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# *LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE*

MEMBERS: Ms K. L. STRUTHERS (Chair)
Mrs E. A. CUNNINGHAM
Mr P. J. LAWLOR
Mr R. O. LEE
Ms R. G. NOLAN
Mrs D. R. PRATT
Miss F. S. SIMPSON

# ROUND TABLE DISCUSSION: Jointly hosted by the Legal, Constitutional and Administrative Review Committee and the Australian Association of Constitutional Law (Queensland Chapter)

**TRANSCRIPT OF PROCEEDINGS**

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**Thursday, 28 November 2002**
**Brisbane**

**The meeting commenced at 7.32 a.m.**

**Ms STRUTHERS:** We do thank you all, too, for getting up early this morning and joining us. It certainly helps in our inquiry to have this kind of dialogue with you and we are particularly indebted to Gerard Carney not only for helping to facilitate and make this happen but, as you might know, Gerard has also been very helpful in a consultant sort of role and providing a lot of legal advice, information and support. Thanks very much for your part and let us have a lively and open discussion this morning on some of these very—probably not so much controversial; some of them are and some of them are not—important issues.

As you would know, LCARC has as one of its responsibilities the area of constitutional reform. In February 2002 our committee resolved to conduct an inquiry into certain issues of constitutional reform. The inquiry follows on from the report of the Queensland Constitutional Review Commission, titled *Report on the Possible Reform of and Changes to the Acts and Laws that Relate to the Queensland Constitution,* tabled on 29 February 2000 by the Premier. The Premier stated that he tabled this report for consideration and reporting by LCARC. The committee has resolved to conduct the inquiry in two stages, really. The first related to the specific issues of constitutional reform, and that was the subject of our report No. 36, and I think most of you—many of you, anyway—contributed well to that work as well.

The second stage relates to the entrenchment of the Queensland constitution, and this is the subject of our discussion this morning. The discussion will focus on our consultation paper and I will essentially be handing over to Gerard to facilitate the discussion to work us through the various sections of our report. The standing orders of the Legislative Assembly allow the committee to refer to a subcommittee any matters the committee is empowered to consider, provided that the parliament or the committee continues to have final responsibility for considering and reporting to parliament on these matters. This morning we have four of our team of seven, but it certainly constitutes a proper subcommittee of our full committee.

At our meeting on 26 November the committee resolved to establish this subcommittee to host the round table discussion and report back today to other members of our committee who were not present. This round table discussion will be transcribed by Hansard and will form part of the committee's record. The committee will use the transcript to formulate our report. Participants here this morning will be given an opportunity to correct the *Hansard.* With those few words of formality, once again thanks for your participation. Gerard, it is over to you. Please take us through this morning.

**Prof. Carney:** Thank you, Karen, and thank you everyone for coming. This is also a AACL function coinciding with this session. I presume that everyone has a copy and hopefully has read the entrenchment document, *proposals for comment,* issued in August this year. I thought that unless someone has a better suggestion we quickly proceed through its various proposals, 1 to 16. Does everyone have a copy?

**Ms STRUTHERS:** I welcome Neil Laurie, the Acting Clerk of the Parliament.

**Prof Carney:** Is everyone happy with the approach of going through the proposals one by one, otherwise we may get a little lost in the intense discussions which follow. Rather than allow everyone an opportunity to make an opening statement, given the time frame I think we should just begin with proposal 1. It looks at the basis for entrenching or the quality reasons for entrenching provisions in the constitution and distinguishing between those which are referendum entrenched and those which are parliamentary entrenched. Proposal 1 says—

'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)'.

The distinction between Appendix A and Appendix B is that Appendix A deals with provisions that are currently in the constitution and Appendix B deals with provisions which are proposed in LCARC's earlier report on substantive reforms to the constitution. Would anyone like to open the proceedings in terms of identifying the principle by which one decides a position is referendum entrenched as distinct from being not entrenched at all?

**Mr Pyke:** Before one addresses the principle by which you determine what should be referendum entrenched and what should be parliamentary entrenched, I suppose there is the question of whether it is better to have a wholly referendum entrenched constitution. I must say, having read both reports of the Hughes commission, if I may call it that, and this set of proposals of LCARC, I can see all of the reasoning and justification behind referendum entrenching only the crucial provisions. I hope we are going to discuss whether the appropriate sections have been identified for referendum entrenchment as this part of the discussion. But for a couple of sections, I think the selection of what should be referendum entrenched and what should be parliamentary entrenched makes sense. It just worries me that it seems that the people, which is to say the 15 or 20 per cent of them who ever think about constitutional matters, I would have thought would normally assume that a constitution is a real constitution and that you put in the constitution all of the stuff which should have superior law status and can be amended only by referendum.

As a teacher who not only teaches tertiary students but has an interest in trying to make constitutional knowledge better available to secondary students, I wonder if having a document that is all said to be constitution—and then when you get to the end of it you find that 20 sections are real constitution and the other 20 sections are what I would not quite call it Clayton's constitution because they will still have a slightly higher status than ordinary law, but a subsidiary constitution—might not be a bit confusing simply from the point of view of trying to let the people of Queensland know what the fundamental set of rules is for the state.

The other option, I guess, would be to carefully consider what ought to be in a constitution and have only those things in a constitution which is all referendum entrenched with a section 128 at the end. Having said that, I go back to what I said at first: I can see the logic behind the approach which is being pursued here. I just feel that in our course on introduction to public law it is going to perpetuate the pedantry that we have to go through of talking about the entrenched sections and the non-entrenched sections and it keeps the spectre of A. V. Dicey hanging over us a bit when really it would be nice to blow A. V. Dicey completely out of the water and be able to teach constitutions as things which stand totally outside of the ordinary legal system and can only be amended by referendum. I have said about three times: I can see both views.

**Mr Logan:** From the point of view of a practising profession, there is much to be said with respect to the idea of an alignment of a state position as far as constitutional amendments are concerned with the federal position in terms of having one referendum based clause which allows amendment of the 'constitution'. That is thinking a little bit outside the square and I suppose that is what academia is for in many ways, so whilst the bar did not promote that because the bar solution is really directed towards the proposals as made, there is merit in that with respect, if one is really looking at it, that is a much more simple model. As far as what one does entrench, the bar would wish to caution against over-entrenchment of minutiae. What metes out an analysis of the current constitutional position is an absence of entrenchment in relation to referendum entrenchment in respect of the judicial branch of government. Beyond that, as the bar submission indicates, there is a degree of diffidence about the rest of the proposals. The one that does concern us is at present in Queensland the judiciary does rather look like the poor relation of branches of government as far as an enduring statement of what is important to our system of government was concerned in terms of what is referendum entrenched and what is not.

**Prof. Carney:** Thanks, John. Are there any other comments?

**Mr Willis:** I just think that, with respect to John's suggestion of having a type of section 128, with the situation and criticisms of the Commonwealth Constitution that occur now, it is very difficult to change by that process. I think what you have done with respect to the proposal to have both a combination of referendum and parliamentary entrenchments probably strikes good balance. My only issue that I raised in my submission was in relation to local government, and that is that the democratic election of local government should be referendum entrenched rather than just parliamentary entrenched.

**Prof. Carney:** We will get to the local government issue, I hope, specifically and to the judicial one as well this morning. We can discuss those two aspects.

**Mr Pyke:** Can I reply briefly to the point John made about the problems with the Commonwealth Constitution? The fact that so many proposals for amendment of the Commonwealth Constitution have been rejected does not seem to me to suggest that section

128 is a bad thing. It simply means that some of those proposals for change have been very ill advised and in respect of others which may in my opinion have been desirable the 'yes' campaign has been lamentably weak. I am partly agreeing with Don here. I would not like to see every clause that is currently called a section of the Queensland Constitution entrenched. But if one selects those things which are of fundamental importance, then it does not seem to me to be a terribly bad thing—an indictment of the constitution and/or society—if referendum proposals are put up and fail to be passed.

**Prof. Carney:** So the principle that it is the essential structure of the state's constitution, no-one can improve on that or suggest an alternative principle for referendum entrenchment? Does that seem to be the best we can come up with?

**Prof. Hughes:** My only comment—and this may be the answer to John's problem of the first-year class—is that the American distinction between the thick constitution and the thin constitution had not come to the commission's attention at the time of the report, otherwise I think it would have been used and I think that is the way you start your first-year class off. There are things that are terribly important and this is the thin constitution, and then there is the rest. First-year students understand thick and thin.

**Prof. Carney:** The other difficulty with a fully referendum entrenched constitution in Queensland is: can we legally achieve that constitution? But the committee has proceeded, I think, on the basis that really we are putting to one side that difficulty in terms of proposing referendum and parliamentary entrenchment in the hope that there is a reasonable legal case for suggesting that they are enforceable provisions, but even if they are not at least they have some political and moral force and if someone wishes to challenge they may well do, but that is the general approach.

**Mr Cross:** If I could make a comment following what John said? You have a Commonwealth Constitution that is of course entrenched. It was drawn up by state or colonial politicians in the main in the 1890s in a somewhat different world. It is extraordinarily difficult to change. I agree with John about the 'yes' cases, but the fact is there is enormous ignorance in the community about constitutional matters because most people only think of the constitution when they have to vote at a referendum. There is a large number of people who will instinctively vote 'no' because you put the fear of god into them—that is, vote 'no' for no more politicians and whatever. Now, there have been several comprehensive reviews of the Commonwealth Constitution by all party committees—1929, 1958 and more recent ones under the Whitlam government and beyond. A lot of very sensible amendments have just been rejected. I think the idea of having two degrees of entrenchment is a sound one, because the truth of the matter is that, if people are ignorant about the Commonwealth constitution, I think they are more ignorant about the state constitutions. In the course of the commission that Colin and I participated in under his chairmanship we found people expressing amazement that there was a Queensland Constitution. You have that problem. Essentially, governments decide to put in a referendum at the time of an election in many cases when the resources of the political parties are devoted to getting their members returned and never to the referendum. I do not want anyone to think I am attacking democracy, but the facts of life are you are dealing with an ill-informed community. I doubt that the Queensland government would have the resources to produce a well-informed community, because it takes a long time and more particularly there is the lead-up to any referendum. I think the two levels of entrenchment make good sense and it makes it even more important when it goes to referendum entrenchment, if that is what the committee decides eventually, that we get it as close as we can to being right.

**Prof. Carney:** Should we look at the Appendices A and B? Does anyone have any suggestion as to provisions that should be referendum entrenched that are not, or provisions that should not be referendum entrenched yet?

**Mr Laurie:** I go back to the litmus test contained within proposal 1 talking about essential structure of the state's constitutional system. I wondered why recommendation 28 about judicial independence was only parliamentary entrenched, if that was the litmus test that the committee was using. It occurred to me that that, if you like, sets out the independence and impartiality of the judiciary which I would have thought was an essential nature of our constitution. I also preferred recommendations 18 and 19 in relation to parliamentary secretaries, but probably more forcefully in respect of what is now section 43 of the Constitution of Queensland Act in relation to ministers and in particular the number of ministers that there is within the Cabinet. I have a view

that the proportion of ministers as a proportion of members of the Legislative Assembly is something that goes to the essential nature of the constitution. The greater the number or the greater proportion of ministers that are within the Assembly, the greater the, if you like, power of executive government and the lesser the number of members who are outside of executive government to scrutinise the actions of government. I am not too certain whether the formula used currently in the constitution of Queensland by fixing it at a number is the correct way to go, and perhaps instead it should be amended to be set at a proportion, but I believe that the number of ministers versus the number of members is an issue that goes fundamentally to responsible government and should be referendum entrenched.

**Prof. Carney:** Any other comments?

**Mr Pyke:** I would endorse Neil's remark about recommendation 28. The justification given there for not referendum entrenching is that it might be used to derive implied constitutional restrictions on the vesting and exercise of judicial powers in bodies other than the courts.

**Prof. Carney:** Is that in Appendix B?

**Mr Pyke:** Yes, on page 47, 'Judicial independence'—an express statement that 'Judges appointed under Queensland law are independent and subject only to the law which they must apply impartially.' To a degree, that is only stating expressly the aim which is sought to be achieved by section 60 that a judge holds office indefinitely during good behaviour. I do think there is a lot to be said for spelling out the principle. It is interesting when you compare the English approach with the European approach that the Europeans spell out grand principles and the English have always just had mechanisms. I think maybe it is about time we did a bit of both.

As to that worry that the committee expresses in the bottom right box on page 47, I would not have thought that a new section such as the one in that recommendation would lead to any implications that might not already be drawn from sections 57 and 58, anyway. If we are to referendum entrench a statement that the court has subject to the Commonwealth Constitution unlimited jurisdiction at law in equity and otherwise, I think there could be some very serious implications which later in life others might be tempted to argue for in the Supreme Court. I would not have thought recommendation 28 would add anything much to that. The fundamental principle of that really ought to be part of the 'real'—the thick constitution.

**Prof. Carney:** You are not concerned that an implication of a separation of judicial and non-judicial power equivalent to that found under the Commonwealth Constitution would arise from recommendation 28 being entrenched?

**Mr Pyke:** I wouldn't have thought so. It arises in the Commonwealth because you have that word 'vested'—judicial power is vested in blah blah blah and blah. If that implication is going to arise anywhere in a new Queensland Constitution, I would have thought that the place you would argue that generates it is section 58. If there is a worry about that—and this was a suggestion I made years ago at the earlier stages of the review—perhaps it should be said expressly in the constitution that the 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.

**Mr Lohe:** I must say that my own view is that I am fairly fundamentally opposed to entrenchment of anything basically. So that probably puts me offside with 90 per cent of people in the room by the sound of it, because I think that the suggestion which is implied is that the legislature at the time which passes the entrenching provisions has some sort of superior wisdom than a legislature 10, 20, 50, 100 years on. We are talking about century spans given the history of the 1867 Act. To think that we know better now than the legislature in 50 years, it depends on what the best structure is, et cetera. It is purely arrogant in a way.

**Prof. Carney:** The other point of view is that this parliament may wish to entrench provisions which they regard as representing enduring principles of constitutional law which any rational and reasonable parliamentary committee will wholeheartedly endorse, but beneath the intention is to obviously guard against an irrational and unreasonable parliament. One of the reasons for entrenchment is to guard against an absurd and clearly disastrous state of affairs arising within the state.

**Mr Lohe:** If we have that situation, we have more fundamental problems than just the technicalities of the constitution. When you look at what we have now with the 2001 constitution, we have these sections that are left over from the old one because they are already entrenched. I think that the reality is that it will be very difficult to persuade people to change once it is entrenched. It will be very difficult to change. That is one of my fundamental concerns, that we end up 20 years down the track with people tearing out their hair and saying, 'Those idiots back then—look what they did to us!'

**Prof. Carney:** What is the likelihood of any provisions that are recommended here for a referendum entrenchment suffering that fate? That is the critical issue the committee is looking at—to decide which provisions essentially need to be fixed, and the chances of their being altered in the future are extremely remote.

**Mr Lohe:** I am not necessarily saying that there could not be some that you could look at that were so fundamental that you would never change them.

**Mr Aroney:** I share your concerns with respect to that. I think the difficulty in articulating in any specific way the reasons why you might be concerned about some specific entrenched provision is that the argument is based on an argument about our inability to know. So it makes it inherently difficult to articulate the problems but it does not mean the position—and I suppose people appreciate this—is not a strong one to be concerned about our ignorance and to be concerned about not overplaying our belief that we understand how things should work. I think that is one concern.

I have to confess to not having studied this document as I should have—I have too much marking at the moment—but I thought I read there very briefly that there was the notion that in introducing the entrenchment as a matter of policy there would be a referendum associated with it and to some extent that might alleviate the concern. I am kind of arguing against the position that I instinctively hold, and that is if it is introduced by referendum that does change the perspective only surely politically, not legally. It is not like the parliament is binding future generations only but the people in a referendum are doing so. I would have to confess that if that process is used it weakens the concern. I still think that the argument from ignorance and the argument about the uncertainty of the future still holds even in that situation.

**Mr Fisher:** I agree that the proposal to have the constitution ratified by the people at referendum does alleviate some of the concerns, but also I believe that there should be something in the constitution as envisaged in the paper that any attempt to introduce manner and form restrictions in the future must be subject to the same discipline that is sought to be imposed on later parliaments. That is an objection I have had to manner and form for many years, that one parliament can raise the hurdle yet not be subject to the same sort of requirement. I think that is a real problem with manner and form as presently constituted so that in regard to that proposal to ensure that the same discipline is imposed on the initiating parliament I am all in favour of it.

**Prof. Carney:** I forget the proposal number, but certainly that is proposed there. It needs to be the subject of a referendum itself. So the whole mechanism of referendum entrenchment is going to be put to the people in that way. Any other comments on recommendation 28 in relation to judicial power—we could come back to that if we have time—or any other comments on provisions that you think should be entrenched that are not by referendum.

**Mr Laurie:** I refer to Appendix B, Recommendation 4, relating to the Governor's right to request information. I am not too sure that this falls within the category that is in the definition of the committee 'that is essential to the nature of the constitution'.

**Prof. Carney:** That principle is applicable to referendum entrenchment, not parliamentary entrenchment.

**Mr Laurie:** I query whether this is a provision that should be referendum entrenched, but in saying that I am finding it difficult to fit it within the committee's reasons for classification. I wonder if it is because essentially in my mind I am using an essentially different criteria to that which the committee has expressed; that is, I look at a referendum entrenchment as a safeguard, and it is a safeguard against a future parliament that is dominated by the executive that attempts to make changes to the constitution that affect our system of government; therefore, I look either at referendum entrenchment as a safeguard provision and I look at these provisions and try to measure which one should be referendum entrenched and which should be

parliamentary entrenched using that test. That may be a different test from what the committee is using and that may be why I have some differences in respect of this. But in respect of recommendation 4, the Governor's right to request information, it occurs to me that if ever you did get into a sticky situation where the Governor was requesting information from the government, the government did not want to give that information, and the government had the requisite majority in the House, this is a provision that could either be deleted or could be changed. So in some contexts I wonder about the illusory nature of parliamentary entrenchment. Queensland has a history of having governments that have, generally speaking, large majorities. Therefore, what we say is entrenchment as some sort of safeguard is really a little bit illusory. That is my view and that is one of the reasons why, if we go down the road of entrenching more provisions, that would be the test I would use about why provisions should be entrenched and why they should not be. Generally, I lean towards Conrad's view of the world, that is: I am a parliamentary supremacist; I believe in the rights of parliament to make these sorts of decisions. But by the same token there are some things that we do have to safeguard against—the unknown governments of the future.

**Prof. Carney:** You would also rely upon the unicameral nature of the Queensland parliament.

**Mr Laurie:** The unicameral nature of the Queensland parliament makes it even more essential and in my view is the reason why, when talking about what should be referendum entrenched and what should be parliamentary entrenched, we talk about it in terms of safeguard.

**Ms STRUTHERS:** Can I ask any of the other participants here today about the notion of the test: is there any further comment on what type of test? We have tried to capture it in terms of the essential nature of the state's constitution system. Neil was talking about the safeguard test. Is there any other way of considering that notion of the test?

**Mr Willis:** I think that is important. That point you have made about the safeguard and protecting the integrity of the constitution—

**Prof. Carney:** It is not structure alone; it is the functioning—the essential democratic functioning.

**Prof. Hughes:** The implication of leaving it at parliamentary entrenchment was that it needed to be in a book of words somewhere that a governor could say that, and it is here in the constitution. It was unlikely that a recalcitrant Premier would dig in his heels about that point. If the parliament is to pull it out, then you are at a different ball game already. It is probably sufficient to have it there. One does not want to build up the Governor's formal powers too much, because the whole thrust of constitutional reform is getting this representative of the Governor's position out of the constitution, and giving him stronger powers might be seeming to claw back some of that.

**Mr Pyke:** Could I try to answer the chair's question, not so much in terms of stating a principle as to how you identify suitable sections for entrenchment but basically addressing the mischiefs against which you wish to entrench. It seems to me that there are two. One is the party in power which wants to fiddle with the electoral system or other aspects of the constitution in order to entrench itself in power at the next election. We have seen plenty of examples of that not only in Queensland but in other states of Australia. This overlaps with the question of how do you identify them because then that leads you to identify the basic democratic features of the democratic system. I would point, for instance, to section 21 of the Constitution of Queensland. If anything, it ought to be entrenched into the constitution in a democratic state. It seems to me that it is the statement that basically everybody, subject to some reasonable qualification, has the right to vote and the right to stand as a candidate. That is the thing which people had to riot in the streets for and throw rocks at the Duke of Wellington's window for and so on in English history. Even though we did not have rioting in the streets, we had a long history of gerrymanders.

**Prof. Hughes:** Going back to 1859.

**Mr Pyke:** Yes, in this state.

The second mischief, it seems to me, is the temptation for the executive in particular, and I suppose members of parliament more broadly, to give themselves powers as against the ordinary people which are hard to justify. At the moment we have the Freedom of Information Act

which, with respect to all the Labor Party members here, has a history of parties in opposition promising to reform. Then when they get into power—and I pay tribute to the members on the committee to have spoken out against the interests of the present executive and said, 'This ought to be reformed.'

**Ms STRUTHERS:** We have had a very comprehensive majority report favouring change.

**Mr Pyke:** It seems to me that Conrad and Nicholas are the two main spokespeople for parliamentary sovereignty here. It seems to me that those are the two mischiefs that parliamentary sovereignty can lead to—the party in power versus the opposition and all of the members of parliament or at least the executive versus the rights of the people. It is measures which will counter those mischiefs that ought to be entrenched in the constitution.

**Prof. Carney:** Are there any other points in relation to Appendices A and B? In regard to proposal No. 2, I ask the question: is there any reason for not entrenching local government by way of referendum?

**Mr Logan:** We might not want it. They might not want to have regional government. What do they mean by 'local government'? That is truly one of those issues which is a 100-year issue. It involves all of the considerations to which Conrad has adverted—what you bind in terms of later parliaments. That is one of those strategic decisions in government. Who can tell 100 years down the track what you might want?

**Mr Pyke:** When you say we might want regional government, who are you talking about?

**Mr Logan:** We in terms of our grandchildren at mature age deciding that it is a good idea to have a regional centre of government at the thriving industrial port of Gladstone which governs central Queensland as defined in some way that we cannot pick at the moment.

**Mr Pyke:** If the majority of the people want it, the opposition is more likely to come from the parliamentarians, I would have thought, as all of the debate about more states or regional government at the moment seems to have a wide support within the people. The opposition is in the eight parliaments in Australia. If the parliamentarians could ever be persuaded to put such a proposal to a referendum—

**Mr Logan:** It might not be a parliament; it might just be a centre of regional administration, so called, which involves all sorts of things we cannot predict now as far as what is sufficient government and what is not.

**Mr Pyke:** My point is that if our grandchildren want it, will they vote for it in a referendum.

**Mr Logan:** So why referendum entrench it?

**Mr Cross:** I do not really think that the words 'a system of local government' would preclude some sort of regional centre.

**Mr Logan:** Brisbane City Council is a fairly large area. It used to be a whole host of small local governments.

**Mr Willis:** Should 'local government' be defined then in general terms?

**Prof. Hughes:** I think it would be difficult to do that without producing all sorts of problems. The example would have been more convincing in real politics had you spoken of the Calliope shire. Calliope shire has fought off quite successfully all attempts to merge it into Gladstone. This is the trouble with local government—it is very parochial. The reason for saying that we should not make too much of it is that people often learn they should not trust governments, to tell them they are doing them a favour and entrenching something for them, because that is where they stand at the moment. They believe they have been given an entrenchment by a previous government, and to pull the rug out from under that is I think a real consideration.

**Prof. Carney:** Any other points on local government?

**Mr Willis:** The point I raised before in terms of the election of the local governments—it is proposed for it to be parliamentary entrenched. I felt that there was more merit in the democratic process being recognised by referendum entrenchment.

**Prof. Carney:** Can we we move on to proposal No. 3 which is parliamentary entrenchment. Of course, this distinguishment between referendum and parliamentary entrenchment came out of the QCRC report. I cannot quite remember whether this is identical to the QCRC recommendation, proposal No. 3, but it is very similar. I think it is fairly close. Are there any comments in relation to that procedure?

**Mr Pyke:** It seems to me this is a very laudable idea in principle. I would just issue a warning to all members of parliament present that it does mean that somebody in parliament, perhaps on the LCARC committee, has to be very vigilant to always look out for sections in routine, ordinary, unscary enactments which might by inadvertence be contrary to one of the entrenched provisions of the constitution. Victoria has fallen into this trap time and again with the parliamentary entrenchment of the jurisdiction of the Supreme Court. They put it in. They then proceeded apparently to forget about it entirely and would set up various tribunals whose jurisdiction appeared to steal some jurisdiction away from the Supreme Court only to find out five or seven years later that it was invalid. Having expressed that as a warning, perhaps I can turn it around and express it as perhaps a praiseworthy improvement—an attempt to improve the parliamentary culture. It seems to me that anything which reminds every member of parliament all the time that there is a book of rules which they must constantly be checking their conduct against is not a bad thing. I do quite seriously warn honourable members here that if you have a section like this you will have to be very vigilant about the drafting of every act and always scratch your heads and think, 'Could there be some provision of the constitution that this might be contrary to?'

**Prof. Hughes:** This sort of thing falls automatically into the jurisdiction of the legislative standards review. I would have thought it would be one more thing that would be added to their list as they went over legislation. If I am wrong in that, then I take John's point.

**Prof. Carney:** About the Scrutiny of Legislation Committee?

**Prof. Hughes:** Yes.

**Mr Logan:** If it is not already in the Legislative Standards Act, it should be a consequential amendment that follows from your parliamentary entrenchment proposal if that comes forward.

**Prof. Carney:** I understand an issue has arisen as to whether the committee should look at constitutional validity of the bill.

**Mr Logan:** Not so much the validity of the measure but just as a check to say, 'Is this going to impact upon McCauley's case?'—the parliament's other provision in our Constitution Act.

**Prof. Carney:** And all of these requirements tended to be mandatory. So, non-compliance with any one of those requirements or all of them in the case of an innocuous bill would lead to invalidity.

**Mr Pyke:** Could I make this point: when you are drafting entrenchment provisions it would be highly advisable to not follow the drafting of the current section 53 which says that any bill which affects it is invalid impliedly in its entirety. The provision should say an act is invalid to the extent that it is inconsistent with one of those provisions. At the moment there is a fairly strong argument that the whole of the Public Service Act of 1996 is invalid. I am not threatening to bring a vexatious litigant action, Conrad. It is a problem.

**Prof. Carney:** Under Appendices A and B we have virtually looked at the issue of whether they should be referendum or parliamentary entrenched. Maybe we can move on from that, unless there are any other comments about provisions which are parliamentary entrenched. Proposal 4—'LCARC's areas of responsibility'—I think that we can move on from there.

Proposal 5—'Enforceability of entrenching provisions'—looks at the Attorney. We need to gain some clarification of the legal effect of currently entrenched provisions.

**Mr Logan:** Perhaps a laudatory desire, but it will run straight into *In re Judiciary and Navigation Acts*—

**Prof. Carney:** Is there a way around *In re Judiciary and Navigation Acts*?

**Mr Pyke:** I would have thought that it does not apply to state constitution, but only arguable.

**Prof. Hughes:** But in terms of what you ask the High Court when you come to this—and suppose the people approve of this at a referendum—is the court going to start going down that very speculative path? Is the passage by the referendum a critical part of the whole package? I suspect it might be preferable to chance your arm and then go to the High Court after the people have spoken, if they have spoken the right way.

**Mr Pyke:** If there is an appeal in Marquet's case, we might know more in a year or so.

**Mr Logan:** If you are relying upon the enforcement of entrenchment on moral and political grounds, then you do not want a High Court decision potentially, do you, which might say 'You cannot entrench any of these provisions.'

**Prof. Carney:** Conrad, do you have any personal views on this issue?

**Mr Lohe:** I could not see how that could happen in practical terms. I cannot imagine the High Court would even look at it.

**Mr Pyke:** I will bring an action challenging the validity of the Public Service Act, if you like—on an undertaking that you will pay my costs!

**Prof. Carney:** Are you desperate for a High Court decision to clarify these issues?

**Mr Pyke:** It might go the wrong way.

**Prof. Carney:** We are not going to get anything out of Western Australia, that case involving Marquet. That is where the entrenchment provision prevented amendment but not repeal. The Full Court of Western Australia has said that it means both. They have sought special leave to appeal to the High Court.

**Mr Logan:** I make the point that I think in the Sharples appeal to the High Court special leave was refused.

**Mr Pyke:** If I could tie that proposal to proposal 9, it may be that whatever the High Court's view at the moment, looking at the interaction of Constitution of Queensland 2001 with Australia Act, section 106 of the constitution, et cetera—if we had a referendum approved, a totally redrafted constitution, including a statement that the constitution is the paramount law, the High Court's answer as to the enforceability of that may be completely different to the answer it would give to the enforceability of the current situation.

**Ms STRUTHERS:** I have just had a request. I know that we are in a cosy room here, but it is hard for Hansard to pick up the voices at their present level.

**Prof. Carney:** Proposal 6 is fairly obvious. Any comments on proposal 7 to allow for relocation and renumbering? Any concerns about that? Proposal No. 8—'Amendment requests to the Commonwealth Parliament'. Please feel free to speak up because time is going fast here. 'Highest rule of the Queensland legal system', proposal No. 9, any comments on that?

**Mr Pyke:** Well, 'thoroughly in favour' and can I just draw the committee's attention to the fact that there are two ways of doing that. One is to have a completely separate section. What section is it these days that talks about general power to make laws—

**Prof. Carney:** We go back to the 1867 Act.

**Mr Pyke:** We still refer back to the 1867 Act. New South Wales set the example in 1902. They did not presume to say that they had a general power to make a clause for the peace, welfare and good government of the state. They admitted that that they were a part of the constitution and their section 5 has since 1902 said 'subject to the constitution of the Commonwealth of Australia' and I think it also says 'subject to this constitution'. I would earnestly recommend that when we take that section 2 out of the 1867 Act it should be redrafted to reflect reality and not make some grandiose plenary power that the parliament does not end up taking.

**Prof. Carney:** Are there any statutes that we should say there that it is subject to? We have the Commonwealth Constitution, both Australia Acts. I think someone suggested the Statute of Westminster.

**Mr Willis:** I have read that in Lumb's book.

**Mr Pyke:** I think it might be safest to leave the Australia Acts and the Statute of Westminster out, and then their status in a modern independent sovereign nation is somewhat arguable.

**Mr Lohe:** The Australia Act is a Commonwealth enactment.

**Mr Pyke:** Yes.

**Prof. Carney:** And the Commonwealth Constitution is a UK statute.

**Mr Pyke:** Well, I certainly would debate the applicability of the UK version. As to the claim in subsection 2(2) that state parliaments have all of the powers in respect of the states that the United Kingdom formerly had, I think it is arguable that the United Kingdom parliament had no powers in respect of the states by 1986.

**Mr Lohe:** I might just ask: what does proposal No. 9 actually mean when we talk about the constitution as the paramount law?

**Prof. Carney:** This is a recommendation of the QCRC.

**Prof. Hughes:** It is not a Dog Act. It is not a Dog Act but it is better than any statute you can think of.

**Mr Lohe:** What is the practical effect of that?

**Prof. Hughes:** To encourage the courts not to follow Lord Birkenhead.

**Prof. Carney:** I thought the other practical implication was that it might be the basis for entrenchment under Ranasinghe's principle.

**Mr Aroney:** My observation would be that it is either circular and ineffective or it is revolutionary in the sense of lifting itself up by the bootstraps. Either it becomes a new source of a declaration which is interpreted in a revolutionary way or it does nothing, because the power to declare that this is supreme must be the supreme power that is declaring it. So it is only with that effective power to declare something that you are effectively doing so. That makes pretty critical the inclusion of the Australia Acts. In that sense it seems a bit odd. Where does the power in Queensland come from to declare that the Australia Act is part of the hierarchy? Even though it is referring specifically to the Queensland Constitution, it is saying 'subject to' the other constitutions. I would not want to press that.

**Prof. Carney:** Those other statutes are superior, are they not, by virtue of 109, et cetera?

**Mr Fisher:** Yes. You can say it is a recognition of constitutional reality. It is not as though the parliament is trying to ratify or give additional status to these overriding laws. It is a recognition of the fact that there are certain overriding laws. I think it is desirable that if we are going to state that the constitution is paramount law we have to say 'subject to certain overriding laws which apply as a matter of constitutional fact', not abstract and irrelevant view. But as a matter of constitutional reality you have to have recourse to the Commonwealth Constitution and the Australia Acts.

**Mr Lohe:** Subject to the Commonwealth Constitution, regardless of whether we say it is or not, et cetera, are we envisaging a situation where you could have people in the courts actually arguing that a particular piece of legislation is invalid because it is inconsistent with the Queensland Constitution, because the Queensland Constitution somehow is paramount and therefore it has some higher status, whatever that might be?

**Mr Logan:** I expect it would be an inspiration for what one might term 'forensic mischief making'. The first thing that one does then if one has got into bother with the state, perhaps even a parking ticket if you are well enough resourced, is to try to find some inconsistency between the legislation which has put you right in the frame and the Queensland Constitution and say that the latter trumps the former.

**Mr Cooper:** Litigants in person will have a field day.

**Mr Pyke:** But should we refrain from desiring to live in a state and a nation with a proper enforceable constitution for fear of the vexatious litigants in person? I know Conrad is driven crazy by only about three of them who generate an enormous amount of unnecessary work, but it seems to me the Commonwealth Constitution does not work this way. Challenges are brought to the validity of Commonwealth statutes usually with some arguable case behind them. Two-thirds of them fail; one third of them succeed, roughly.

**Mr Cooper:** There are significant litigants in person in problems—

**Mr Logan:** Yes. I do not envisage them only as a logical person in that aspect at all; rather, something that would be a little more inspirational for the mainstream litigant.

**Prof. Carney:** Is there an alternative expression to 'paramount'? Is that something that needs to be—

**Mr Logan:** Does that sort of imply something like section 109. What does it mean?

**Mr Pyke:** It implies something like covering clause 5 of the Commonwealth Constitution.

**Mr Cooper:** It is really intended I think to describe the pre-eminence of this statute over all other statutes, recognising it can be changed in accordance with whatever procedure.

**Ms STRUTHERS:** Don has offered up the concept of 'fundamental'.

**Mr Willis:** 'Fundamental'—just the basic ground rules; that sort of concept.

**Mr Fisher:** Yes, I would prefer the term 'fundamental'. I thought about that before, that 'fundamental law' probably states the position the way I would prefer it.

**Mr Pyke:** Is that even stronger?

**Prof. Hughes:** I suspect you are moving in the direction of natural rights and away from a Kelsen view of things. It is really who has the last word as against that this is something very special by its nature. I think that is the more slippery path for bringing in the litigants.

**Mr Pyke:** Can I suggest to the committee, with the greatest of respect and friendship for Conrad, that the principles of drafting of a state constitution should not be too worried about the fact that the Crown Solicitor will be driven crazy by some unmeritorious litigation. There may be some meritorious litigation as well. The way to save the Crown Solicitor's office is to perhaps further strengthen the provisions in the Supreme Court Act and rules about dealing with vexatious litigants.

**Mr Lohe:** I actually was not worried so much about vexatious litigants but what this fundamentally really means to say 'it is a paramount law'. If it is an aspirational statement that the courts really can ignore because although it says that, and the Premier might say it in introducing a bill, it does not actually mean anything, in practical terms, in terms of the way the judges treat that legislation over and against another piece of legislation. That is not a problem. If they are to treat it differently from some other legislation, then in what way are they to treat it differently and what practical effect will that have. That is my concern.

**Mr Logan:** If one is going to record one's constitution as not a Dog Act, then there is everything to be said in favour of a paramount seclusion. It is just that as part and parcel of that statement there is a forensic baggage. It is not something that should be regarded as 'don't do it'; it is just that if one sorts out with precision that these are things that are so fundamental we should regard them as paramount, then one is saying really that anything that is inconsistent with that we want it to be struck down. It is really just a corollary of one's devotion to the idea that there are fundamentals that should be paramount—that there is that invalidity consequence that will follow.

**Mr Cooper:** Well, the invalidity will follow because of parliamentary and referendum entrenchment. If you link paramount in with those forms of entrenchment and define paramountcy in those terms, you may overcome that problem.

**Mr Fisher:** Certainly overcome Conrad's concern.

**Mr Lohe:** Yes, I would have thought that a reference to the constitution as paramount is really derived from the fact that the constitution under these arrangements will have special procedures for amendment which automatically place the constitution into the special category, as you are saying, by virtue of the fact that the essential provisions are referendum entrenched but the rest of the constitution is parliamentary entrenched, so that the constitution itself by virtue of the entrenchment technique does have a superior status.

**Mr Fisher:** I suppose the question that would be alive would be really whether it does have that paramountcy, notwithstanding a statement to that effect in the constitution.

**Mr Pyke:** Perhaps a referendum entrenchment provision and a parliamentary entrenchment provision which between them cover every section of the constitution would have that effect regardless.

**Mr Logan:** I just wonder about that. It is just one Queensland Act as against another. That is the conundrum.

**Ms STRUTHERS:** You will have to help us find more answers rather than throwing up more issues. We have 20 more minutes. I am feeling a little more confused, I think, after today. How about other members?

**Prof. Carney:** Is the committee amenable to further communications in writing?

**Ms STRUTHERS:** By all means.

**Mr Pyke:** I was going to ask that. I do not want this to sound like a whinge, but after the fundamental consolidation exercise took eight years you are now rushing at commendable speed but rather frightening speed through the much more important exercise and those of us who are university teachers and I guess those who are practising at the bar find that sometimes these

issues papers come out with six weeks to reply at the most inconvenient time. I would be very grateful if you say you will still accept a written submission.

**Ms STRUTHERS:** By all means. One of our concerns as a committee is that we may have a life of, say, another 12 months and another election, a new committee. We are very keen to make sure that in work like our FOI work, this work, we actually see a beginning, middle and some conclusion to the work rather than providing something that another committee will carry forward. That is probably driving us at the moment. Veronica, can you be more specific with some timelines? We would be open to receiving further written or other communication up until—

**Ms Rogers:** You will not be able to report until early next year anyway, so submissions up to late January would still be able to fit into your meeting timeframe.

**Ms STRUTHERS:** I know that that does not satisfy the eight-year timeline, but try eight weeks.

**Prof. Carney:** At least this committee had more time than the QCRC!

**Mr Aroney:** Can I make a drafting point about this? It relates back to my first point about where does the power come to declare that this is paramount. It is about the drafting of the words 'subject to'—to my mind, we are tending to read this 'It is because there is an inherent limitation on the capacity to declare any more than that', but it could be read differently and that it is an expression of 'Look, even though we have the power to overrule all of this we submit ourselves to it.' I think that would be odd, it would not be what we would expect it to mean, but if you are asserting the power to declare that something is paramount you are claiming a great deal of power. If it has any legal effect at all, in any strong sense, then it is a claim to sovereignty that is unlimited; or it could be read as that logically. That is not what we would expect it to mean. That is not how I read it, but I wonder whether in time to come it could be construed in that way.

**Mr Pyke:** I think this has to be approached in the context of a referendum entrenchment of this process. It seems to me—and I might be reading things into Hughes's and Cross's minds that were not there, and this came as a recommendation from their commission and I think I had made a submission along those lines to them—the point is that if the people of Queensland are to approve the whole thing at referendum, the best is for the parliament to, if you like, offer the people of Queensland a chance to state that the people of Queensland are sovereign, that this document that has been sovereign in a 'restricted state only' sense, that the enactment of this document signals the fact that here we have a book of rules that the parliamentarians, and especially the Scrutiny of Legislation Committee and the LCARC committee, will have to watch forever. That may be a minor revolution in the terms that Nick was using earlier, but it seems to me it is only stating something which in our politics if not in our constitutional law we have been presuming for the last 100 years. If we have been presuming that in our politics for the last 100 years, is it not about time that we stated it in our constitutional law?

**Prof. Carney:** Proposal 10, Constitutional review—that no specific provisions be inserted in the constitution for that. Are there any comments about proposal 10? Proposals 11 and 12 talk about what we mentioned earlier, that is, that entrenchment will be only done in compliance with whatever manner and form is prescribed and that future referendum entrenched provisions will be subject to that requirement. Any comments about proposals 11 and 12?

**Mr Fisher:** With proposal 11, I would even go further and suggest that it would be desirable to have some provision to the effect that any proposed manner and form requirement wherever cited would have to comply with the standard or the requirement that it seeks to impose on later parliaments so that it is not just in regard to amendment of the constitution but any state law. I would think there is no constitutional problem with that because such a law would be a manner and form requirement and it would fall within the terms, I think, of the Australia Act.

**Prof. Carney:** I am not sure that the current proposal is wide enough to cover that, but certainly you are looking at imposing restrictions and entrenching provisions in any statute.

**Mr Fisher:** Yes, entrenching provisions wherever found.

**Mr Pyke:** Would that not be implied? In fact, there is an argument that that has in fact been the law in Queensland ever since 1977 when the legislative power section of the Constitution Act 1867 was entrenched. That really rules out further manner and form provisions in the run of the mill Dog Act type statutes.

**Prof. Carney:** But this proposal is looking at the new constitution with the whole provisions removed under the whole referendum procedure.

**Mr Pyke:** Yes, but if you have a consolidated constitution which now has a peace, welfare and good government section which is referendum entrenched, I think there is a strong implication unless you say somehow the ghosts of the CLV Act and the Australia Act still authorise things outside of that, but within the constitution itself there is a strong implication that parliament no longer has power to pass Dog Acts with manner and form provisions in them.

**Prof. Carney:** But it would be better to express that clearly.

**Mr Pyke:** I suppose so.

**Mr Fisher:** Yes, that is my point. I am aware of John's arguments, but I think it should be put beyond any doubt.

**Prof. Carney:** I think we have almost dealt with all the proposals. Proposals 13 and 14 simply deal with whenever a constitution is finally put to the people, it will be subject to a referendum. That will deal presumably then with all the old entrenched provisions that we are still subject to. I think that basically completes the proposals. We have time for, I suppose, any final comments from each of you if you wish to make them.

**Mr Aroney:** I wanted to go back to proposal 11 and just agree with what Geoff is saying, although in the spirit of what John was saying right at the beginning about the constitution being a readable document and one which is giving expression to the fundamentals, if you like. By going down the more technical path that Geoff is proposing, especially on this point of entrenching by referendum, this whole wrapping the whole thing up and ensuring that the people and the referendum is at the base of the system, to my mind if you were trying to achieve what John was talking about, to an extent it would be easier to teach students that this is a democratic document if it just looked like the referendum was at the basis of the system. If you adopted the technical language to cover all different methods of entrenchment, it will weaken the document's readability in that way. That reads for everything that we have been looking at here, because we have been wanting to, in the spirit of what John was saying, produce a document that is readable but nevertheless we are stuck with the legalities of it, so we have to cross our t's and dot our i's, and we weaken its readability as well. It is a tension that is difficult to resolve. I do not have anything concrete to propose about that.

**Prof. Hughes:** Proposal 14, 'A constitutional convention'. Is it intended that anything more be said as to how this feature is brought into being, because there are a variety of models about. The Gladstone convention I thought worked very well, the Canberra convention I did not think worked at all. Is it to be elected? Is it to be partially elected, compulsory, optional, et cetera? I think it could turn out to be a disaster at the critical eve of getting the thing through. Do you really think it is necessary, considering the amount of consultation et cetera that has been going on?

**Ms STRUTHERS:** I think we will take heed of that. I do not have a response today.

**Prof. Hughes:** If you can find a spectacular event that you can keep control of, that would be an excellent idea. I am not sure that a constitutional convention will necessarily do that.

**Mr Fisher:** Yes, I had a problem with the idea of a constitutional convention. I thought what was really the point when all the groundwork over a number of years has fundamentally been done. When it talks about 'finalise the drafting', I doubt whether a constitutional convention would be the appropriate body for technical drafting, and in any event if you have a constitutional convention being established the problem is: will the convention start to roam widely; will it just start to reopen a lot of issues that we have thought had been settled by a process of exhaustive consultation and inquiry? I think the proposal as formulated is very ill-defined and it has potential dangers I would have thought.

**Mr Lohe:** The solution is that only the people in this room are allowed to attend.

**Ms STRUTHERS:** I was just going to say: how come women are not interested in constitutional matters? It was the founding fathers, now it is the ongoing fathers; it will be the grandads!

**Prof. Carney:** My last comment was to ask the committee members if they had any final questions to ask the people. Thank you very much for a most interesting discussion and your attendance and thank you, Karen, for organising it.

**Ms STRUTHERS:** Thanks Gerard. Your input is very helpful and we certainly are open to hearing more from you. You have signed those forms in relation to the Hansard. We will get our copy in about two weeks. Staff will forward that on to you and we would appreciate any corrections or comments back and any further issues or matters you would like to raise with us by the end of January. Please consider the matters raised today. If you have anything further to offer, please keep in touch.

The meeting closed at 8.52 a.m.