically elected Parliament;*
> - *judicial independence;*
> - *an executive that is responsible to the Parliament;*
> - *rights of the citizen;*[62] *and*
> - *a system of local government.*

3.1 REFERENDUM ENTRENCHMENT

Provisions of the Constitution which the QCRC considered justify referendum entrenchment concerned:

- the Legislative Assembly;
- the law-making power;
- the Parliament;
- members of the Legislative Assembly;
- one member for each electoral district;
- duration of the Legislative Assembly;
- certain matters regarding the office of Governor;
- the Supreme Court and District Court;
- the Supreme Court's superior jurisdiction;
- the length of a judge's appointment;
- removal of a judge for misbehaviour or incapacity;
- judge's salary;
- acting judges;
- requirement to pay tax, impost, rate or duty;

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59 See comments by the Clerk of the Parliament, submission no 23 at 5.

60 QCRC report, n 1 at 77.

61 Queensland Constitutional Convention 16-18 June 1999, Gladstone, *Communiqué* <www.constitution.qld.gov.au/communique.htm> at 2-3.

62 The QCRC, noted that 'rights of the citizen' were not included in the matters which it recommended for referendum entrenchment, because adding a bill of rights to the Queensland Constitution was specifically excluded from the QCRC's inquiry: n 1 at 76.

- Governor's recommendation required for appropriation;
- the system of local government;
- the requirements of parliamentary entrenchment (see section 3.2); and
- provisions relating to referendum entrenchment (including the effect of entrenchment on amendment etc if principle preserved).[63]

3.2 PARLIAMENTARY ENTRENCHMENT

The QCRC's concept of 'parliamentary entrenchment'[64] involves an additional three steps to the ordinary law-making procedure, namely:

- a minimum period of one calendar month between the first and second readings of a bill to amend the Constitution (to ensure sufficient time for the community to be alerted to what is proposed and, if they wish, to take any appropriate action);
- a LCARC report on the bill to the Legislative Assembly before the second reading (to enable a careful and public examination of the merits of the proposal); and
- the short title of the bill to include the words 'Constitution Amendment' (to ensure that the Constitution is not amended inadvertently or by concealment).

Clauses 82 and 83 of the QCRC's draft Constitution of Queensland 2000 contained the relevant provisions. The QCRC further proposed that these provisions should be referendum entrenched: cl 84.

63 QCRC report, n 1 and appendix A to this committee's consultation paper regarding entrenchment of the Constitution, n 17.

64 Note 1 at 78-79 and recommendation 12.3.

4. THE COMMITTEE'S APPROACH TO ENTRENCHMENT[65]

In its consultation paper, the committee proposed that certain provisions of the Constitution should be referendum entrenched (namely, those which establish the '*essential structure of the State's constitutional system*'),[66] and that the whole Constitution should be parliamentary entrenched (in a manner similar to that recommended by the QCRC).[67] The committee further proposed that a referendum giving effect to this broad position be held at the end of the current process of constitutional reform.[68]

Having given detailed consideration to this issue, the committee now proposes a different approach. In essence, the committee cannot support referendum entrenchment of provisions of the Constitution which relate to the current monarchical system of government. Further, the committee considers that any further consolidation or referendum entrenchment of the Constitution should not occur until the Queensland Parliament seeks a republic referendum.

The QCRC was established in May 1999 in the lead up to the November 1999 Commonwealth referendum on a republic. The QCRC's terms of reference included to research and investigate what alterations would be necessary to the laws of Queensland to enable Queensland to sever its links with the Crown should the Australian people at that referendum approve a proposed law to amend the Commonwealth Constitution and thereby establish Australia as a republic.[69] The defeat of the republic referendum in November 1999 rendered that term of reference inoperative. Hence, the recommendations in the QCRC's report relate to Queensland's current system of government, that is, a constitutional monarchy.

Despite defeat of the 1999 referendum, there remains considerable support in the community for a republican system of government in Australia.[70] A successful Commonwealth referendum on this issue will, practically, require Queensland and each of the other Australian states to take steps to also become republics.

Apart from necessary changes to the Australia Acts,[71] for Queensland to adopt a republican system of government a referendum will be necessary to amend certain provisions of earlier constitutional legislation which are currently entrenched.[72] These provisions directly entrench a monarchical system of government by: defining the Parliament as including the Queen; vesting the legislative power of the State in the Queen with the advice and consent of the Legislative Assembly; and requiring Royal Assent to be given to bills passed by the Parliament in order to become law. As discussed in section 2.3.1, these provisions are effectively entrenched since any repeal or amendment of them would relate to the 'constitution, powers or procedure of the Parliament'.[73]

The committee's consultation paper proposed a referendum to approve the re-enactment of the currently entrenched provisions in the *Constitution of Queensland 2001* to complete the consolidation exercise. The committee also proposed referendum entrenchment of other provisions relating to the essential structure of the State's constitutional system, including provisions which relate to the current

65 Note the dissenting report attached to this report.

66 Note 17 at 17.

67 Note 17 at 21.

68 Note 17 at 30.

69 QCRC Term of reference 1(c). The QCRC's terms of reference are reproduced in the QCRC's report, n 1 at 4-5.

70 According to a national survey conducted by Ingenuity Research in late April and early May 2002, 54 per cent of adult Australians would like to see Australia become a republic: *Australians All*, Newsletter of the Australian Republican Movement, Issue 1, Summer 2002/03 at 16.

71 These changes are discussed by Carney G in 'Republicanism and State Constitutions', in *Republic or Monarchy? Legal and constitutional issues*, Stephenson and Turner C (eds), University of Queensland Press, Brisbane, 1994 183-210 at 196-197.

72 The currently entrenched provisions are outlined in section 2.5.

73 Carney, n 71 at 198.

monarchical system of government. However, the committee now feels that while the issue of a republic remains on the public agenda, it can not endorse holding a referendum to entrench provisions of the Constitution which relate to the current monarchical system of government. Further, the significant cost involved in holding such a referendum cannot be justified when a further referendum is required to transform Queensland's system of government to a republic.

Unless compelling justification for an earlier constitutional referendum arises, any further consolidation or referendum entrenchment of the Constitution should be delayed until the Queensland Parliament seeks a republic referendum. (The committee further discusses the timing of a referendum regarding the Queensland Constitution in chapter 9.)

Subject to these comments, the committee recommends in chapter 5 a test which, as a matter of general principle, should be used to support referendum entrenchment of provisions of the Constitution. Referendum entrenchment of key provisions of the Constitution provides a mechanism of direct sovereignty of the people. Provided the entrenching provisions themselves are enacted following referendum approval (as recommended in section 8.2.1), this does not inappropriately restrict the powers of Parliament. Rather, it enables the citizens of Queensland to define the powers of Parliament.

This test serves as a touchstone to support referendum entrenchment of some aspects of the Constitution which do not relate to the current monarchical system of government. The committee discusses these provisions in chapter 5 and in the table in Appendix B. The committee also applies this test to identify in the table in Appendix B which essential elements of the currently entrenched provisions should be referendum entrenched whether or not Queensland retains its monarchical system of government.

Irrespective of the debate regarding a republican system of government, the committee supports parliamentary entrenchment (as outlined in chapter 6) of all provisions of the Constitution by way of legislative amendment to the Constitution. The requirements of parliamentary entrenchment are procedural in nature. Their effect would be to ensure that proposed amendments to the Constitution are given detailed consideration and in such a way as to facilitate public input to the proposed amendments. Although parliamentary entrenchment would not prevent a simple majority of Parliament from amending the Constitution, the requirements of parliamentary entrenchment would be an important point of difference between constitutional and ordinary legislation.

The committee also endorses some of the broad statements of principle recommended by the QCRC regarding matters such as: how provisions effecting referendum entrenchment should be drafted; future constitutional review; and future entrenchment of the Constitution: see chapters 7 and 8.

Recommendation 2 – The committee's approach

While change to a republican system of government remains on the public agenda, there should be no further referendum entrenchment of provisions of the *Constitution of Queensland 2001* which relate to the current monarchical system of government.

5. REFERENDUM ENTRENCHMENT

5.1 A GENERAL TEST

COMMITTEE PROPOSAL 1 – REFERENDUM ENTRENCHMENT OF CERTAIN SECTIONS

Subject to implementation of the committee's proposals below, the Queensland Constitution should referendum entrench provisions which establish the 'essential structure of the State's constitutional system', including certain provisions relating to the legislature, the executive, and the judiciary. (Appendices A and B contain the committee's proposals regarding which specific provisions should be referendum entrenched.)

In its consultation paper, the committee proposed referendum entrenchment of provisions necessary to maintain the '*essential structure of the State's constitutional system*'[74] including provisions which:

- prescribe a system of representative and responsible government;
- provide for the legislature, the executive and the judiciary as the three arms of government; and
- maintain a balance of power between these arms of government as appropriate for a system of representative and responsible government.

Generally, people who provided feedback in submissions regarding this proposal were supportive of it.[75]

A slightly different articulation of the criteria to determine which provisions of the Constitution should be referendum entrenched was proposed at the round-table discussion. There it was suggested that the test should focus on safeguarding the rights of the people against an executive-dominated Parliament which might seek to change the system of government as set out in the Constitution.[76]

As discussed in chapter 4, the committee does not believe that there should be any further referendum entrenchment of provisions of the *Constitution of Queensland 2001* which relate to the current monarchical system of government. However, as a matter of general principle the committee agrees that referendum entrenchment should apply not only to constitutional provisions which set out the State's structure of government but also to those provisions which provide for the fundamental principles of the State's constitutional system. These fundamental principles include those providing for an appropriate balance of power between the three arms of government which, in turn, safeguards the rights of the people against an executive-dominated Parliament. Referendum entrenchment of such provisions would ensure that fundamental changes to the democratic system of government in Queensland are only made with support of the majority of voters. This is particularly imperative in a unicameral Parliament which historically has been dominated by the executive.

The table in appendix B contains the committee's recommendations regarding which specific provisions of the *Constitution of Queensland 2001* should be referendum entrenched in light of the approach outlined in chapter 4 and applying the above test. In the case of the currently entrenched provisions, the committee uses this test to identify which essential elements of the Constitution should be referendum entrenched whether or not Queensland retains its monarchical system of government.

The table in appendix C contains the committee's recommendations regarding which provisions recommended in LCARC report no 36, *The Queensland Constitution: Specific content issues,*[77] should be referendum entrenched in light of the approach outlined in chapter 4 and applying the above test.

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74 Note 17 at 17. This test was drawn from submission no 13 to the QCRC by (then) Associate Professor Gerard Carney at para 8, available at <www.constitution.qld.gov.au/review/si.htm>.

75 See, for example, Townsville City Council, submission no 1 and Gold Coast City Council, submission no 13.

76 Transcript, n 18 at 5-7. Mr Don Willis also submitted that the committee's test should be extended to encompass the notion of limitation of power, submission no 22 at 2.

77 Note 10.

Recommendation 3 – Referendum entrenchment

As a matter of general principle, the *Constitution of Queensland 2001* should referendum entrench provisions which:

- **establish the essential structure of the State's constitutional system; or**
- **provide for the fundamental principles of the State's constitutional system.**

This includes provisions which:

- **prescribe a system of representative and responsible government;**
- **provide for the legislature, the executive and the judiciary as the three arms of government; and**
- **maintain a balance of power between these arms of government, appropriate for a system of representative and responsible government.**

However, for the reasons discussed in chapter 4, the committee does not support referendum entrenching provisions which relate to the current monarchical system of government.

Applying the above test in light of the committee's proviso, provisions (or components thereof) of the *Constitution of Queensland 2001* which should be referendum entrenched concern:

- **the Legislative Assembly (s 7);**
- **members of the Legislative Assembly (s 10);**
- **division of the State into electoral districts (s 12);**
- **one member for each electoral district (s 13);**
- **a minimum sitting requirement for the Legislative Assembly (s 19);**
- **a maximum limit on the combined number of ministers of the state and parliamentary secretaries (s 43 redrafted as recommended by the committee: see section 5.2.3);**
- **various provisions relating to the judiciary (ss 57-63);**
- **the consolidated fund (s 64);**
- **requirement to pay tax, impost, rate or duty (s 65);**
- **payment from consolidated fund (s 66); and**
- **the system of local government (s 70).**

The above test should also be used to identify which essential elements of the currently entrenched provisions should be referendum entrenched whether or not Queensland retains its monarchical system of government.

The discussion in section 5.2 and the table in appendix B outlines this aspect of the committee's recommendation in more detail.

Provisions (or components thereof) which the committee recommended in LCARC report no 36 *The Queensland Constitution: Specific content issues* should be included in the *Constitution of Queensland 2001* and which should be referendum entrenched concern:

- **the requirement that ministers be members of the Legislative Assembly (recommendation 7);**
- **a maximum limit on the combined number of ministers of the state and parliamentary secretaries (recommendation 18);**
- **acting judges (recommendation 31);**
- **the compulsory retirement age for judges (recommendation 32); and**
- **certain aspects of the procedure relating to removal of judges from office (recommendation 33).**

The discussion in section 5.2 and the table in appendix C outlines this aspect of the committee's recommendation in more detail.

In accordance with recommendation 15 (Future referendum entrenchment), provisions should only be referendum entrenched following approval of that entrenchment by referendum.

5.2 SOME SPECIFIC PROVISIONS

Referendum entrenchment of some particular provisions of the Constitution (current and proposed) was the focus of considerable attention in the committee's consultation. These provisions, which are discussed in this section, concern:

- the District Court;
- a statement of judicial independence;
- the number of ministers of the state and parliamentary secretaries; and
- local government.

5.2.1 The District Court

Section 57 of the Constitution provides that there must be a Supreme Court of Queensland and a District Court of Queensland. In its consultation paper the committee proposed that the existence of the Supreme Court be referendum entrenched, and the existence of the District Court be parliamentary entrenched.[78] While recognising that the courts are an essential part of the State's constitutional system, the committee was concerned that referendum entrenchment of the existence of the District Court might unnecessarily restrict the capacity of future governments to modify the structure of the court system.[79]

Judges of the District Court support referendum entrenchment of s 57 in its entirety. They consider that the District Court '*should be afforded the same protection in relation to appointment, tenure and removal of judicial officers as the Supreme Court'*.[80]

The committee remains of the view that the District Court should not be referendum entrenched for the reasons expressed in its consultation paper. However, judges of the District Court should be afforded the same protection in relation to appointment, tenure, removal and salary as judges of the Supreme Court. Thus, the committee recommends referendum entrenchment of key components of: s 59 (Appointment of judges), s 60 (Length of judge's appointment), s 61 (Removal from office for misbehaviour or incapacity), s 62 (Judge's salary) and s 63 (Protection if office abolished). These provisions apply equally to judges of the District Court by virtue of the definition of 'judge' in s 56 which includes a judge of the District Court.

Should the District Court be abolished, s 63 would apply to ensure appointment of each District Court judge to another office of equivalent or higher status in another court.

Failure to referendum entrench the definition of 'judge' diminishes the protection given to District Court judges. It means that Parliament could, by ordinary legislation, amend that definition to refer only to Supreme Court judges. However, entrenching the current definition of 'judge' is undesirable if the existence of the District Court is not referendum entrenched. Careful redrafting of provisions of the Constitution regarding the judiciary is therefore required to ensure that judges of the District Court are given the same protection in relation to appointment, tenure, removal and salary as the judges of the Supreme Court.[81] In this redrafting process it should also be made clear that s 61 (Removal from office for misbehaviour or incapacity) is subject to s 63 (Protection if office abolished).

Recommendation 4 – The District Court

78 Note 17 at 38, appendix A, commentary regarding s 57.

79 The Bar Association of Queensland agreed with this proposal subject to certain comments concerning tenure: submission no 8 at 4.

80 Chief Judge P M Wolfe, submission no 19 at 2.

81 The Bar Association of Queensland, submission no 8.

The existence of the District Court should not be referendum entrenched. However, judges of the District Court should be given the same protection in the *Constitution of Queensland 2001* in relation to appointment, tenure, removal and salary as judges of the Supreme Court. In appendices B and C the committee recommends referendum entrenchment of relevant provisions.

Some redrafting of provisions in chapter 4 of the *Constitution of Queensland 2001* is required to ensure that referendum entrenchment of the provisions relating to the appointment, tenure, removal and salary of judges of the District Court can not be subverted by amendment of the definition of 'judge' in s 56. In this redrafting process it should also be made clear that s 61 (Removal from office for misbehaviour or incapacity) is subject to s 63 (Protection if office abolished).

5.2.2 A statement of judicial independence

In LCARC report no 36 *The Queensland Constitution: Specific Content Issues* the committee recommended that the Constitution should expressly recognise 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*'.[82]

In its consultation paper the committee proposed that this provision be parliamentary entrenched. The committee was concerned that referendum entrenchment of this provision might be used to derive implied constitutional restrictions on the vesting and exercise of judicial power in bodies other than courts.[83]

However, the committee's consultation indicated support for referendum entrenchment of such a statement.[84] Mr John Pyke suggested at the round-table discussion that a statement such as the one recommended by the committee would be unlikely to lead to implications that might not already be drawn from ss 57 and 58.[85] Although, the committee notes that ss 57 and 58 in their current form simply establish the Supreme and District Courts and set out the jurisdiction of the Supreme Court. There is no 'vesting' as such of judicial power.

Mr Pyke further suggested that to clarify the matter the Constitution might expressly state that Parliament is free to create quasi-judicial bodies with '*some protection for the right of people to seek judicial review of what is going on in the quasi-judicial body*'.[86] However, such a statement might itself lead a court to imply a vesting of judicial power in the courts or, conversely, a restriction on vesting non-judicial power in the courts.

The committee remains of the view that it would be undesirable to referendum entrench its proposed statement of judicial independence.

5.2.3 The number of ministers of the state and parliamentary secretaries

Section 43 of the Constitution empowers the Governor to appoint ministers of the state. Section 43(4) provides that the maximum number of ministers at any time is 19. Section 11 provides that the Legislative Assembly is to consist of 89 members. In its consultation paper, the committee proposed parliamentary entrenchment of these provisions.[87]

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82 Note 10, recommendation 28 at 56.

83 Note 17 at 47, appendix B, commentary regarding recommendation 28 – Judicial Independence.

84 See, for example: the Bar Association of Queensland, submission no 8; Chief Judge P M Wolfe, submission no 19; and Clerk of the Parliament, submission no 23. See also the transcript of the round-table discussion, n 18 at 3-4.

85 Transcript, n 18 at 4.

86 Transcript, n 18 at 4.

87 Note 17 at 33 and 37, appendix A, commentary regarding s 11 and s 43 respectively.

At the round-table discussion, the Clerk of the Parliament suggested that it might be appropriate to restrict the proportion of members of the Legislative Assembly who may become ministers and to referendum entrench the provisions setting that proportion.[88] The number of ministers as a proportion of the Legislative Assembly is significant because ministers are part of the executive government. As one of the roles of Parliament is to scrutinise the executive government, a higher proportion of ministers results in a lower proportion of members of Parliament who are outside the executive and therefore likely to be effective in scrutinising the actions of government.

A similar issue arises in relation to parliamentary secretaries. Section 24 of the Constitution provides that the Governor-in-Council may appoint members of the Legislative Assembly as parliamentary secretaries. In LCARC report no 36 the committee recommended that the Constitution should provide that a limit of five parliamentary secretaries may be appointed at any one time.[89] Some of the reasoning on which the committee based this recommendation was to '*restrain the patronage power which the government otherwise has over the Assembly'*.[90]

The Clerk proposed that it would not be unreasonable for the Constitution to provide that the total number of ministers and parliamentary secretaries cannot exceed, for example, 30% of the number of members of the Legislative Assembly. Thus, if it were deemed necessary to increase the executive in the future, a counterbalance increase in the number of members would be required.[91]

The committee agrees that even in a party-dominated system of parliamentary democracy, proper independent scrutiny by Parliament is unlikely to be achieved if too high a proportion of members are ministers or parliamentary secretaries. A maximum limit on the combined number of ministers and parliamentary secretaries is therefore highly desirable. This maximum limit should be expressed as one-third of the number of members of the Legislative Assembly. With the current number of members, this would equate to a maximum combined total of 29 ministers and parliamentary secretaries. Currently, there are 19 ministers and five parliamentary secretaries.

The committee stresses that in recommending such a maximum limit it is not advocating an increase in the number of ministers or parliamentary secretaries.

The provision establishing this maximum limit should be referendum entrenched as it seeks to maintain a balance of power between the executive and legislature as appropriate for a system of representative and responsible government: see the committee's test for referendum entrenchment in section 5.1. Without referendum entrenchment, a majority government could merely amend the limit on the number of ministers and parliamentary secretaries, thus rendering the limit redundant.

88 Transcript, n 18 at 4. See also Clerk of the Parliament, submission no 23, where the Clerk extended his comments to include parliamentary secretaries.

89 Note 10, recommendation 18 at 41.

90 This wording comes from the submission by Mr Harry Evans to the committee's inquiry concerning specific content issues, and is repeated in LCARC report no 36, n 10 at 40.

91 The Clerk of the Parliament, submission no 23 at 4. See also the comments of Mr D Willis, submission no 22 at 3.

Recommendation 5 – The number of ministers of the state and parliamentary secretaries

While the committee is not advocating an increase in the number of ministers or parliamentary secretaries, the *Constitution of Queensland 2001* should provide that the maximum combined number of ministers of the state and parliamentary secretaries that may be appointed at one time be equal to one-third of the total number of members of the Legislative Assembly. This provision should itself be referendum entrenched.

5.2.4 Local government

COMMITTEE PROPOSAL 2 – REFERENDUM ENTRENCHMENT OF LOCAL GOVERNMENT

Subject to implementation of the committee's proposals below, the Queensland Constitution should referendum entrench the provision requiring that there must be a system of local government in Queensland, and that the system consists of a number of local governments.

The Constitution:

- provides that there must be a system of local government in Queensland, and that the system consists of a number of local governments: s 70;[92]
- sets out requirements for a local government: s 71;
- requires certain procedures for the dissolution of a local government: ss 72-76; and
- provides that a bill for an Act ending the system of local government in Queensland must be approved at a referendum before being presented for assent: s 78. Section 78 does not entrench itself. Thus, the requirement for a referendum to end a system of local government can be expressly amended or repealed by an ordinary Act of Parliament.[93] This replicates the position prior to consolidation of the Constitution.[94]

In its consultation paper, the committee proposed that the requirement for a system of local government in Queensland should be referendum entrenched. The committee reasoned:

> *Local government is generally recognised as an elected third tier of government and plays an important role in the structure of government in Australia. Thus, it should be recognised and accorded the status of an established part of the structure of government.*[95] *Abolition of local government would represent a fundamental change to the system of government in Queensland and should not be done without approval at a referendum.*[96]

The committee's proposal to entrench the system of local government received substantial support from many local governments and other submitters.[97]

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92 The system of local government in Queensland currently includes: 125 local governments established under the *Local Government Act 1993* (Qld) and the *City of Brisbane Act 1924* (Qld); 15 Aboriginal Councils established under the *Community Services (Aborigines) Act 1984* (Qld); and 17 Island Councils established under the *Community Services (Torres Strait) Act 1984* (Qld).

93 Explanatory notes to the *Constitution of Queensland 2001*, cl 78.

94 See the *Constitution Act 1867* (Qld), s 56 (now repealed).

95 The Constitutional Commission, *Final report of the Constitutional Commission 1988*, AGPS, Canberra, 1988 volume one at para 8.39.

96 Note 17 at 18.

97 See, for example, submission nos 1, 2, 3, 4, 10, 11, 13, 15, 16, 17, and 18.

During the round-table discussion it was noted that state governments from time to time might wish to change the system of local government for strategic or policy reasons.[98] However, as some participants at that forum also noted, s 70 provides substantial flexibility with respect to the details of the system of local government. For example, it would enable the amalgamation of several local governments or a change in the structure by which local governments manage their functions and deliver services. Thus, referendum entrenchment of s 70 would give a future government considerable scope to change the system of local government without referendum approval.

On this basis, the committee maintains that s 70 should be referendum entrenched subject to an amendment to s 70. That is, the statement in s 71(1) that a local government '*is charged with the good rule and local government of a part of Queensland allocated to the body*' should be incorporated into s 70. Including the primary function of local government in s 70 will assist to ensure that referendum entrenchment of s 70 cannot be circumvented. Any change to the system of local government which would require amendment to the redrafted s 70 would be so substantial that it should be approved by the citizens of Queensland at a referendum.

Mr Willis suggested that s 71(1) should also be referendum entrenched.[99] Among other matters, s 71(1) provides that a local government is an elected body. Mr Willis considered that local governments need to be accountable to their electors because of their important role. Referendum entrenchment of s 71(1) would, among other matters, have the effect that a referendum would be required to change to a system of non-elected local government.

The practical difficulty with referendum entrenching this aspect of s 71(1) is that s 71(3) provides an exception to the 'elected body' requirement. Section 71(3), which is expressed to be '*despite subsection (1)*', enables another Act to provide for the appointment of persons to perform a local government's functions and exercise its powers in certain circumstances. Referendum entrenchment of s 71 in its entirety is undesirable in that it would still enable the provision to be undermined by 'another Act'. Moreover, the content of s 71(2)-(4) does not fulfil the requisite test for referendum entrenchment as discussed in section 5.1.

The Ipswich City Council further suggested that ss 71 to 77 of the Constitution should be entrenched by a two-thirds majority of the Legislative Assembly.[100] As discussed in section 8.2.2, the committee has some concerns about entrenching provisions requiring support of a two-thirds majority of the Legislative Assembly. The committee considers that parliamentary entrenchment of ss 71 to 77 provides adequate protection for these provisions.

Recommendation 6 – Local government

The statement in s 71(1) of the *Constitution of Queensland 2001* that a local government '*is charged with the good rule and local government of a part of Queensland allocated to the body*' should be incorporated into s 70.

Section 70 (System of local government) of the *Constitution of Queensland 2001*, as amended, should be referendum entrenched. As a consequence, s 78 can be repealed.

98 Transcript, n 18 at 7.

99 Submission no 11.

100 Submission no 17.

6. PARLIAMENTARY ENTRENCHMENT

COMMITTEE PROPOSAL 3 – PARLIAMENTARY ENTRENCHMENT OF THE WHOLE CONSTITUTION

The Queensland Constitution should provide that any law which amends or repeals any provision of the Constitution, including a referendum entrenched provision:

- *cannot be passed within 27 calendar days of being introduced;*
- *must be the subject of a report to Parliament by an appropriate, duly constituted parliamentary committee before being passed;*
- *must contain the words "Constitution Amendment" in its title; and*
- *must be passed by a majority of the Legislative Assembly equal to a majority of the number of seats in the Assembly (an absolute majority of the Legislative Assembly).*

These requirements should be referendum entrenched.

COMMITTEE PROPOSAL 4 – LCARC'S AREAS OF RESPONSIBILITY

LCARC's areas of responsibility should be amended to expressly recognise that its responsibilities include any bill expressly or impliedly repealing or amending the Constitution.

6.1 THE CONCEPT

In its consultation paper, the committee proposed that *all* provisions of the Constitution, including referendum entrenched provisions, should require special procedures for amendment or repeal.[101] The committee proposed a process of 'parliamentary entrenchment' so that any bill to amend or repeal any provision of the Constitution:

- cannot be passed within 27 calendar days of being introduced;
- must be the subject of a report to Parliament by an appropriate parliamentary committee before being passed;
- must contain the words 'Constitution Amendment' in the title; and
- must be passed by an absolute majority of the Legislative Assembly.[102]

The committee reasoned that these requirements, which are discussed in more detail in section 6.2, would reinforce the superior status of the Constitution and assist to prevent implied repeal without inhibiting the capacity of the Parliament to respond appropriately to the changing needs of society.

The committee maintains its support for parliamentary entrenchment of the whole Constitution. Parliamentary entrenchment is procedural in nature and is an important mechanism to ensure that proposed amendments to the Constitution are given detailed consideration and in such a way as to facilitate public input to the proposed amendments. Parliamentary entrenchment provides a point of difference between constitutional and ordinary legislation.[103] Further, as a procedural requirement it will not unduly inhibit any transformation to a republic.

101 Note 17 at 21.

102 Note 17 at 21.

103 There was broad support for parliamentary entrenchment in the little comment the committee received on this issue. See, for example, Mr D Willis, submission no 11 and comments made at the round-table discussion: transcript, n 18 at 8.

At the round-table discussion, participants raised an important consideration, namely, the risk that there might be inadvertent non-compliance with the requirements of parliamentary entrenchment particularly in the case of bills which, on their face, do not appear to be of a constitutional nature. This could provide a platform on which to challenge the validity of any such resulting legislation.

Inadvertent amendment of provisions in Victoria's Constitution which parliamentary entrench the jurisdiction of that state's Supreme Court has been the source of litigation in that jurisdiction.[104]

Provisions of the Queensland Constitution which forseeably could be inadvertently amended include those in Chapter 3, Part 5 (Powers of the State) and s 58 (Supreme Court's superior jurisdiction).

The risk of inadvertent non-compliance could be overcome by expressly making the requirements of parliamentary entrenchment directory rather than mandatory. This would mean that while the requirements of parliamentary entrenchment might be seen as morally and politically binding, legal compliance with those requirements would be optional. Thus, there could be no challenge to legislation on the basis of non-compliance with the requirements of parliamentary entrenchment. However, the committee has difficulties with this proposal. Making compliance optional would undermine an important mechanism which seeks to distinguish the Constitution from ordinary legislation.

This committee has sought advice from the Queensland Parliament's Scrutiny of Legislation Committee (SLC) as to a possible role that committee could have in scrutinising all bills for consistency with the Constitution. The SLC advised as follows.

- If the SLC were to assume such a role, s 4 of the *Legislative Standards Act 1992* (Qld) should be amended to specifically include constitutional validity as a 'fundamental legislative principle' to place the question of the committee's jurisdiction beyond any doubt.
- If the SLC were to assume such a role, its capacity to examine *amendments* to bills would need to be incorporated into its statutory charter. (The SLC's power to examine amendments to bills is currently conferred by resolution of the Parliament dated 7 November 2001.)
- Apart from the issue of jurisdiction regarding amendments to bills, given the relatively short notice within which amendments are often circulated, it is difficult for the SLC to report on a proposed amendment prospectively. In nearly all cases, the SLC has reported historically after the amended bill has passed through the Legislative Assembly.
- A difficulty remains in relation to bills dealt with by Parliament as urgent bills, that is, where Parliament suspends standing and sessional orders so as to bring on debate of a bill in less than 13 calendar days. The SLC almost always has insufficient time to prepare a report in relation to urgent bills, which thereby escape its scrutiny.
- There would be a number of occasions when the constitutional validity of proposed legislation would remain uncertain and could not be certified with confidence. In such cases the SLC would most likely endeavour to persuade the sponsoring minister to comply with the 'parliamentary entrenchment' provisions to avoid any significant element of doubt.

The SLC concluded that it felt it was best placed to perform the role scrutinising all bills for consistency with the Constitution but that it could only do so if it received significant staffing and financial supplementation which would appear to be required.

This committee supports mandatory compliance with the requirements of parliamentary entrenchment on the proviso that the SLC has express statutory jurisdiction to scrutinise all bills and amendments to bills for consistency with the Constitution (including compliance with the requirements of parliamentary entrenchment) and constitutional validity.

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[104] See, for example, *City of Collingwood v State of Victoria* [1993] 2 VR 66; *City of Collingwood v State of Victoria and Another [No 2]* [1994] 1 VR 652; *Broken Hill Proprietary Co Ltd v Dagi* [1996] 2 VR 117.

The SLC's area of responsibility includes the application of the fundamental legislative principles (FLPs) to particular bills and particular subordinate legislation by examining all bills and subordinate legislation. Section 4 of the *Legislative Standards Act* which deals with FLPs should be amended by adding 'consistency with the Constitution and constitutional validity' as an example of an FLP. This would have the additional benefit of reminding drafters of the need to consider whether a particular bill will need to comply with the requirements of parliamentary entrenchment. The Office of Parliamentary Counsel also has a statutory function to provide advice to ministers and government entities on the application of the FLPs when drafting legislation.[105]

As the SLC itself recognises, in some cases it does not have sufficient time to consider an amendment to a bill or an urgent bill before its passage (and assent). To overcome this difficulty, the SLC should have statutory jurisdiction to scrutinise such Acts for consistency with the Constitution and constitutional validity so that the relevant minister can address any issues of non-compliance as a matter of urgency by way of repeal and reintroduction.

The SLC will need to be sufficiently resourced to effectively fulfil this additional function.

6.2 PARLIAMENTARY ENTRENCHMENT REQUIREMENTS

The committee considers that parliamentary entrenchment should comprise four requirements (as proposed in its consultation paper).[106] These requirements should apply to any bill which seeks to alter the Constitution, not only by amendment or repeal of existing provisions but also by inserting additional provisions.[107]

Each of the four proposed requirements is discussed below.

Time between introduction and debate. There should be at least 27 calendar days between a bill which amends or repeals the Constitution being introduced and the bill being passed. This will allow the bill to be reconsidered in the fourth week after it is introduced, if Parliament is sitting in that week, provided a parliamentary committee has reported (see below). Currently, Sessional Orders require 13 calendar days between the introduction of a bill and the resumption of debate on the second reading.[108]

Parliamentary committee review. An appropriate parliamentary committee should conduct an inquiry involving public consultation, and a subsequent report to Parliament, on any bill to amend or repeal the Constitution before that bill is passed. Referring a bill which affects the Constitution to a parliamentary committee for report to Parliament provides an additional mechanism by which Parliament and the citizens of Queensland can be informed about, and have the opportunity to comment on, the implications of the proposed legislation.

This requirement would preclude a bill proceeding to a second reading until the tabling of the parliamentary committee report. This could mean that the passage of a bill is delayed beyond 27 days. Presumably, the relevant parliamentary committee would take any factors warranting urgency into account in deciding upon its inquiry and reporting strategy.

LCARC's responsibility regarding constitutional reform includes any bill expressly or impliedly repealing any law relevant to the State's Constitution. Thus, under the current parliamentary committee structure, LCARC would be the appropriate committee to conduct a review of any bill which seeks to amend or repeal the Constitution. However, to allow for changes to the current structure of parliamentary committees it is preferable not to designate any particular committee as being responsible for conducting the necessary review.

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

106 Note 17 at 21.

107 Section 128 of the Commonwealth Constitution provides that: '*This Constitution shall not be altered except in the following manner*…'. This has the effect that existing provisions cannot be amended or repealed. It also prevents additional provisions being inserted into the Constitution without a referendum.

108 Standing Order 241 as amended by Sessional Order 8 approved by the Legislative Assembly on 22 March 2001.

In any case, LCARC's jurisdiction should be amended to expressly recognise that the committee's responsibilities include any bill expressly or impliedly repealing *or amending* the Constitution. Currently, s 87 of the *Parliament of Queensland Act* provides that: '*The committee's areas of responsibility about constitutional reform includes any bill expressly or impliedly repealing any law relevant to the State's Constitution*.' While this provision is inclusive and there is little doubt that the committee's jurisdiction includes bills amending constitutional legislation, addition of the phrase 'or amending' would more expressly describe the committee's role.

'Constitution Amendment'. It is highly desirable that any bill amending the Constitution includes in its title the words 'Constitution Amendment'. This will bring to the attention of the Parliament that the bill relates to constitutional matters and will need to comply with the requirements of parliamentary entrenchment.

The committee recommends this requirement despite some uncertainty as to whether the prescription of certain words is an effective manner and form requirement.[109]

Absolute majority. To prevent the government of the day taking advantage of a temporary absence of members of the Legislative Assembly, an absolute majority should be required to pass legislation amending or repealing the Constitution. An absolute majority should be defined as a majority of the Legislative Assembly equal to a majority of the number of seats in the Assembly (as opposed to a majority of members at the time present in the Assembly, or a majority of members elected to the Assembly). In cases where there is a majority government this provision will have limited practical effect. However, it could be significant when there is a minority government, or where there are temporary vacancies in one or more seats in the Legislative Assembly. For the reasons noted in section 8.2.2, the committee does not support a two-thirds majority requirement.

6.3 THE STATUS OF PARLIAMENTARY ENTRENCHMENT REQUIREMENTS

The requirements of parliamentary entrenchment are procedural in nature and designed to ensure that proposed amendments to the Constitution are given detailed consideration and in such a way as to facilitate public input to the proposed amendments. On this basis, the requirements of parliamentary entrenchment should be inserted into the Constitution as soon as possible by way of ordinary legislative amendment. This would provide some immediate recognition of the status of the Queensland Constitution as a fundamental law of the State.[110]

The legislative amendment inserting the parliamentary entrenchment requirements should itself comply with these requirements. This accords with the principle that the enactment of any manner and form provision should comply with the same requirements being enacted: see section 8.2. Further, those requirements should themselves be doubly entrenched so that their amendment or repeal must follow the same requirements. If Parliament enacts legislation which expressly or impliedly alters the *Constitution of Queensland 2001* without complying with these parliamentary entrenchment requirements, it is likely to attract a constitutional challenge. The success of any such challenge will depend on the legal bases for the enforcement of those requirements as a manner and form provision. If the legislation being enacted relates to the constitution, powers or procedure of the Parliament, the challenge may be successful under s 6 of the Australia Acts.[111] Irrespective of their legal effectiveness, the parliamentary entrenchment requirements will be morally and politically binding.

Inserting the parliamentary entrenchment requirements into the Constitution now would also allow some assessment of their operation before a constitutional referendum is held. (See chapter 9 as to the timing of that referendum.) At that time, consideration should be given to referendum entrenching the provisions effecting parliamentary entrenchment.

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109 See *South Eastern Drainage Board (South Australia) v Savings Bank of South Australia* (1939) 62 CLR 603, Evatt J at 633-634.

110 QCRC, n 1 at 24.

111 See section 2.3.1.

Recommendation 7 – Parliamentary entrenchment

The *Constitution of Queensland 2001* should be amended to provide that any bill which seeks to amend or repeal the Constitution, including a referendum entrenched provision:

- **cannot be passed within 27 calendar days of being introduced;**
- **must be the subject of an inquiry and report to Parliament by a committee of the Queensland Parliament before being passed;**
- **must contain the words 'Constitution Amendment' in its title; and**
- **must be passed by a majority of the Legislative Assembly equal to a majority of the number of seats in the Assembly (an absolute majority of the Legislative Assembly).**

The bill inserting the requirements of parliamentary entrenchment should:

- **itself comply with the requirements of parliamentary entrenchment: see recommendation 16 (Future entrenchment other than referendum entrenchment); and**
- **double entrench those requirements so that their amendment or repeal must follow the same requirements.**

To address the possibility of inadvertent non-compliance with the requirements of parliamentary entrenchment, this recommendation is conditional upon the Scrutiny of Legislation Committee of the Queensland Parliament:

- **having statutory jurisdiction to scrutinise all bills and amendments to bills for consistency with the Constitution (including compliance with the requirements of parliamentary entrenchment) and constitutional validity;**
- **having the statutory jurisdiction to scrutinise bills which have received Royal Assent for consistency with the Constitution and constitutional validity (to cover circumstances where a bill or an amendment to a bill has been passed urgently and the Scrutiny of Legislation Committee has not had time to consider the relevant bill or amendment for consistency with the Constitution and constitutional validity); and**
- **being sufficiently funded to effectively perform the above functions.**

Section 4 of the *Legislative Standards Act* should be amended by adding 'consistency with the Constitution and constitutional validity' as an example of a fundamental legislative principle.

The operation of the parliamentary entrenchment requirements should be assessed before the next constitutional referendum is held. At that time, consideration should be given to referendum entrenching the provisions effecting parliamentary entrenchment.

Recommendation 8 – LCARC's areas of responsibility

The *Parliament of Queensland Act 2001*, s 87 should be amended to expressly recognise that the Legal, Constitutional and Administrative Review Committee's area of responsibility about constitutional reform includes any bill expressly or impliedly repealing *or amending* any law relevant to the State's Constitution.

7. OTHER MATTERS RELATING TO ENTRENCHMENT

7.1 DRAFTING OF PROVISIONS EFFECTING ENTRENCHMENT

COMMITTEE PROPOSAL 6 – DRAFTING OF PROVISIONS EFFECTING REFERENDUM ENTRENCHMENT

Provisions effecting referendum entrenchment should be drafted specifically to preclude amendment or repeal of referendum entrenched sections of the Constitution without approval at a referendum.

COMMITTEE PROPOSAL 7 – RELOCATION AND RENUMBERING

Referendum entrenching provisions should allow entrenched sections to be renumbered and relocated, and allow consequential amendments necessary to effect such renumbering and relocation to be made, without approval at a referendum. However, they should not expressly allow the entrenched sections to be redrafted.

Parliamentary entrenchment requirements should apply to legislation relocating or renumbering any provision of the Constitution.

7.1.1 Referendum entrenchment

General approach. The effect of referendum entrenchment is to prevent certain laws being made unless they have '*been approved by a majority of the electors voting'* at a referendum.[112] Entrenching provisions can be drafted to:

- restrict any amendment or repeal of specific section/s of an Act or the Act as a whole; or
- restrict any change (specific or otherwise) to the legal effect of certain section/s of an Act.

The committee endorses the approach outlined in its consultation paper that any entrenching provisions in the Constitution should require special additional procedures to be followed to *amend or repeal* the entrenched provisions. The protection so afforded would apply to both implied and express amendment or repeal.

It is important that an entrenching provision does not render the amending legislation invalid in its entirety in the event its requirements are not complied with. Rather, the entrenching provision should provide that only those provisions which fail to comply with the entrenching provision are invalid and not the whole amending Act.[113]

Relocation and renumbering. In the recent process of consolidating the Constitution it became apparent that minor redrafting, or even relocation of, entrenched provisions risked offending some of the entrenching provisions. Hence, the currently entrenched provisions have not been incorporated in the *Constitution of Queensland 2001*[114] and a complete consolidation of the Queensland Constitution has been prevented.

In its consultation paper, the committee proposed that, to prevent a similar problem occurring in the future, there should be a mechanism by which referendum entrenched provisions can be renumbered and relocated, and consequential amendments necessary to effect such renumbering and relocation made, without a referendum.[115] The committee received no objections to this proposal. The four

112 See the *Referendums Act 1997* (Qld), s 43(2)(b).

113 This issue was raised by Mr John Pyke at the round-table discussion: transcript, n 18 at 8.

114 Explanatory notes to the bill for the *Constitution of Queensland 2001* at 4-5.

115 Note 17 at 23-24.

requirements of parliamentary entrenchment should apply to legislation relocating or renumbering referendum entrenched provisions.

Recommendation 9 – Drafting of provisions effecting referendum entrenchment

Any referendum entrenching provisions inserted in the *Constitution of Queensland 2001* should be drafted:

- **specifically to preclude *amendment or repeal* of referendum entrenched provisions of the Constitution without approval at a referendum; and**
- **so as to invalidate only those provisions of an amending bill which fail to comply with the entrenching provision, rather than the bill as a whole.**

Recommendation 10 – Relocation and renumbering of referendum entrenched provisions

Any referendum entrenching provisions inserted in the *Constitution of Queensland 2001* should allow entrenched provisions to be relocated and renumbered, and allow consequential amendments necessary to effect such relocation and renumbering to be made, without approval at a referendum. However, these provisions should not allow the entrenched provisions to be redrafted.

Parliamentary entrenchment requirements should apply to legislation relocating or renumbering any provision of the Constitution.

7.1.2 Parliamentary entrenchment

The requirements of parliamentary entrenchment are not so onerous that they would prevent Parliament proceeding with amendments which necessitate relocation and renumbering of parliamentary entrenched provisions. Accordingly, the committee does not consider that a provision enabling the relocation and renumbering of parliamentary entrenched provisions without compliance with the special requirements is necessary.

Recommendation 11 – Relocation and renumbering of parliamentary entrenched provisions

A bill seeking to relocate and renumber provisions of the *Constitution of Queensland 2001* which are parliamentary entrenched should comply with the requirements of parliamentary entrenchment.

7.2 AMENDMENT REQUESTS TO THE COMMONWEALTH PARLIAMENT

COMMITTEE PROPOSAL 8 – AMENDMENT REQUESTS TO THE COMMONWEALTH PARLIAMENT

The Constitution should expressly provide that bills requesting amendment of the Queensland Constitution by the Commonwealth Parliament be subject to the same parliamentary entrenchment or referendum entrenchment requirements as amending legislation passed by the Queensland Parliament.

The Queensland Constitution might be amended following a request by the Queensland Parliament made under s 51(xxxviii) of the Commonwealth Constitution that the Commonwealth Parliament undertake the amending process. The *Australia Acts (Request) Act 1985* (Qld) is an example of this occurring.

The committee endorses the proposal in its consultation paper that any entrenchment requirements contained in the Queensland Constitution should apply equally to bills which request the

Commonwealth Parliament to amend entrenched provisions.[116] It is unlikely that such a requirement would be inconsistent with s 51(xxxviii) of the Commonwealth Constitution.

Recommendation 12 – Amendment requests to the Commonwealth Parliament

The *Constitution of Queensland 2001* should provide that bills requesting amendment of the Queensland Constitution by the Commonwealth Parliament be subject to the same parliamentary entrenchment or referendum entrenchment requirements as amending legislation passed by the Queensland Parliament.

7.3 'HIGHEST RULE OF THE QUEENSLAND LEGAL SYSTEM'

COMMITTEE PROPOSAL 9 – STATEMENT THAT THE CONSTITUTION IS THE PARAMOUNT LAW

The Queensland Constitution should make it clear that the Constitution is the paramount law of Queensland, subject to the Commonwealth Constitution and the Australia Act 1986 (UK) *and* Australia Act 1986 (Cth).

In its consultation paper, the committee proposed that the Queensland Constitution should make it clear that the Constitution is the paramount law of Queensland, subject to the Commonwealth Constitution and the *Australia Act 1986* (UK) and *Australia Act 1986* (Cth).[117]

Such a statement would have two primary advantages.

First, it would provide a clear statement of principle.

Secondly, it might serve to support the legal basis for entrenchment of the principal features of the Constitution. In section 2.3 the committee discusses possible legal bases for entrenching provisions outside the Australia Acts, s 6 when the amending law does not relate to the 'constitution, powers or procedure of the Parliament'. One such basis is s 106 of the Commonwealth Constitution which, on one possible interpretation, provides a constitutional guarantee that any entrenching provision prescribed by a state constitution for its own amendment must be observed whether or not any other legal basis exists for its enforcement. Assuming this interpretation to be correct, and in order to rely on s 106 to enforce entrenching provisions, it must be established that the entrenching provision is in the 'state constitution'. Similarly, the principle in *Ranasinghe* appears limited to 'constitutions'.

Thus, inclusion of a provision recognising the Constitution as the paramount law of Queensland would maximise the possibility of effectively entrenching provisions outside the Australia Acts, s 6.

Public input to the committee's inquiry revealed some support for such a statement to be included in the Constitution.[118] Although, at the round-table discussion it was queried whether the statement would merely be an aspirational statement, or whether it is intended to have some practical effect and, if the latter, what that effect is to be.[119]

On reflection, the committee believes that such a statement might be more appropriate for any preamble to the Constitution and should be considered as part of any review of that issue.

116 Note 17 at 24.

117 Note 17 at 25.

118 See, for example, Australian Spirit, submission no 10 and Mr D Willis, submission no 11. See also the comments made at the round-table discussion: transcript, n 18 at 9-12.

119 Transcript, n 18 at 11.

Recommendation 13 – Statement that the Constitution is the paramount law

The issue of whether the *Constitution of Queensland 2001* should include a statement that it is the paramount law of Queensland should be considered as part of any review of a preamble for the Constitution.

8. FUTURE CONSTITUTIONAL CHANGE

8.1 CONSTITUTIONAL REVIEW

COMMITTEE PROPOSAL 10 – CONSTITUTIONAL REVIEW

No specific provisions for constitutional review should be included in the Queensland Constitution. Parliament retains the power to refer relevant matters to a parliamentary committee or convene a constitutional convention.

In its consultation paper, the committee considered a range of options for constitutional review and concluded that the Constitution should contain no specific provision regarding constitutional review.[120] The committee remains of this view.

The system of democratic government established by the Constitution provides a process by which citizens can initiate review of the Constitution. For example, citizens can raise issues of constitutional reform with members of Parliament, and/or petition Parliament seeking reform. In response, Parliament might resolve to establish a constitutional convention or refer specific issues to a parliamentary committee for further consideration and report back to the House.

The fact that the Queensland Constitution is now consolidated, and hence more accessible, will make it easier for citizens to identify areas which they believe should be reformed.[121]

Recommendation 14 – Constitutional review

No specific provision regarding constitutional review should be included in the *Constitution of Queensland 2001*.

8.2 FUTURE ENTRENCHMENT

8.2.1 Referendum entrenchment

COMMITTEE PROPOSAL 11 – FUTURE REFERENDUM ENTRENCHMENT

The Queensland Constitution should clearly state that provisions can only be referendum entrenched following approval at a referendum, and this provision should itself be referendum entrenched.

One of the difficulties with entrenching provisions of the Constitution is that the capacity to introduce safeguards against undesirable legislative measures is also a capacity which can be used to entrench undesirable law.[122] In its consultation paper, the committee drew on judicial commentary and a resolution from the Queensland Constitutional Convention to propose that provisions of the Constitution should only be referendum entrenched following approval at a referendum.[123]

A requirement that provisions can only be referendum entrenched by referendum ensures that provisions are only referendum entrenched with the support of the majority of voters. This prevents one Parliament seeking to constrain future Parliaments without the approval of the people of Queensland, and thus helps Queensland voters retain some control of the Queensland Constitution.

120 Note 17 at 26-27.
121 Mr D Willis, submission no 11 at 4.
122 Carney, n 21 at 73.
123 Note 17 at 28. In this regard, the committee was considering QCRC recommendation 12.2.

The committee therefore recommends that referendum entrenchment of any provision of the Constitution should only occur with the prior approval of Queensland voters at a referendum. This principle should be expressly stated and itself entrenched in the Queensland Constitution.[124] As discussed in section 2.6, entrenchment of the Constitution is justified on the grounds that future governments are likely to consider the entrenchment requirements morally and politically binding. This argument loses much of its strength if the requirements are not approved at a referendum.

Recommendation 15 – Future referendum entrenchment

The *Constitution of Queensland 2001* should provide that provisions can only be referendum entrenched following approval of that entrenchment by referendum. This provision should itself be referendum entrenched.

8.2.2 Other types of entrenchment

COMMITTEE PROPOSAL 12 – FUTURE ENTRENCHMENT OTHER THAN REFERENDUM ENTRENCHMENT

The Constitution should require that entrenching provisions requiring special procedures which an absolute majority of the Legislative Assembly will be able to comply with should only be inserted following the same procedure as the provision itself provides for amendment or repeal of the entrenched provisions.

The Constitution should expressly provide that a referendum is necessary to insert entrenching provisions requiring a referendum or requiring other special additional procedures which cannot be complied with by an absolute majority. This provision should itself be referendum entrenched.

Entrenching provisions, whether in the Constitution or other legislation,[125] potentially impose significant restrictions on future Parliaments. In its consultation paper the committee discussed its particular concern with entrenching provisions which cannot be complied with by an absolute majority of the Legislative Assembly or by referendum.[126] For example, a provision requiring a two-thirds majority to amend or repeal the Constitution could, in circumstances where the governing party in the Legislative Assembly holds greater than two-thirds of the seats, be unreasonably difficult for subsequent Parliaments to amend. Alternatively, it might place excessive power in one or a number of members who happen to have a pivotal role in the Assembly at a given time.[127]

Entrenching requirements which are merely procedural, and capable of compliance by an ordinary majority of members, do not raise the same level of concern that a future Parliament might be inappropriately bound by the entrenchment requirement. Examples of such procedural requirements include:

- passage of a certain period of time between the introduction of a bill and its debate;
- a parliamentary committee report on a bill; and
- inclusion of the words 'Constitution Amendment' in the title of a bill.

Such procedural requirements help ensure that proposed amendments to the Constitution are given detailed consideration and in such a way as to facilitate public input to the proposed amendments. They do not prevent an ordinary majority of the Legislative Assembly from passing the proposed amendments

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124 See submission no 13 by (then) Associate Professor Gerard Carney to the QCRC, n 1. See also comments by Mr D Willis, submission no 11 to this inquiry at 5.

125 The issue of including entrenching provisions in legislation other than the Constitution was raised at the round-table discussion. As discussed at that forum, there is some debate about whether it is possible for Parliament to pass ordinary legislation containing manner and form provisions: transcript, n 18 at 13.

126 Note 17 at 28-29.

127 QCRC, n 1 at 78.

or repeals. The most significant restriction of such requirements is that they may delay the passing of relevant legislation. Potential delay is an acceptable cost of ensuring that full consideration is given to constitutional amendments.

Further, a requirement that any amendments or repeals be passed by an absolute majority of the Legislative Assembly does not threaten the power of a future Parliament to legislate as necessary for the peace, welfare and good government of Queensland.

Nevertheless, entrenching provisions requiring special procedures which an absolute majority of the Legislative Assembly will be able to comply with should only be inserted after following the procedure required to be followed to amend the relevant entrenched provision. This would ensure that the entrenching provisions themselves are only inserted after being given due consideration and attention by Parliament.

Further, the committee remains of the view that the Constitution should provide that a referendum is not only necessary to referendum entrench a provision, but also to insert entrenching provisions which require special additional procedures other than procedures which can be complied with by an absolute majority of the Legislative Assembly. This provision should itself be referendum entrenched.

This would prevent any Parliament unilaterally inserting entrenching provisions which might subsequently make amendment or repeal of the Constitution (or other legislation) unreasonably difficult.

Following this principle, the requirements of parliamentary entrenchment, recommended in chapter 6, could be inserted without a referendum because an absolute majority of the Legislative Assembly can comply with these requirements. Although, the Parliament would be required to follow the procedures required by parliamentary entrenchment to so entrench those provisions.

Recommendation 16 – Future entrenchment other than referendum entrenchment

The *Constitution of Queensland 2001* should require that all entrenching provisions (whether in the Constitution or other legislation) only be enacted in accordance with the same special procedure which they prescribe. However, referendum approval should be required of any special requirements which are incapable of being satisfied by an absolute majority of the Legislative Assembly. This provision should itself be referendum entrenched.

9. ADOPTION OF THE CONSTITUTION AT A REFERENDUM

COMMITTEE PROPOSAL 13 – ADOPTION OF THE CONSTITUTION AT A REFERENDUM

When consideration of the current issues of constitutional reform is finalised, the Queensland Constitution should be submitted for approval at a referendum.

COMMITTEE PROPOSAL 14 – A CONSTITUTIONAL CONVENTION

A constitutional convention should be convened as the penultimate stage of the current process of constitutional reform to finalise the drafting of the Queensland Constitution and determine the logistical details for proceeding to a referendum.

As discussed in chapter 4, the committee does not believe that there should be any further referendum entrenchment of provisions of the Constitution which relate to the current monarchical system of government.

Unless compelling justification for an earlier constitutional referendum arises, the next referendum to be held in Queensland regarding the State's Constitution should concern a bill or bills which, among other matters, propose to transform the State's system of government from a monarchical to a republican system.

Holding an earlier referendum at the end of the current process of constitutional reform would provide an opportunity to finalise the consolidation of the Constitution by relocating the currently entrenched provisions from their original Acts to the 2001 Constitution, and to referendum entrench provisions identified by the committee. However, in practical terms the significant cost involved in holding such a referendum (as indicated by table 1) is not warranted when a republican system of government in Queensland remains on the public agenda and would require a further referendum, most likely within a short time frame.

Table 1: Estimated cost of holding a State referendum[128]

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

At the same time a bill or bills is submitted to the people at a referendum for a republican system of government, the people's approval should also be sought to referendum entrench the provisions recommended in this report and the requirements of parliamentary entrenchment if an assessment of the operation of those provisions supports their referendum entrenchment.

The Constitution might be amended in the future as a result of recommendations emanating from inquiries into:

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

- certain matters relating to the judiciary (see chapter 13 of LCARC report no 36 *The Queensland Constitution: Specific content issues*);[129]
- Aboriginal and Torres Strait Islander Peoples' participation in Queensland's democratic process (stage three of the committee's current constitutional reform inquiry); and
- the issue of a preamble for the Queensland Constitution.

The committee's approach would allow consideration of whether, and to what extent, any constitutional provisions recommended by these inquiries should be entrenched before a referendum. The committee also recognises that the government might perceive that there is compelling justification for a referendum following one or more of these inquiries.

The process by which Queensland might proceed to a constitutional referendum and how significant issues are to be presented to the people will require further consideration at the relevant time.

In its consultation paper the committee proposed that a constitutional convention should be convened as the penultimate stage of *the current process of constitutional reform* to finalise the drafting of the Constitution to be presented at a referendum, and to determine logistical details for proceeding to a referendum. While the committee no longer proposes to link a referendum with the end of the current process of constitutional reform, it is worthwhile to note that at the round-table discussion some concern was expressed about the value of a constitutional convention at such a late stage in the constitutional reform process.[130] In particular, there was concern that a convention might result in the reopening of some issues which have already been resolved following substantial consultation processes.

The committee does not propose to make any recommendation at this stage about how Queensland might proceed to a referendum which, among other matters, seeks to change the State's system of government. This will depend upon the events leading up to that referendum.

Recommendation 17 – A constitutional referendum

Unless compelling justification for an earlier constitutional referendum arises, referendum approval to relocate the currently entrenched provisions to the *Constitution of Queensland 2001* and to referendum entrench other provisions of the Constitution should occur only when the people are asked to approve a change to a republican system of government in Queensland.

129 Note 10.

130 Transcript, n 18 at 13-14. See also Mr D Willis, submission no 22 at 4.

DISSENTING REPORT

At the outset we must express our disappointment that the majority of members of the committee have now taken a different approach to entrenchment of the Constitution than that expressed in the consultation paper which, in turn, was the basis of the round-table discussion held in November 2002.

The committee's consultation paper proposed:

- relocation of those provisions referendum entrenched in earlier constitutional legislation to the *Constitution of Queensland 2001* (following their reassessment and redrafting) to complete the consolidation exercise;
- referendum entrenchment of certain provisions relating to the essential structure of the State's constitutional system, including provisions which relate to the current monarchical system of government; and
- that the referendum to give effect to the above be held when consideration of the current issues of constitutional reform is finalised.

We maintain that this approach is the appropriate course of action.

It follows that we cannot agree with two significant aspects of the report of the majority of members of the committee, namely, which provisions of the Queensland Constitution should be referendum entrenched and when steps to attempt to secure their referendum entrenchment should occur.

Recommendation 2 of the report of the majority of members of the committee is that: '*While change to a republican system of government remains on the public agenda, there should be no further referendum entrenchment of provisions of the Constitution of Queensland 2001 which relate to the current monarchical system of government*'.

The majority of members of the committee go on to recommend that unless compelling justification for an earlier constitutional referendum arises, referendum approval to relocate the currently entrenched provisions to the *Constitution of Queensland 2001* and to referendum entrench other provisions of the Constitution should occur only when the people are asked to approve a change to a republican system of government in Queensland: recommendation 17 (A constitutional referendum).

These recommendations are based on the assertion that, despite the defeat of the 1999 Commonwealth republic referendum, there remains considerable support in the community for a republican system of government. However, the minority committee members accept that Australians voted at that referendum to defeat a proposal to change to a republican system of government. Australia and Queensland remain constitutional monarchies and appear likely to do so for the foreseeable future. We believe that entrenchment of the Queensland Constitution should be based on current realities not hypothetical scenarios.

It is our position that steps should be taken *at the end of the current process of constitutional reform* to referendum entrench provisions of Queensland's Constitution which satisfy the test contained in recommendation 3 (Referendum entrenchment) with which we agree. At the same time, certain provisions recommended in LCARC report no 36 *The Queensland Constitution: Specific Content Issues* should also be proposed for referendum entrenchment. Entrenchment of these provisions will not render transformation to a republic, should that ever occur, more difficult.

We discuss our position on these issues in more detail below.

Provisions recommended for referendum entrenchment

The Queensland Parliament is unicameral and has a history of large majorities. In these circumstances, a Constitution which defines the structure of the State's constitutional system, and safeguards that system against abuse by any particular government is appropriate. Applying the test for referendum

entrenchment contained in recommendation 3, the following provisions (or components thereof) of the *Constitution of Queensland 2001* should be proposed for referendum entrenchment:

- the Parliament (s 6);
- the Legislative Assembly (s 7);
- the law-making power (s 8);
- members of the Legislative Assembly (s 10);
- division of the State into electoral districts (s 12);
- one member for each electoral district (s 13);
- duration of the Legislative Assembly (s 16);
- a minimum sitting requirement for the Legislative Assembly (s 19);
- the Governor in Council (s 27);
- appointment, role and term of the Governor (ss 29 and 30);
- appointment of ministers of the state and a maximum limit on the combined number of ministers of the state and parliamentary secretaries (s 43 redrafted as recommended in recommendation 5 of the report of the majority of committee members);
- establishment and membership of Executive Council (s 48);
- meetings of Executive Council (s 50);
- various provisions relating to the judiciary (ss 57-63);
- the consolidated fund (s 64);
- requirement to pay tax, impost, rate or duty (s 65);
- payment from consolidated fund (s 66); and
- the system of local government (s 70).

In the fourth column of the table in Appendix B we discuss this aspect of our recommendation in more detail.

Provisions (or components thereof) which the committee recommended in LCARC report no 36 *The Queensland Constitution: Specific content issues* should be included in the *Constitution of Queensland 2001* and which we believe should be referendum entrenched concern:

- a statement of executive power (recommendation 2);
- the main function of, and other matters relating to, Executive Council (recommendation 3);
- the Governor's right to request information (recommendation 4);
- the requirement that ministers be members of the Legislative Assembly (recommendation 7);
- appointment of the Premier (recommendation 8);
- dismissal of the Premier (recommendation 9);
- a maximum limit on the combined number of ministers of the state and parliamentary secretaries (recommendation 18);
- acting judges (recommendation 31);
- the compulsory retirement age for judges (recommendation 32); and
- certain aspects of the procedure for removal of judges from office (recommendation 33).

In the fourth column of the table in Appendix C we discuss this aspect of our recommendation in more detail.

The currently entrenched provisions

Given that a referendum will be necessary to finalise the current process of constitutional reform, it is appropriate to:

- reassess the currently entrenched provisions and the extent to which they should be included in the Constitution; and
- redraft the entrenched provisions which are to be included in the Constitution using modern language.

The entrenched provisions have previously been incorporated into draft constitutions forming part of EARC's *Report on consolidation and review of the Queensland Constitution*[131] and LCARC report nos 10, 13 and 24.[132] These provisions were (re)drafted in the context of consolidating the Constitution rather than reforming the Constitution. Thus, the recommendations of these reports largely restate the existing entrenched provisions in modern language rather than reflect a review of the desirability of their existence or content.

The QCRC also recommended provisions to replace the currently entrenched provisions in its draft Constitution of Queensland 2000. The QCRC's report does not specifically discuss the reasoning used in deciding upon these provisions.

The consolidation of those provisions currently entrenched in the *Constitution Act 1867*, the *Constitution Act Amendment Act 1890* and the *Constitution Act Amendment Act 1934* can only occur after endorsement by the voters of Queensland at a referendum. Before the next constitutional referendum is held, these provisions should be reviewed and, where appropriate, redrafted using modern language. In the fourth column of the table in appendix B we indicate, among other matters, what components of each of the currently entrenched provisions should be retained in the *Constitution of Queensland 2001* and how such components should be entrenched.

The timing of a constitutional referendum

The committee proposed in its consultation paper that, when consideration of the current issues of constitutional reform is finalised, the Constitution should be presented to Queensland voters at a referendum.[133] We believe that this is the only appropriate course of action. Adoption of the Constitution at a referendum would serve to:

- referendum entrench key aspects of the State's constitutional system, such as the independence of the judiciary;
- implement the committee's recommendation in section 8.2 (with which we agree) that certain provisions should only be entrenched in the Constitution with the support of a referendum;
- enhance the status of the Constitution as a fundamental law;
- enhance public awareness of, and respect for, the Constitution;
- promote the practical entrenchment of provisions which do not relate to the constitution, powers or procedure of the Parliament: see the discussion in section 2.6; and
- provide an opportunity to finalise the consolidation of the Constitution by relocating the currently entrenched provisions (following their redrafting).

There are certain issues which should be considered before a Constitution is presented at a referendum for adoption by the people of Queensland. These issues concern the judiciary and the magistracy,

131 Note 6.

132 Note 8.

133 Note 17 at 30. Submissions in support of proposal 13 included Australian Spirit, submission no 10 and Mr D Willis, submission no 11.

Aboriginal and Torres Strait Islander peoples' participation in the democratic process, and a preamble for the Constitution. The question of whether, and to what extent, any constitutional provisions recommended by these inquiries should be entrenched will need to be considered before the current process of constitutional reform is finalised. Ideally, the inquiries themselves will make recommendations about entrenchment of relevant provisions.

When consideration of these issues of constitutional reform is finalised, the *Constitution of Queensland 2001*, amended in accordance with our recommendations in Appendices B and C, should be submitted for approval at a referendum.

Miss Fiona Simpson MP
Member for Maroochydore

Shadow Minister for Health; and
Shadow Minister for Women's Policy

Mrs Liz Cunningham MP
Member for Gladstone

Mrs Dorothy Pratt MP
Member for Nanango

APPENDIX A ~ SUBMISSIONS RECEIVED

Submission No	**SUBMISSION FROM:**
1	Mr B S Guthrie, Chief Executive Officer, Townsville City Council
2	Mr T P Brennan, Chief Executive Officer, Stanthorpe Shire Council
3	Cr J Soorley, Chairman, South East Queensland Regional Organisation of Councils
4	Mr T C Melchert, Chief Executive Officer, Douglas Shire Council
5	Hon P de Jersey AC, Chief Justice
6	Confidential
7	Mr W Tait
8	Mr A J Glynn SC, President, Bar Association of Queensland
9	M/s M Carstairs (Not tabled)
10	Mr G Blyth, National Executive Director, Australian Spirit
11	Mr D Willis
12	Ms D Vasta & Mr S Vasta
13	Mr D Dickson, Acting Chief Executive Officer, Gold Coast City Council
14	Hon M Foley MP, Minister for Employment, Training & Youth & Minister for the Arts
15	Mr G Hallam PSM, Executive Director, Local Government Association of Queensland Inc
16	Mr A J Lee, Deputy Chief Executive Officer, Thuringowa City Council
17	Mr R Rapinette, Acting Chief Executive Officer, Ipswich City Council
18	Mr G R Kellar, Chief Executive Officer, Logan City Council
19	Chief Judge P M Wolfe
20	Mr L Springborg MP, Shadow Attorney-General, Member for Southern Downs
21	Judge D J McGill
22	Mr D Willis (supplementary submission)
23	Mr Neil Laurie, Clerk of the Queensland Parliament

APPENDIX B ~ ENTRENCHMENT OF SPECIFIC PROVISIONS OF THE *CONSTITUTION OF QUEENSLAND 2001*

As discussed in chapter 4, the committee does not support holding a referendum at this stage to relocate the currently entrenchment provisions to the *Constitution of Queensland 2001*, or to referendum entrench provisions of the Constitution which relate to the current monarchical system of government.

However, as discussed in chapter 5, the committee recommends that, as a matter of general principle, the *Constitution of Queensland 2001* should referendum entrench provisions which establish the essential structure of the State's constitutional system, or provide for the fundamental principles of the State's constitutional system. The table in this appendix contains the committee's recommendations regarding which specific provisions of the *Constitution of Queensland 2001* should be referendum entrenched in light of the approach outlined in chapter 4 and applying the above test. The committee also applies this test to identify which essential elements of the currently entrenched provisions should be referendum entrenched whether or not Queensland retains a monarchical system of government.

Unless compelling justification for an earlier constitutional referendum arises, the referendum required for these purposes should occur only when the people are asked to approve a change to a republican system of government in Queensland: see chapter 9.

The committee recommends that *all* provisions of the Constitution should be 'parliamentary entrenched': see chapter 6 for an explanation as to what parliamentary entrenchment entails. Thus, a recommendation that a provision be referendum entrenched also means that the provision be parliamentary entrenched.

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
s 1 Short title [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 2 Commencement [Not entrenched]	**Parliamentary entrenchment**	Not a substantive provision	
s 3 Object [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 4 References to the Sovereign [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 5 Note in text is part of this Act [Not entrenched]	Not a substantive provision	Not a substantive provision	

134 As set out in the committee's consultation paper, n 17, appendix A.

135 Unless a comment is made in this column, the dissenting members agree with the committee's recommendation and its reasoning.

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
s 6 The Parliament [The *Constitution Act 1867*, s 2A is referendum entrenched by s 53 of that Act (doubly entrenched). The *Constitution Act Amendment Act 1934*, s 3 requires a referendum to establish another legislative body, such as a Legislative Council, and referendum entrenches itself.]	**Referendum entrenched**	**Parliamentary entrenchment** Section 6 should be parliamentary entrenched. The provision to which s 6 relates is currently referendum entrenched. Essential elements of this provision which should be referendum entrenched are the components of the Parliament of Queensland and the legislative process. These elements are pivotal to the State's constitutional system.	**Referendum entrenchment** In redrafting s 2A of the *Constitution Act 1867*, the following elements should be referendum entrenched. • The Parliament of Queensland consists of the Sovereign and the Legislative Assembly. • Every bill passed by the Legislative Assembly must be presented to the Governor (as the Sovereign's representative) for assent. • No bill has effect until the Governor assents to it. The key elements of this proposed provision would define the Parliament and the legislative process which are pivotal components of the State's constitutional system. Section 2A is currently referendum entrenched.
s 7 Legislative Assembly [The *Constitution Act 1867*, s 1 is referendum entrenched by s 53 of that Act (doubly entrenched).]	**Referendum entrenched**	**Referendum entrenchment** Section 7 should be parliamentary entrenched. The provision to which s 7 relates is currently referendum entrenched. The committee recommends its transfer to the *Constitution of Queensland 2001* and its continued referendum entrenchment (after modern redrafting) because it does not refer to the current monarchical system of government.	**Referendum entrenchment** In redrafting s 1 of the *Constitution Act 1867*, the following element should be referendum entrenched. • The Legislative Assembly is established in Queensland. This provision provides for the single house of the Queensland Parliament. It is currently referendum entrenched.
s 8 Law-making power [The *Constitution Act 1867*, s 2 is referendum entrenched by s 53 of that Act (doubly entrenched).]	**Referendum entrenched**	**Parliamentary entrenchment** Section 8 should be parliamentary entrenched. The provision to which s 8 relates is currently referendum entrenched.	**Referendum entrenchment** In redrafting s 2 of the *Constitution Act 1867*, the following elements should be referendum entrenched.

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
		Essential elements of this provision which should be referendum entrenched are: • the prescription of the legislative power of Queensland which is to make laws for the peace, welfare and good government of Queensland; and • the role of the Legislative Assembly in the exercise of that power.	• The Sovereign has power to make laws for the peace, welfare and good government of Queensland. • The Sovereign may only exercise the power to make laws with the advice and consent of the Legislative Assembly. The key elements of this provision define the law-making or legislative power of the State. Section 2 is currently referendum entrenched.
s 9 Powers, rights and immunities of Legislative Assembly [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 10 Members of Legislative Assembly [Not entrenched]	**Referendum entrenchment**	**Referendum entrenchment** It is an essential characteristic of the Legislative Assembly that its members are *directly elected* by voters in the State. This provision reflects the principle of representative democracy.	
s 11 Number of members of Legislative Assembly [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 12 Division of State into electoral districts [Not entrenched]	**Referendum entrenchment**	**Referendum entrenchment** Section 12 provides that the State is to be divided into the same number of electoral districts as there are members of the Legislative Assembly. This provision is integral to the current electoral system in Queensland. Substantial changes would have significant consequences for the legislature, the executive and the political process and should only be effected with referendum approval.	

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
s 13 1 member for each electoral district [Not entrenched]	**Referendum entrenchment**	**Referendum entrenchment** This provision is integral to the current electoral system in Queensland. Substantial changes would have significant consequences for the legislature, the executive and the political process and should only be effected with referendum approval.	
s 14 Power to alter system of representation [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 15 Summoning, proroguing and dissolving the Legislative Assembly [Not entrenched	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 16 Duration of Legislative Assembly [The *Constitution Act Amendment Act 1890*, s 2 is referendum entrenched by the *Constitution Act Amendment Act 1934*, s 4 (doubly entrenched).]	**Referendum entrenchment**	**Parliamentary entrenchment** Section 16 should be parliamentary entrenched. The provision to which s 16 relates is currently referendum entrenched. The essential element of this provision which should be referendum entrenched is the term of the Legislative Assembly. The Assembly's term is fundamental to ensuring that the Parliament is accountable to the people of Queensland. A limited parliamentary term is an essential safeguard on the power of the Legislative Assembly. The term of the Legislative Assembly is currently referendum entrenched from being increased from three years. In report no 27[136] the former LCARC recommended that the Premier introduce a bill to extend the maximum term of the Legislative Assembly to four years, subject to certain restrictions.	**Referendum entrenchment** The term of the Legislative Assembly is fundamental to ensuring that the Parliament is accountable to the people of Queensland. A limited parliamentary term is an essential safeguard on the power of the Legislative Assembly. The term of the Legislative Assembly is currently referendum entrenched from being increased from three years.

136 Note 5.

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
s 17 Continuation of Legislative Assembly despite end of Sovereign's reign [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 18 Time and place for sessions of Legislative Assembly [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 19 Minimum sitting requirement for Legislative Assembly [Not entrenched]	**Parliamentary entrenchment**	**Referendum entrenchment** Mr Don Willis[137] submitted that s 19 should be referendum entrenched because it relates to Parliament's ability to meet and therefore publicly scrutinise the activities of the executive. The committee agrees that the minimum sitting requirement for the Legislative Assembly ensures the legislature's ability to scrutinise the executive and as such is a fundamental principle to the State's constitutional system. Therefore, the provision should be referendum entrenched.	
s 20 Separate appropriation for Legislative Assembly [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 21 Eligibility to be a candidate and to be elected as a member [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment** At the round-table discussion, Mr John Pyke raised the issue of entrenchment of s 21.[138] The practical problem with referendum entrenching s 21 is that it refers to matters prescribed in other	

137 Submission no 22 at 3.

138 Transcript, n 18 at 6.

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
		Acts. Therefore, any referendum entrenchment of s 21 could be subverted by merely amending those other Acts.	
s 22 No member to sit or vote without first taking oath or making affirmation [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 23 Ministers [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 24 Appointment of Parliamentary Secretaries [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 25 Functions of Parliamentary Secretary [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 26 Length of Parliamentary Secretary's appointment [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 27 Governor in Council [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment** The committee does not recommend referendum entrenchment of this provision as it relates to the current monarchical system of government. However, the committee recommends that the republican equivalent of this provision be referendum entrenched.	**Referendum entrenchment** Section 27 provides that the Governor in Council is the Governor acting with the advice of Executive Council. We believe that the provisions establishing, and relating to the functioning of, Executive Council should be referendum entrenched (see also our comments regarding ss 48 and 50 and appendix C regarding recommendation 3 of report no 36). It follows that s 27 also be referendum entrenched.
s 28 Definition for pt 2 [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
s 29 Governor [Not entrenched] [Section 7 of the Australia Acts requires that '*Her Majesty's representative in each State shall be the Governor'*.]	**Referendum entrenchment**	**Parliamentary entrenchment** The committee does not recommend referendum entrenchment of this provision as it relates to the current monarchical system of government. However, the committee recommends that the republican equivalent of this provision be referendum entrenched.	**Referendum entrenchment** Appointment of a Governor is essential to the effective functioning of executive government. Further, s 7 of the Australia Acts requires that '*Her Majesty's representative in each State shall be the Governor'*.
s 30 Office of Governor [The *Constitution Act 1867*, ss 11A and 11B are referendum entrenched by s 53 of that Act (doubly entrenched). Section 7 of the Australia Acts requires that '*Her Majesty's representative in each State shall be the Governor'*.]	**Referendum entrenchment**	**Parliamentary entrenchment** Section 30 should be parliamentary entrenched. The provisions to which s 30 relate are currently referendum entrenched. Essential elements of this provision which should be referendum entrenched are the appointment, term and removal of the head of state.	**Referendum entrenchment** In redrafting ss 11A and 11B of the *Constitution Act 1867*, the following elements should be referendum entrenched. • The Sovereign's representative in Queensland is the Governor. • The Governor is appointed by the Sovereign. • The Governor can hold office for the term of his or her appointment or until removed by the Sovereign. These elements are essential to the State's system of government, that is, a constitutional monarchy. Thus, any change to these principles should be approved by the people at a referendum. Sections 11A and 11B are currently referendum entrenched. Further, s 7 of the Australia Acts requires that '*Her Majesty's representative in each State shall be the Governor'*.
s 31 Requirements concerning commission and oath or affirmation [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
s 32 Termination of appointment as Governor [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 33 General power of Governor [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 34 Power of Governor—Ministers [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 35 Power of Governor—removal or suspension of officer [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 36 Power of Governor—relief for offender [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 37 Power of Governor—public seal [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 38 Continued use of seal despite end of Sovereign's reign [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 39 Statutory powers when Sovereign personally in State [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 40 Delegation by Governor to Deputy Governor [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 41 Administration of Government by Acting Governor [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
s 42 Cabinet [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment** Mr Don Willis[139] submitted that s 42 should be referendum entrenched, particularly subsection (2) which provides that Cabinet is collectively responsible to the Parliament. Mr Willis felt that referendum entrenchment would be important to '*ensure a future executive did not attempt to dilute the principle of responsible government which underlines Queensland's political system*'. The committee does not believe that it is necessary to referendum entrench Cabinet. Rather, the requirement that ministers be members of the Legislative Assembly is critical to preserving responsible government. In this regard, see the committee's recommendation in appendix C regarding recommendation 7 of report no 36.	
s 43 Appointment of Ministers of the State [Not entrenched]	**Parliamentary entrenchment**	**Referendum and parliamentary entrenchment** This provision will require redrafting as a result of committee recommendation 5 (The number of ministers of the state and parliamentary secretaries). Section 43(4) provides that the maximum number of ministers at any time is 19. In recommendation 5 the committee recommends that a maximum limit be prescribed for the combined number of ministers and parliamentary secretaries at any one time, and that the provision prescribing this limit be referendum entrenched. The remainder of s 43 should be parliamentary entrenched.	**Referendum and parliamentary entrenchment** We agree with committee recommendation 5 (The number of ministers of the state and parliamentary secretaries). Further, in appendix C the committee recommends referendum entrenchment of a requirement that ministers must be members of the Legislative Assembly: see the committee's recommendation regarding recommendation 7 of report no 36. While we also agree with this recommendation, we believe that it is logical for the subsections of s 43 relating to the appointment of ministers to also be referendum entrenched.

139 Submission no 22 at 2.

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
			The remainder of s 43 should be parliamentary entrenched.
s 44 Administrative arrangements [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 45 Minister may act for another Minister [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 46 Member may act for a Minister [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 47 Sick leave [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 48 Executive Council [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment** The committee does not recommend referendum entrenchment of this provision as it relates to the current monarchical system of government. However, the committee recommends that the republican equivalent of this provision be referendum entrenched.	**Referendum entrenchment** Executive Council is part of the essential structure of the State's constitutional system. Therefore subsections (1) and (2) which establish Executive Council and prescribe its membership should be referendum entrenched. See also our comments regarding s 50 below and appendix C regarding recommendation 3 of report no 36.
s 49 Length of appointment as member of Executive Council [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 50 Meetings of Executive Council [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment** The committee does not recommend referendum entrenchment of this provision as it relates to the current monarchical system of government. However, the committee recommends that the republican equivalent of this provision be referendum entrenched.	**Referendum entrenchment** Section 50 requires that the Governor must preside over a meeting of Executive Council and sets out preconditions for Executive Council dealing with any business. As this provision is integral to the functioning of Executive Council, it should be afforded the same protection as those provisions

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
			establishing and prescribing membership of Executive Council. (See also our comments regarding s 48 above and appendix C regarding recommendation 3 of report no 36.)
s 51 Powers of the State [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 52 Definitions for div 2 [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 53 Commercial activities by State [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 54 Commercial activities by Minister [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 55 Delegation by Minister [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 56 Definitions for ch 4 [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment** As discussed in section 5.2.1, this provision needs to be redrafted so that entrenchment of provisions relating to the appointment, tenure, removal and salary of District Court judges is not subverted by amendment of the definition of 'judge' currently contained in s 56.	
s 57 Supreme Court and District Court [Not entrenched]	**Referendum and parliamentary entrenchment**	**Referendum and parliamentary entrenchment** The committee maintains that the existence of the Supreme Court, as the superior court, should be referendum entrenched. However, as discussed in section 5.2.1, referendum entrenching the existence of the District Court might unnecessarily restrict the capacity of future governments to modify the structure of the court system.	

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
		Accordingly, the Supreme Court should be referendum entrenched, and the District Court parliamentary entrenched.	
s 58 Supreme Court's superior jurisdiction [Not entrenched]	**Referendum entrenchment**	**Referendum entrenchment** The superior jurisdiction of the Supreme Court is an essential feature of the State's constitutional system. Thus, this provision should be referendum entrenched.	
s 59 Appointment of judges [Not entrenched]	**Parliamentary entrenchment**	**Referendum and parliamentary entrenchment** Subsection 59(1) should be redrafted so that the reference to the Governor in Council is separated, thereby enabling referendum entrenchment of the remainder of s 59(1). The requirement in the remainder of subsection 59(1) that a person is eligible for appointment as a judge if they are a barrister or solicitor of the Supreme Court of at least five years standing should be referendum entrenched. This element of the subsection provides an important mechanism to protect the courts from interference by other arms of government and, as such, it maintains a balance of power between the arms of government as appropriate for a system of representative and responsible government. As discussed in section 5.2.1, Supreme and District Court judges should have equivalent protection in relation to their appointment, tenure, removal and salary. Subsections (2) and (3) should only be parliamentary entrenched.	**Referendum and parliamentary entrenchment** Section 59(1) provides that the *Governor in Council*, by commission, may appoint a barrister or solicitor of the Supreme Court of at least five years standing as a judge. All of s 59(1) as it is currently drafted should be referendum entrenched. This subsection provides an important mechanism to protect the courts from interference by other arms of government and, as such, it maintains a balance of power between the arms of government as appropriate for a system of representative and responsible government. As discussed in section 5.2.1, Supreme and District Court judges should have equivalent protection in relation to their appointment, tenure, removal and salary. Subsections (2) and (3) should be parliamentary entrenched.

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
s 60 Length of judge's appointment [Not entrenched]	**Referendum entrenchment**	**Referendum and parliamentary entrenchment** Section 60(1) provides that a judge holds an office as a judge indefinitely during good behaviour. Security of tenure of judges is essential to ensure that judges are, and are seen to be, independent from the other arms of government. This subsection provides an important mechanism to protect the courts from interference by other arms of government. Accordingly, the subsection should be referendum entrenched subject to the incorporation of a compulsory retirement age for judges of 70 years: see appendix C regarding recommendation 32 of report no 36. Subsections (2) and (3) should only be parliamentary entrenched.	
s 61 Removal from office for misbehaviour or incapacity [Not entrenched]	See appendix B regarding recommendation 33 of report no 36.	See appendix C regarding recommendation 33 of report no 36.	
s 62 Judge's salary [Not entrenched]	**Referendum entrenchment**	**Referendum entrenchment** Protecting a judge's salary is essential to ensure that judges are, and are seen to be, independent from the other arms of government. This provision provides an important mechanism to protect the courts from interference by other arms of government. Accordingly, the provision should be referendum entrenched. The judges of the District Court[140] submitted that, to give proper effect to the principle of judicial	

[140] Submission no 19 at 3.

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
		independence, the word 'salary' in s 62 be replaced with the word 'remuneration'. This is because there are other components of a judge's remuneration package apart from salary. While the committee is not reviewing substantive provisions of the Constitution as part of this inquiry, the committee refers this issue to the Premier for his consideration.	
s 63 Protection if office abolished [Not entrenched]	**Referendum entrenchment**	**Referendum entrenchment** Referendum entrenchment of this provision is necessary to ensure that other provisions granting security of tenure to judges are not undermined.	
s 64 Consolidated fund [Not entrenched]	**Referendum entrenchment**	**Referendum entrenchment** Section 64 requires all taxes and other revenues of the State are to form one consolidated fund to be appropriated for the public service of the State in the manner, and subject to the charges, specified in an Act. This provision imposes an important restriction on executive power and, as such, it maintains a balance of power between the arms of government as appropriate for a system of representative and responsible government. Accordingly, it should be referendum entrenched.	
s 65 Requirement to pay tax, impost, rate or duty [Not entrenched]	**Referendum entrenchment**	**Referendum entrenchment** Section 65 states that a requirement to pay a tax, impost, rate or duty of the State must be authorised under an Act. This provision imposes an important restriction on executive power and, as such, it maintains a balance of power between the arms of government as appropriate for a system of representative and responsible government. Accordingly, it should be referendum entrenched.	

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
s 66 Payment from consolidated fund [Not entrenched]	**Referendum entrenchment**	**Referendum entrenchment** Section 66 requires that a payment from the consolidated fund must be authorised under an Act and the Act authorising the payment must specify the purpose for which the payment is made. This provision imposes an important restriction on executive power and, as such, it maintains a balance of power between the arms of government as appropriate for a system of representative and responsible government. Accordingly, it should be referendum entrenched.	
s 67 Charges on consolidated fund [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 68 Governor's recommendation required for appropriation [Not entrenched]	See appendix B regarding recommendation 21 of report no 36.	See appendix C regarding recommendation 21 of report no 36.	
s 69 Lands [Not entrenched]	In LCARC report 36, *The Queensland Constitution: Specific content issues*, the committee recommends that this section be repealed (recommendation 17).	In LCARC report 36, *The Queensland Constitution: Specific content issues*, the committee recommends that this section be repealed (recommendation 17).	
s 70 System of local government [Not entrenched]	**Referendum entrenchment**	**Referendum entrenchment** As discussed in recommendation 6 (Referendum entrenchment of local government), s 70 should be referendum entrenched following some redrafting.	
s 71 Requirements for a local government [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment** As discussed in section 5.2.4, the statement in s 71(1) that a local government is an elected body should not be referendum entrenched.	

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
s 72 Definition for pt 2 [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 73 Dissolution of local government must be tabled [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 74 Suspension until dissolution ratified [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 75 Ratification of dissolution [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 76 No tabling or ratification of dissolution [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 77 Procedure for Bill affecting a local government [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
s 78 Procedure for Bill ending system of local government [Section 78 requires that a bill for an Act ending the system of local government in Queensland must be approved at a referendum before being presented for assent. However, s 78 is not doubly entrenched.]	Repeal. Referendum entrenchment of s 70, as proposed above, will render this provision redundant.	Repeal. Referendum entrenchment of s 70, as proposed above, will render this provision redundant.	
s 79 Issue of compliance not justiciable [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment** Section 79 provides that '*the issue of compliance with section 31, 40, 41, 48 or 50 is not justiciable in any court*'. The committee recommends that the republican equivalents of ss 48 and 50 be referendum	**Parliamentary entrenchment** Section 79 provides that '*the issue of compliance with section 31, 40, 41, 48 or 50 is not justiciable in any court*'. We believe that ss 48 and 50 (which relate to Executive Council) should be referendum

CONSTITUTION OF QUEENSLAND 2001 [including current entrenchment status]	**COMMITTEE PROPOSAL 15 – ENTRENCHMENT OF SPECIFIC PROVISIONS**[134]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[135]
		entrenched. At that time, there might need to be some redrafting of s 79 as it relates to those sections. While the substantive effect of those provisions should be enforceable, the proceedings of the republican equivalent of Executive Council should not be justiciable.	entrenched. So that the referendum entrenchment of ss 48 and 50 is not compromised, there needs to be some redrafting of s 79 as it relates to those sections. While the substantive effect of those provisions should be enforceable, Executive Council's proceedings should not be justiciable.
s 80 Continued holding of office under the Crown despite end of Sovereign's reign [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
ss 81 – 93 (Transitional provisions) [Not entrenched]	Entrenchment not necessary.	Entrenchment not necessary.	
s 95 Repeal [Not entrenched]	Entrenchment not necessary.	Entrenchment not necessary.	
sch 1 Oaths and affirmations [Not entrenched]	**Parliamentary entrenchment**	**Parliamentary entrenchment**	
sch 3 Repealed laws [Not entrenched]	Entrenchment not necessary.	Entrenchment not necessary.	
sch 4 Repealed imperial laws [Not entrenched]	Entrenchment not necessary.	Entrenchment not necessary.	

APPENDIX C ~ CONSTITUTIONAL PROVISIONS RECOMMENDED IN LCARC REPORT NO 36 *THE QUEENSLAND CONSTITUTION: SPECIFIC CONTENT ISSUES*

As discussed in chapter 4, the committee does not support holding a referendum at this stage to relocate the currently entrenchment provisions to the *Constitution of Queensland 2001*, or to referendum entrench provisions of the Constitution which relate to the current monarchical system of government.

However, as discussed in chapter 5, the committee recommends that, as a matter of general principle, the *Constitution of Queensland 2001* should referendum entrench provisions which establish the essential structure of the State's constitutional system, or provide for the fundamental principles of the State's constitutional system. The table in this appendix contains the committee's recommendations regarding which provisions the committee recommended in LCARC report no 36 *The Queensland Constitution: Specific content issues* should be referendum entrenched in light of the approach outlined in chapter 4 and applying the above test.

Unless compelling justification for an earlier constitutional referendum arises, the referendum required for these purposes should occur only when the people are asked to approve a change to a republican system of government in Queensland: see chapter 9.

The committee recommends that *all* provisions of the Constitution should be 'parliamentary entrenched': see chapter 6 for an explanation as to what parliamentary entrenchment entails. Thus, a recommendation that a provision be referendum entrenched also means that the provision be parliamentary entrenched.

REPORT NO 36 RECOMMENDATION	**COMMITTEE PROPOSAL 16 - ENTRENCHMENT OF PROVISIONS RECOMMENDED IN LCARC REPORT NO 36**[141]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[142]
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*	**Referendum entrenchment**	**Parliamentary entrenchment** The committee does not recommend referendum entrenchment of this provision as it relates to the current monarchical system of government. However, the Constitution to be put to the referendum discussed in chapter 9 should address the vesting of executive power.	**Referendum entrenchment** The vesting in the Sovereign of the executive power of the State is essential to the structure of the current system of government in Queensland. No amendments should be made to this provision without approval at a referendum.

141 As set out in the committee's consultation paper, n 17, appendix B.

142 Unless a comment is made in this column, the dissenting members agree with the committee's recommendation and its reasoning.

REPORT NO 36 RECOMMENDATION	**COMMITTEE PROPOSAL 16 - ENTRENCHMENT OF PROVISIONS RECOMMENDED IN LCARC REPORT NO 36**[141]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[142]
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.			

REPORT NO 36 RECOMMENDATION	**COMMITTEE PROPOSAL 16 - ENTRENCHMENT OF PROVISIONS RECOMMENDED IN LCARC REPORT NO 36**[141]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[142]
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.	**Parliamentary entrenchment**	**Parliamentary entrenchment** The committee does not recommend referendum entrenchment of this provision as it relates to the current monarchical system of government. However, the committee recommends that the republican equivalent of this provision be referendum entrenched.	**Referendum entrenchment** The main function of Executive Council is to advise the Governor, as the Sovereign's representative. Executive Council is part of the essential structure of the State's constitutional system and, as such, should be referendum entrenched. See also our comments regarding ss 48 and 50 in the fourth column of Appendix B.
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*.'	**Parliamentary entrenchment**	**Parliamentary entrenchment** The committee does not recommend referendum entrenchment of this provision as it relates to the current monarchical system of government. The Clerk of the Parliament submitted that this provision be referendum entrenched[143] on the basis that the provision safeguards the Governor's right to request information. Parliamentary entrenchment would not prevent a majority government amending or deleting this provision.	**Referendum entrenchment** We agree with the Clerk of the Parliament that this provision be referendum entrenched on the basis that the provision safeguards the Governor's right to request information. Parliamentary entrenchment would not prevent a majority government amending or deleting this provision.

143 Submission no 23 and comments at the round-table discussion: transcript, n 18 at 5-6. See also the submission of the Bar Association of Queensland, submission no 8 at 6.

REPORT NO 36 RECOMMENDATION	**COMMITTEE PROPOSAL 16 - ENTRENCHMENT OF PROVISIONS RECOMMENDED IN LCARC REPORT NO 36**[141]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[142]
		Apart from relating to a monarchical system of government, the committee does not believe that referendum entrenchment of this provision is warranted on the basis that the Governor's right, by convention, to seek information is not legally enforceable.	
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.	**Referendum (and parliamentary) entrenchment**	**Referendum and parliamentary entrenchment** It is an integral part of Queensland's system of responsible government that ministers must be members of the Legislative Assembly. This ensures that ministers are accountable to Parliament and rely on the support of Parliament for their continuation in office. Thus, the requirement that ministers must be members should only be changed with the approval of a referendum. However, there may be some benefit in retaining flexibility in relation to the period of time within which a member must be appointed. Accordingly, this element of the provision should be parliamentary entrenched.	
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	**Referendum entrenchment**	**Parliamentary entrenchment** The committee does not recommend referendum entrenchment of this provision as it relates to the current monarchical system of government. That is, it concerns a process whereby the	**Referendum entrenchment** This provision reflects a fundamental principle of the State's constitutional system which should be changed only with the approval of the people of Queensland at a referendum.

REPORT NO 36 RECOMMENDATION	**COMMITTEE PROPOSAL 16 - ENTRENCHMENT OF PROVISIONS RECOMMENDED IN LCARC REPORT NO 36**[141]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[142]
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; and • the Governor's power to appoint a member as Premier in accordance with the above provision is non-justiciable.		Governor, as the Sovereign's representative, appoints the Premier. However, the Constitution to be put to the people in the referendum discussed in chapter 9 should referendum entrench provisions relating to the appointment of the Premier as this is a fundamental principle of the State's constitutional system.	
<u>Recommendation 9 – Dismissal of the Premier</u> 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.	**Referendum entrenchment**	**Parliamentary entrenchment** The committee does not recommend referendum entrenchment of this provision as it relates to the current monarchical system of government. That is, it concerns a process whereby the Governor, as the Sovereign's representative, dismisses the Premier. However, the Constitution to be put to the people in the referendum discussed in chapter 9 should referendum entrench provisions relating to the dismissal of the Premier as this is a fundamental principle of the State's constitutional system.	**Referendum entrenchment** This provision reflects a fundamental principle of the State's constitutional system which should be changed only with the approval of the people of Queensland at a referendum.

REPORT NO 36 RECOMMENDATION	**COMMITTEE PROPOSAL 16 - ENTRENCHMENT OF PROVISIONS RECOMMENDED IN LCARC REPORT NO 36**[141]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[142]
Recommendation 10 – A Lieutenant-Governor for Queensland A Lieutenant-Governor should again be appointed for Queensland.	**Parliamentary entrenchment** of relevant provision.	**Parliamentary entrenchment** of relevant provisions (see appendix B regarding ss 40-41). Mr Don Willis[144] submitted that the provisions relating to the Lieutenant-Governor should be referendum entrenched to be consistent with the committee's proposal to referendum entrench s 29 of the Constitution regarding appointment of the Governor. Mr Willis argues that if the appointment of the Governor is essential to the effective functioning of executive government, the appointment of Lieutenant-Governor should be similarly recognised by being referendum entrenched. The committee does not recommend referendum entrenchment of this provision as it relates to the current monarchical system of government. In any case, the committee does not believe that referendum entrenchment of provisions relating to the Lieutenant-Governor is necessary to protect the balance of power between the arms of government. Parliamentary entrenchment, which would allow an alternative mechanism to be introduced in the future, is more appropriate.	**Parliamentary entrenchment** of relevant provisions (see appendix B regarding ss 40-41). Referendum entrenchment of this provision is not necessary to protect the balance of power between the arms of government. Parliamentary entrenchment, which would allow an alternative mechanism to be introduced in the future, is more appropriate.

144 Submission no 22 at 3.

REPORT NO 36 RECOMMENDATION	**COMMITTEE PROPOSAL 16 - ENTRENCHMENT OF PROVISIONS RECOMMENDED IN LCARC REPORT NO 36**[141]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[142]
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.	**Parliamentary entrenchment**	**Parliamentary entrenchment** The Bar Association of Queensland[145] submitted that the absence of referendum entrenchment of this requirement makes it asymmetrical with referendum entrenchment of our current system of government. The committee does not recommend referendum entrenchment of this provision as it relates to the current monarchical system of government. In any case, the committee does not believe that an oath should be referendum entrenchment. An oath or affirmation is a commitment which is morally, not legally, binding.	**Parliamentary entrenchment** Referendum entrenchment of this provision is not necessary. An oath or affirmation is a commitment which is morally, not legally, binding.
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.	**Parliamentary entrenchment**	**Parliamentary entrenchment** Mr Don Willis[146] submitted that this provision should be referendum entrenched on the basis that it relates to Parliament's ability to meet and thereby publicly scrutinise the activities of the executive. The committee recommends that this provision remains parliamentary entrenched. The principle of responsible government is only effective if the Legislative Assembly meets. However, in	

145 Submission no 8 at 6-7.
146 Submission no 22 at 3.

REPORT NO 36 RECOMMENDATION	**COMMITTEE PROPOSAL 16 - ENTRENCHMENT OF PROVISIONS RECOMMENDED IN LCARC REPORT NO 36**[141]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[142]
		practice, a government cannot get appropriation or implement its legislative program unless the Legislative Assembly meets. Therefore, referendum entrenchment of this provision is not necessary to ensure that the executive remains accountable to the Legislative Assembly. However, s 19 of the Constitution which requires that there must be at least two sittings of the Legislative Assembly in every calendar year and that six months must not pass between sittings should be referendum entrenched: see appendix B.	
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.	**Parliamentary entrenchment**	**Referendum entrenchment (of revised provision)** In recommendation 5, the committee recommends that a maximum limit be prescribed for the combined number of ministers and parliamentary secretaries at any one time, and that this limit be referendum entrenched.	
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.		**Parliamentary entrenchment** Parliamentary secretaries assist the executive to fulfil its functions. Thus, parliamentary entrenchment is appropriate.	
Recommendation 21 – Requirements for appropriation bills	**Parliamentary entrenchment**	**Parliamentary entrenchment** The committee does not recommend referendum entrenchment of this	**Parliamentary entrenchment** Referendum entrenchment of this provision is not necessary to maintain an

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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.		provision as it relates to the current monarchical system of government. In any case, referendum entrenchment of this provision is not necessary to maintain an appropriate balance of power between the arms of government. The flexibility to change this provision as the system of government evolves is more appropriate.	appropriate balance of power between the arms of government. The flexibility to change this provision as the system of government evolves is more appropriate.
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.	**Parliamentary entrenchment**	**Parliamentary entrenchment** Mr Don Willis[147] submitted that referendum entrenchment of this provision would '*be more consistent with the democratic rights and expectations of citizens to choose their governmental representatives*'. The committee maintains that parliamentary entrenchment of this requirement, which is not legally enforceable, is more appropriate.	
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.*	**Parliamentary entrenchment**	**Parliamentary entrenchment** In section 5.2.2 the committee outlines its reasoning for recommending parliamentary entrenchment of this provision.	

147 Submission no 11 at 3.

REPORT NO 36 RECOMMENDATION	**COMMITTEE PROPOSAL 16 - ENTRENCHMENT OF PROVISIONS RECOMMENDED IN LCARC REPORT NO 36**[141]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[142]
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.	**Referendum entrenchment**	**Referendum and parliamentary entrenchment** The committee maintains that provisions relating to acting judges, as an exception to security of judicial tenure, be entrenched in the same way as provisions which guarantee judicial tenure. However, the provision stating that acting appointments can be renewed should be parliamentary entrenched. In their submission the judges of the District Court[148] raised some issues regarding acting judges. These might be further considered as part of the review of matters relating to the judiciary recommended by the committee in report no 36 (see recommendation 29).	
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	**Referendum entrenchment**	**Referendum entrenchment** This provision should be referendum entrenched because it defines the period of judicial tenure. It is important that this provision be entrenched in the same way as other provisions which guarantee judicial tenure.[149] (See also appendix B,	

148 Submission no 19 at 2.

149 While the judges of the District Court (submission no 19) agreed with this reasoning, Judge Mc Gill (submission no 21) opposed any suggestion that an age limit for judges should be entrenched.

REPORT NO 36 RECOMMENDATION	**COMMITTEE PROPOSAL 16 - ENTRENCHMENT OF PROVISIONS RECOMMENDED IN LCARC REPORT NO 36**[141]	**COMMITTEE RECOMMENDATION**	**DISSENTING REPORT**[142]
Anti-Discrimination Act 1992 should be amended as necessary to include this compulsory retiring age in the *Constitution of Queensland 2001*.		s 60 and the discussion below in relation to recommendation 33.)	
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.	**Referendum and parliamentary entrenchment**	**Referendum and parliamentary entrenchment** Security of tenure is important to protect the independence of the judiciary and should be referendum entrenched. Accordingly, it is important that those elements of ss (1)-(2) which provide for: • removal of a judge on an address from the Legislative Assembly; and • the grounds upon which a judge may be removed; be referendum entrenched to ensure that removal occurs only in the manner and on the ground prescribed. To facilitate this, subsection (2) should be redrafted to substitute 'designated body' for the Governor in Council. A new section should define 'designated body' to be the Governor in Council. The committee does not recommend referendum entrenchment of this new subsection as it relates to the current monarchical system of government. The procedural provisions relating to the removal of a judge should be parliamentary entrenched. This provides some flexibility if practical difficulties with the procedure arise.	**Referendum and parliamentary entrenchment** It is important that those elements of ss (1)-(2) which provide for: • removal of a judge on an address from the Legislative Assembly; and • the grounds upon which a judge may be removed; be referendum entrenched to ensure that removal occurs only in the manner and on the ground prescribed. Referendum entrenchment should also apply to the statement in subsection (2) that a judge may be removed from an office by the *Governor in Council* on an address from the Legislative Assembly. The procedural provisions relating to the removal of a judge should be parliamentary entrenched. This provides some flexibility if practical difficulties with the procedure arise.