LEGISLATIVE ASSEMBLY OF QUEENSLAND

PARLIAMENTARY COMMITTEE FOR ELECTORAL AND ADMINISTRATIVE REVIEW

REPORT ON

Consolidation and Review of the Queensland Constitution

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PARLIAMENTARY COMMITTEE FOR ELECTORAL AND ADMINISTRATIVE REVIEW

Report on Consolidation and Review of The Queensland Constitution

November 1994

Report No. 24

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47th Parliament

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While few Australians have a detailed knowledge of the contents of the Commonwealth Constitution, they have a basic understanding that it is a legal document which limits the Federal government's power and is incapable of amendment by Parliament in the normal way.

Queenslander's understanding of their own State Constitution is much hazier, despite the fact that it predates that of the Commonwealth by more than 30 years.

The explanation of this state of affairs lies in lack of education in our schools about our Constitution. However, in the case of the Queensland Constitution there is another major problem; unlike the Commonwealth there is no one document setting out the Constitution. In fact, Constitutional legislation in Queensland is to be found in a large number of different Acts. EARC proposed to overcome this lack of public accessibility to the Constitution by preparing a consolidated, up to date, plain English version of our Constitution in a new piece of legislation to be referred to as the Queensland Constitution Act 1993.

Whilst EARC's draft Constitution is essentially a consolidation of existing legislation it does introduce new provisions designed to strengthen the independence of the judiciary. The Committee endorses the inclusion of District Courts judges in the provisions regarding retirement age, dismissal and salaries of judges in recognition of the greater jurisdiction given to District Courts.

On the matter of dismissal of Supreme Court and District Courts judges, the Committee supports the general thrust of EARC's recommendations that the grounds for dismissal of such judges should only consist of proved misbehaviour or incapacity, and that investigation of such grounds should be conducted by a tribunal of retired or serving judges.

However, some refinement of the draft provisions was considered necessary. The Committee considered that clause 28 of EARC's draft Constitution Bill could be interpreted as requiring that a tribunal investigating the possible dismissal of a Judge to apply a criminal standard of proof, rather than the accepted civil standard of proof. The Committee therefore recommended that clause 28 of the draft Constitution Bill be redrafted to reflect a civil standard of proof.

EARC proposed that the tribunal should be independent, but did not recommend how it could be established to maintain its independence. After consideration of past investigation into the dismissal of judges, the Committee recommended that the tribunal be established by a resolution of Parliament.

The Committee endorsed EARC's proposal that the salary of Supreme Court and District Court judges may not be decreased, but did not support inclusion in the draft Constitution Bill of a provision that ensures the salaries of the judiciary are regularly adjusted to ensure their amount continues to be at least equivalent to the original value. The Committee considers that matters relevant to judicial salaries are complex and are adequately dealt with in legislation other than the Constitution, such as the Judicial Legislation Amendment Bill 1994, passed by the Parliament on 22 November 1994.

Two further matters, concerning a quorum and proxy voting, are commented on by the Committee. EARC's recommendation that the quorum of the Legislative Assembly be raised from 16 members to 23 members is not supported by the Committee and it was recommended that the matter be
referred to the Standing Orders Committee for its further consideration.

Neither does the Committee support EARC's recommendation that provision for proxy voting be repealed on grounds that a provision designed to ensure the political survival of a government of the 1920's has no place in a modern statute. In fact, the provision has been utilised three times since 1923 by Members unable to attend Parliament due to surgical operations. The Committee did not find that the provision has been abused and recommended retention of proxy voting to be used as a last resort in case of medical emergencies.

The remainder of EARC's report explored the possibility of drafting a new fully entrenched Constitution for Queensland in the future. EARC gave consideration to the process whereby a new Queensland Constitution could come into being within five years, and recommended that a Parliamentary Committee conduct a more extensive review of these matters. In light of the limited life of this Committee it has been recommended that the proposed Legal and Constitutional Committee is the appropriate body for such a detailed specialised task.

Several suggestions were made by EARC regarding additional matters that could be considered for inclusion in a future Queensland Constitution. One such matter supported by the Committee was consideration of Constitutional recognition of Aborigines and Torres Strait Islander peoples.

The community debate about the future of the Australian Constitution will almost certainly result in fundamental changes during the next decade. Changes in the Commonwealth Constitution will surely have profound implications for the Queensland Constitution and the Committee was of the view that community debate regarding our Constitution should recognise this reality. Indeed, changing the Queensland Constitution in isolation from these broader considerations would be a futile exercise.

Whilst the content of a future Queensland Constitution is of fundamental importance, so too is the requirement that it reflects the wishes of the people. Queensland inherited its Constitution from New South Wales when the State of Queensland was created in 1859. The drafting of a new Constitution for Queensland provides an opportunity to prepare a document that reflects the views of Queenslanders and which will be relevant for life in the 21st century. The consolidation of the present Queensland Constitution into one Act is a most welcome and necessary first step in that long process.

Dr L A Clark  
Chair  
Parliamentary Committee for Electoral and Administrative Review  
INTRODUCTION

THE ROLE OF THE PARLIAMENTARY COMMITTEE

1 The Parliamentary Committee for Electoral and Administrative Review is an all party Committee of the Legislative Assembly, established by motion on 21 March 1990 in pursuance of Part V of the Electoral and Administrative Review Act 1989 (the Act).

2 Section 5.8(1) of the Act defines the Committee's functions and provides for it:

   (a) "to monitor and review the discharge of the Commission's functions"; s.5.8(1)(a);

   (b) "to examine the ... reports of the Commission and report to the Legislative Assembly on any matter appearing in or arising out of such report"... s.5.8(1)(c).

THE EARC REPORT

3 An Electoral and Administrative Review Commission report entitled Report on Consolidation and Review of the Queensland Constitution (the EARC report) was furnished to the Chairman of the Parliamentary Committee, Dr Lesley Clark MLA, the Speaker of the Legislative Assembly, Hon Jim Fouras MLA, and the Minister (the Premier), Hon Wayne Goss MLA on 1st September 1993 and was subsequently tabled in the Legislative Assembly and ordered to be printed. The EARC report grew out of two other EARC reviews, namely the Report on Review of Parliamentary Committees and the Report on the Preservation and Enhancement of Individuals' Rights and Freedoms, and is effectively an extension of them. EARC"s recommendations with respect to the Constitution are summarised at pages 163 to 168. The Report also includes Appendix A a Queensland Constitution Act 1993, Appendix B a draft Queensland Constitution Bill 1993, and Appendix C a Queensland Constitution Amendment Bill 1993.

4 The Act provides that EARC's object is to report to the Chairman of the Parliamentary Committee, the Speaker of the Legislative Assembly and the responsible Minister with a view to achieving and maintaining:

   "(a) efficiency in the operation of the Parliament; and

   (b) honesty, impartiality and efficiency in -

    (i) elections;

    (ii) public administration of the State;

    (iii) Local Authority administration" (s.2.9(1) of the Act).

5 The Commission's functions also require it to investigate and report from time to time in relation to:
"the whole or part of the public administration of the State, including any matters pertaining thereto specified in the Report of the Commission of Inquiry, or referred to the Commission by the Legislative Assembly, the Parliamentary Committee or the Minister" (s.2.10(1)(a)(iii) of the Act).

6 The Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Report) recommended that EARC implement and supervise the:

"(i) introduction of a comprehensive system of Parliamentary Committees"

7 Section 2.10(2) of the Act also provides that:

"... the Commission may investigate and report in relation to all or any of the matters specified in the Schedule".

8 The items in the Schedule to the Act relevant to this Report are:

"1. Preservation and enhancement of individuals' rights and freedoms".


3. Functions and powers of Committees of the Legislative Assembly".

THE PARLIAMENTARY COMMITTEE'S REVIEW PROCESS

9 On receipt of EARC's report, the Parliamentary Committee advertised, inviting written submissions on EARC's Report and recommendations. That advertisement appeared in Queensland newspapers on 4th September 1993 and a copy of that advertisement appears as Appendix A to this Report. The Committee received 22 submissions in response. The persons who made a submission are listed in Appendix B of this Report.

10 In this Report the Committee examines the procedures adopted by EARC in the preparation of its report, and assesses EARC's compliance with its statutory duties. The Committee also comments on aspects of EARC's recommendations. To assist it in this task, the Committee employed Associate Professor Gerard Carney as a consultant. Associate Professor Carney has lectured at the Queensland Institute of Technology, the University of Queensland, and is now teaching at Bond University where he specialises in Constitutional Law.
EARC'S PROCEDURES

11 EARC adopted the following procedures in the preparation of its report:

(a) EARC advertised its call for submissions on the Issues Paper with a closing date of 19 January 1993, but issued a media statement on 30 January 1993 extending the date to 26 February 1993. Submissions received were placed on a public register, published and widely distributed.

(b) Issues Paper No. 21, *Consolidation and Review of the Queensland Constitution*, was released in February 1993 and approximately 600 copies were circulated to public libraries, the Courts, government organisations, community and professional groups, academics and members of the public.

(c) EARC received 45 submissions and comments in response from local authorities, state government bodies, political parties, organisations and individuals. A list of persons and organisations who made contributions to the Report are contained in Appendix J. Many further submissions to the Rights and Freedoms Review also addressed constitutional issues.

(d) EARC conducted a public seminar entitled *Consolidation and Review of the Queensland Constitution* on 14 April 1993 at which relevant issues were discussed. The public hearing was addressed by Associate Professor Gerard Carney (Bond University), Mr Peter Jull (Australian National University) and Mr David Russell QC (National Party of Australia, Queensland). A transcript of proceedings was made available through the Commission.

(e) EARC consulted with a number of persons in the course of the review, as identified in paragraph 1.47 of the EARC Report.

EARC'S COMPLIANCE WITH ITS STATUTORY DUTIES

12 The Committee has considered whether EARC has satisfied its statutory duties:

- to act "independently, impartially, fairly and in the public interest" (s.2.23(2)(a) of the Act);

- to act openly and make available to the public all submissions, objections and suggestions made to it apart from any such material which it would be contrary to the public interest or unfair to disclose (s.2.23(2)(b) and (c); and

- to include in its report its recommendations and an objective summary and comment on all considerations of which it is aware which support or oppose or otherwise pertain to its recommendations (s.2.23(2)(d)(i) and (ii).

13 Having regard to the procedures described above, the Committee considers that EARC has satisfied each of its statutory duties.

EARC'S RECOMMENDATIONS
A summary of EARC’s recommendations on consolidation and review of the Queensland Constitution appears as Appendix C to the Committee’s Report. The key elements of EARC’s recommendations are:

**EXTENT OF PARLIAMENT’S POWER TO ENTRENCH PROVISIONS IN THE CONSTITUTION**
- That the Attorney-General bring an action in the Supreme Court to clarify the extent of Parliament’s power to entrench provisions in the Constitution (para.4.27).

**NO FURTHER ENTRENCHMENT OF PRESENT CONSTITUTION**
- That there be no further entrenchment of any part of the present Queensland Constitution without approval of the people by referendum (para.4.110)

**CONSOLIDATION OF RELATED ACTS INTO ONE ACT**

**OUTCOME FOR PROVISIONS NOT CONSOLIDATED**
- That those provisions currently in constitutional legislation which are not incorporated into the consolidated draft Constitution Bill be repealed (paras.5.37, 6.61, 6.67, 7.52).
- That where applicable, some provisions relating to the Constitution be redrafted and incorporated into the proposed Queensland Parliament Bill as recommended in the Report on Review of Parliamentary Committees (paras. 6.102, 6.104, 6.105, 6.127, 6.128, 6.202, 6.207)

**THE GOVERNOR**
- That the draft Constitution Bill provides for the Governor to prorogue and dissolve the Legislative Assembly in accordance with current convention (para.6.176).
- That the remaining provisions of the Constitution (Office of Governor) Act 1867 be preserved (para.6.192).

**RESPONSIBLE GOVERNMENT**
- That the Parliamentary Legal and Constitutional Committee review the constitutional conventions concerning membership of the Executive Council (para.6.194).

**THE INDEPENDENCE OF THE SPEAKER**
- That the proposed Legal and Constitutional Committee further review the matter of the independence of the Speaker (para.8.62).

**JUDICIAL TENURE AND THE COURTS**
As in the Review of the Preservation of the Preservation and Enhancement of Individuals' Rights and Freedoms Report, EARC considered that an essential prerequisite for the preservation and enhancement of those rights and freedoms was the maintenance of an independent judiciary. EARC sought to strengthen judicial tenure by recommending:

- That s.15 of the Constitution Act 1867 be redrafted and provide for:
  
  (a) the continuance of the Supreme Court of Queensland as the superior court of the State and that a finding of misconduct or incapacity by an independent tribunal precede an address of Parliament for removal of a judge (para.7.51);
  
  (b) the compulsory retirement of Supreme Court Justices at the age of 70, and that s.15 be included in any fully entrenched State Constitution (paras. 7.52 and 7.57);
  
  (c) that the same constitutional guarantees of tenure allowed judges of the Supreme Court be allowed for judges of the District Court, any courts of equivalent or higher status and any courts created in substitution for the District Court (para.7.67).

- That the position of magistrates be further considered in the process of drafting a future entrenched Constitution (para.7.68).

- That the draft Constitution Bill provides that salaries of the judiciary are adjusted regularly and remain at least equivalent to their original value (para.7.72).

- That the matter of selection of judges and other matters concerning the judiciary should be referred to the proposed Parliamentary Legal and Constitutional Committee (para.7.81).

- That the Attorney-General direct a reference to the Queensland Law Reform Commission to investigate options for the system of administration of Queensland courts (para.7.105).
QUALIFICATIONS FOR ELECTION TO AND DISQUALIFICATION FROM
THE LEGISLATIVE ASSEMBLY

In keeping with EARC’s Report on Rights and Freedoms Review, EARC believed that the Constitution should contain a general reference to the conditions of eligibility for membership of and disqualification from the Legislative Assembly, and recommended:

· That the draft Constitution Bill provide that any Adult Australian citizen resident in Queensland is eligible to stand for election to the Legislative Assembly subject to conditions and disqualifications determined by Parliament (paras.6.106).

FUTURE CONSTITUTIONAL REFORM

The Role of a Constitution Convention

· That the Parliamentary Electoral and Administrative Review Committee or its successor conduct a more extensive review with a view to convening a Constitutional Convention to draft a new Constitution within 5 years (paras.4.90 and 4.91).

Content of A Future Fully Entrenched Constitution

The Commission’s recommendations for constitutional reform were directed to a consolidation of existing constitutional provisions, with additional matters which would supplement the Rights and Freedoms Review.

However, EARC did consider that in the drafting of an entrenched Constitution, the proposed Constitutional Convention should:

· Consider whether for the purpose of addressing separation of powers there should be some constitutional rules regulating and limiting the scope of subordinate and delegated legislation (para.8.24);

· Consider whether there should be some constitutional rules defining the scope of executive power, specifying that the executive must exercise its power according to law, and guaranteeing the availability of remedies against abuses of power or wrong decisions by the executive (para.8.57);

· Consider what matters concerning the conduct of the Parliament should be included within the Constitution (para.8.80);

· Consult further with Aborigines and Torres Strait Islanders (para.8.144).
COMMITTEE'S APPROACH TO EARC'S RECOMMENDATIONS

15 There are two important aspects to EARC's Report. The first is to recommend consolidation of existing constitutional legislation into one document called the *Queensland Constitution Act 1993*. The second is a discussion of the process of developing a new Constitution, the content of a fully entrenched Constitution and establishment of a Constitutional Convention to facilitate the writing of such a Constitution.

16 The Committee has considered EARC's recommendations in the light of available evidence and is satisfied that the intention of the majority of EARC's recommendations are appropriate. There are, however, a number of points that the Committee believes deserve further attention and these are addressed in the Report.
OVERVIEW

17 Generally, EARC seeks to consolidate the existing constitutional and related law. Some constitutional provisions were dealt with earlier in EARC's Report on Review of Parliamentary Committees, and EARC recommended that those provisions be contained in the Queensland Parliament Bill. EARC's proposals regarding the remaining constitutional law are contained in Appendix B of EARC's Report in the Queensland Constitution Bill 1993 (the draft Constitution Bill). The main provisions in the draft Constitution Bill relate to:

- Parliament
- Governor and Executive Government
- Members of Legislative Assembly
- Courts
- Revenue
- Local Government

18 The draft Constitution Bill also includes transitional provisions and amendments to other legislation. While most of EARC's recommendations regarding the draft Constitution Bill concern consolidation of existing law, some significant changes are recommended concerning judicial tenure. Of particular interest to the Committee are EARC's proposals embodied in clauses 27 to 29 of the draft Constitutional Bill regarding the retirement age of judges, removal of judges, and judges' salaries.

19 The task of consolidating Queensland's constitutional laws is technically problematic because several provisions are "entrenched" and may only be amended by a referendum of eligible voters. Entrenched provisions apply to matters relevant to:

- The office of Governor
- The Governor in Council
- Appointment of public offices vested in the Governor
- Any Bill proposing an end to the system of local government
- The Legislative Assembly
- Re-establishment of the Legislative Council or another body, and
- Extension of the term of the Legislative Assembly.

20 For technical reasons the entrenched provisions are not included in the draft Constitution Bill, as even the reprinting of such provisions must be dealt with in a certain manner. The final product, comprising of the entrenched provisions, the whole of the draft Constitution Bill, and a proposed amendment of the Constitution Act 1867 to replace the word "colony" with the word "state" (entitled the Queensland Constitution Amendment Bill 1993 in Appendix C of EARC's Report) are contained in the Queensland Constitution Act 1993 in Appendix A of EARC's Report. All 3 of these documents are attached as appendices to this Report.

SECURITY OF JUDICIAL TENURE
Background

21 In Chapter 7 EARC discusses the independence of the judiciary:

"Independence of the judiciary from control or influence by the Executive has been seen as one of the fundamental protections of human liberty since the disputes of seventeenth century England. Independence is desirable not because of some abstract theory, but because it represents an effective guarantee of judicial impartiality.

Since the 17th century, guaranteed tenure of office has been seen as a principal element in preserving judicial independence, and ensuring impartiality in cases involving the Executive. The provision in the Act of Settlement 1700 that judges commissions shall be quamdiu se bene gesserint - "as long as they conduct themselves well", generally rendered as "as long as they are of good behaviour" - was a belated response to the dismissal of judges who decided cases against executive interests. This guarantee was later reinforced by provisions that ensured that Parliament, not the Executive, reviewed judicial behaviour - a judge could not be dismissed except on a petition from both Houses of Parliament. Without the guarantee, a judge who decides cases against the interest of the Executive may be dismissed (as Chief Justice Coke was by James I) or, if appointed for a short term, may not have his or her appointment renewed" (EARC 1993, paras.7.30-7.31).

22 EARC goes on to outline the potential for conflict that could arise between judges and the executive as a result of an extended system of administrative law:

"Judicial independence from executive influence is of particular importance when there is a wider range of administrative law actions now available in part as a result of the Commission's earlier reports on Judicial Review of Administrative Actions and Decisions (90/R5) and Review of Freedom of Information (90/R6). To have cases involving the Judicial Review Act 1991 or the Freedom of Information Act 1992 heard by a judge who was dependent on the Executive for continuance in office could rob these reforms of much of their value. Whilst, as the Crown Solicitor noted in the Government Department's submission (S20), only one judge has been dismissed in Queensland - and then only after a public inquiry - an extended system of administrative law does increase the potential for conflict between judges and the executive.

If the proposed Queensland Bill of Rights recommended in the Report on the Review of the Preservation and Enhancement of Individuals' Rights and Freedoms is enacted the argument for judicial independence will become all the stronger.

For this reason the Commission's recommendations in this Chapter depart from the general principal of consolidation of existing provisions in other chapters. Rather than merely consolidating the existing provisions and deferring substantial changes for consideration by a Convention, the recommendations in this Chapter involve significant changes to the State's constitutional law (EARC 1993, paras 7.32-7.34).
The Committee considers that some aspects of EARC's recommendations regarding judicial tenure require further attention. The topics of the retirement age, the grounds for dismissal, and the salary of judges of the District and Supreme Courts are discussed below.

The Retirement Age of Judges

The current provision of s.15 of the Constitution Act 1867 provides that judges of the Supreme Court continue in office during good behaviour.

"15. Judges continued in the enjoyment of their offices during their good behaviour notwithstanding any demise of the Crown. The commissions of the present judges of the Supreme Court of the said colony and of all future judges thereof shall be continue and remain in full force during their good behaviour notwithstanding the demise of Her Majesty (whom may God long preserve) or of her heirs and successors any law usage or practice to the contrary thereof in anywise notwithstanding".

In EARC's view, although s.15 may appear to provide for a guarantee of tenure, its lack of entrenchment has allowed the section to be overridden or amended by implication by any later inconsistent Act (EARC 1993, para 7.5). This occurred in the case of McCawley v The King [1920] AC 691, where judges of the Industrial Arbitration Court were appointed to the Supreme Court for the period of their appointment to the Industrial Court; a period of 7 years.

Lack of entrenchment of s.15 also allows direct repeal and amendment of that provision. Associate Professor Gerard Carney advised the Committee that the clearest example of an amendment of s.15 was made by The Judges' Retirement Act 1921 (Qld) which imposed a retirement age of 70 on all judges in Queensland. Rather than applying to future judicial appointments, the Act applied to judges who were already on the bench, forcing a number of judges into retirement.

Clause 27 of the draft Constitution Bill reflects s.15 of the Constitution Act 1867, but includes tenure for District Court judges. District Court judges are included by EARC due to the fact that District Courts now handle criminal cases where the maximum penalty is less than life imprisonment, and civil matters where the subject of the action is valued at up to $200,000. EARC further states that:

"Under the proposed Bill of Rights, District Court judges will have the power and the duty to adjudicate on allegations of breaches of civil and political rights, where that is relevant to an issue in the proceedings. Such matters are also likely to arise in criminal trials ... The Commission considers that the independence of the judges of the District Courts is almost as important as that of Justices of the Supreme Court, and the same constitutional protection should extend to them." (EARC 1993, para.7.63-7.64).

The Committee notes that the jurisdiction of the District Courts have been extended significantly in recent years and agrees with the inclusion of District Court judges in clause 27 of the draft Constitution Bill. Clause 27 provides that:

27(1) A Judge of the Supreme Court or a Judge of District Courts holds office
indefinitely during good behaviour.

(2) However, a Judge must retire at 70, subject to arrangements under an Act for finishing remaining duties.

(3) A Judge's appointment is unaffected by the end of the Sovereign's reign.

Since both District Courts and Supreme Court judges are required to retire at age 70 pursuant to ss. 12A and 13 of the District Court Act 1967 and s.23 of the Supreme Court Act 1991 respectively, the Committee did consider amending clause 27(2) of the draft Constitution Bill to stipulate that the retirement age of these judges should be provided for in legislation other than the Constitution. However, if the legislation prescribing the retirement age is repealed, leaving no retirement age specification, clause 27 would effectively give judges life tenure. Hence, the Committee considers that the retirement age of 70 for Supreme Court and District Courts judges should be specified in clause 27(2) of the draft Constitution Bill.

The Committee endorses EARC’s recommendations at para.7.57 and para.7.67 that section 15 of the Constitution Act 1867 be amended to provide for the compulsory retirement of Supreme Court and District Courts judges at the age of 70 years.

Removal of Judges on Address of Parliament

Background

In Queensland the only judge to have been removed from office by the Governor on address of Parliament was Mr Justice Vasta in 1989. A Commission of Inquiry was established pursuant to the Parliamentary (Judges) Commission of Inquiry Act 1988 to investigate the matter and advise Parliament whether there was any behaviour of the Judge warranting removal from office. The Report of that Commission was tabled in the Legislative Assembly advising the Assembly that in its opinion there was behaviour warranting removal. A week later the Judge appeared before the Legislative Assembly to show cause as to why he should not be dismissed from office. After debate, the Assembly resolved to present an address to the Governor praying for the dismissal of the Judge. The Governor's reply, agreeing with the Address and removing Justice Vasta from the office of Judge of the Supreme Court, was conveyed to the Assembly by the Speaker.

Section 16 of the Constitution Act 1867 provides for the removal of Supreme Court Judges. As the section does not prescribe specific grounds for removal, the address of Parliament can be on any ground. Section 16 states:

"16. But they may be removed by the Crown on the address of Parliament. It shall be lawful nevertheless for Her majesty her heirs or successors to remove any such judge or judges upon the address of the Legislative Assembly".

EARC's view regarding the effectiveness of a guarantee or supposed guarantee of judicial tenure is that:

"Guarantees or supposed guarantees, of judicial tenure are implemented in various ways in different jurisdictions. Some prevent the Executive dismissing
judges unless Parliament petitions for a removal, but do not entrench the provision. That leaves it open to Parliament to erode the guarantee in two ways - to petition for removal pursuant to the legislation, or to enact an ordinary law which expressly or impliedly limits or repeals the guarantee...

In Queensland the Constitution Act of 1867 appears to guarantee tenure of Supreme Court judges by virtue of section 15, but since it is subject to amendment or repeal by any later inconsistent legislation the guarantee is fragile. An attempt to expressly repeal it would no doubt attract publicity - which gives the guarantee some strength - though less than absolute - but as McCawley's case shows, a provision of a later Act may affect the operation of section 15 without drawing express attention to the possibility, until it was acted upon" (EARC 1993, paras. 7.39-7.40. McCawley's case was discussed in para.17 of this Report).

33 EARC further argues that erosion of judicial tenure may result from the transfer of the jurisdiction of a particular court to another body which can leave judges with a guarantee of tenure but no jurisdiction. This occurred when the jurisdiction of the Commonwealth Industrial Court was transferred to the Federal Court of Australia in 1976 (EARC 1993, para.7.44-7.45).

34 EARC considers the situation in other jurisdictions where a tenure clause is more or less firmly entrenched in the Constitution. Section 72 of the Commonwealth Constitution protects judicial tenure by stipulating that removal of judges is by the Governor-General in Council, on an address from both Houses of Parliament in the same session, "on the ground of proved misbehaviour or incapacity". Section 72 is entrenched and can only be altered by a referendum of eligible voters. New South Wales has proposed entrenchment of s.53 of the Constitution Act 1902 (NSW) which provides for dismissal of a judicial officer on grounds of proved misbehaviour or incapacity. The Committee understands that the proposal to entrench this provision will be put to NSW voters in the near future.

35 However, EARC do not recommend entrenchment of a like provision in the Queensland Constitution at this time. EARC's focus is primarily on limiting the grounds for dismissal of Supreme Court and District Courts judges, and on establishing the procedure for such dismissal:

"The Commission considers it preferable to have a guarantee of tenure that can be bypassed only where there is a genuine case of misconduct or incapacity. The recent practice by Parliaments, Commonwealth and State, of constituting an independent inquiry into allegations against a judge should now be converted into a legal requirement" (EARC 1993, para.7.49).

Inclusion of District Courts Judges

36 EARC's recommendation at para.7.51(b) is that s.15 of the Constitution Act 1867 be re-drafted to modernise the language and to:

"require that before an address for the removal of a judge can be passed by the Legislative Assembly there must have been a finding of misconduct or incapacity as a judge by an independent tribunal consisting of at least three current or retired judges".
As with other aspects of judicial tenure, EARC includes judges of District Courts in this recommendation. The Committee indicated in para.27 its support of inclusion of District Courts judges. The Committee also sought the opinion of the Litigation Reform Commission and the Chief Justice of the Supreme Court of Queensland on whether District Courts judges ought to be included in the same removal procedure as that applicable to Supreme Court judges. The Litigation Reform Commission informed the Committee that:

"... the procedure for removal of District Court judges should be identical to that for Supreme Court judges".

In the opinion of the Chief Justice:

"It is of crucial importance that the security of tenure and independence of the judges should be effectively guaranteed by legislative provision. So far as the courts of Queensland are concerned, this need stands highest in the case of the Supreme Court. However, it can now be accepted that the tenure of judges of District Courts should be accorded equally effective protection. The importance of the jurisdiction which, as a result of amendments over the years has come to be discharged by the District Courts, now justifies members of those courts being accorded the highest level of security of tenure which is essential in the case of Supreme Court judges".

Clause 28 of the Draft Constitution Bill

EARC's recommendation regarding dismissal of judges is reflected in clause 28 of the draft Constitution Bill, which provides:

Removal of Judge for misbehaviour or incapacity

28(1) A Judge of the Supreme Court or a Judge of District Courts may be removed from office by the Governor on the address of the Legislative Assembly in support of a finding mentioned in subsection (2).

(2) The address may only be made after a tribunal has found that the person to be removed has been guilty of misconduct justifying removal or is incapable of performing the duties of office.

(3) The tribunal is to-

(a) be independent; and
(b) consist of at least 3 persons each of whom is a Judge or retired Judge of the Supreme Court or the High Court.

The Committee recommends several changes to clause 28. These are discussed in turn, beginning with clause 28(1).

Clause 28(1) of the draft Constitution Bill

(a) The Only Removal Process Available
The Committee believes that it is necessary to stipulate that the removal process in clause 28 of the draft Constitution Bill is the only valid method of removal of a Supreme Court or District Courts Judge. The reason is that there may be two historical alternative methods of removing judges.

The first concerns the Colonial Leave of Absence Act 1782 (22 Geo.III.c.75), commonly known as Burke's Act. Burke's Act was passed to prevent officers, including judges, who had received appointments by letters patent from performing their duties by deputy and remaining in England. The Act gave the Governor in Council of a Colony the power to remove a Judge, subject to an appeal to the Privy Council of England (Keith, 1912, p.1329).

In 1912 Keith argued that Burke's Act was impliedly amended by s.16 of the Queensland Constitution Act 1867, which provides for removal of judges on address of Parliament, so that Burke's Act probably no longer applies in Queensland. However in 1972 Fajgenbaum and Hanks stated that if Burke's Act has survived, the State Governor may remove a judge "on the ground of absence from the State without leave, neglect of duty, or misbehaviour" (Fajgenbaum and Hanks, 1972, p.345). It may be thought that the Australia Act 1986 has effectively extinguished the right of appeal to the Privy Council, but s.11 of that Act only applies to decisions of an Australian Court, not to decisions of a State Governor.

The second historical alternative applies to judges who are appointed by commission during good behaviour and is mentioned by both Fajgenbaum and Hanks (at page 345) and the Final Report of the Constitutional Commission. In its Final Report, the Constitutional Convention observed that:

"There is a question whether at common law judges appointed during good behaviour may have their offices vacated by a declaration of a court upon proof of the absence of good behaviour, under a procedure initiated by a writ of scire facias. This is a procedure not used since the Act of Settlement and there is doubt whether it is a form of action that has survived" (Constitutional Commission 1988, footnote 162).

The Committee makes the point that even if these methods of removal are still valid, they are unlikely to be used. However, because of the uncertainty that exists concerning the status of these methods, the Committee believes it would be prudent to ensure that the removal process applicable to Supreme Court and District Courts judges in clause 28 of the draft Constitutional Bill is the only method of dismissal available in Queensland. The insertion of the word "only" in clause 28(1) of the draft Constitution Bill would achieve this aim.

(b) Inclusion of the Grounds for Removal of Judges in Clause 28(1)

The Committee believes that the grounds for removal of Supreme Court or District Courts judges ought to be established in clause 28(1) rather than in clause 28(2), primarily for technical reasons, as the Committee recommends several amendments to clause 28(2), as discussed below.

The Committee recommends a redrafting of clause 28(1) to the effect that removal of a
Judge by the Governor on address of Parliament is the only method of removing such a Judge, on the grounds of proved misbehaviour or incapacity.

The Committee recommends that clause 28(1) of the draft Constitution Bill be amended to provide that, subject to subsection (2), a Judge of the Supreme Court or a Judge of the District Courts may only be removed from office by the Governor on address of the Legislative Assembly on the grounds of proved misbehaviour or incapacity.

Clause 28(2) of the draft Constitution Bill

There are several matters requiring attention in subsection (2).

(a) The Procedure and Process For Dismissal of Judges

Generally the Committee is of the view that the procedure of dismissal of judges, entailing the establishment of a tribunal, the grounds of dismissal applicable to judges, and the necessity of an address of Parliament, is sufficiently important to warrant inclusion in the Constitution. However, the powers, procedures and duties of the tribunal itself need not be contained in the Constitution.

A procedure providing for the removal of Supreme Court judges on the basis of misconduct already exists under the Criminal Justice Act 1989. The Committee found no discussion of this model in EARC's Report. Sections 27 and 28 of the Criminal Justice Act 1989 permit the Criminal Justice Commission to report on “court procedures and confidential matter”. Where such a report applies to a Supreme Court Judge, s.28 provides that:

"28(1) A report of the Commission is not sufficient ground for an address of the Legislative Assembly for removal from office of a Judge of the Supreme Court.

(2) If the Assembly resolves that further action in respect of such a Judge should be taken having regard to a report of the Commission, it shall-

(a) appoint a tribunal of serving or retired judges of any 1 or more of the State or Federal superior courts of Australia to inquire into the matter dealt with in the Commission's report in relation to the Judge; and

(b) defer any other further action until the findings and recommendations of such tribunal are known.

(3) When such tribunal is appointed the Commission shall furnish to it such number of copies of its report as the tribunal requires and all material in the Commission's possession relevant to the subject of the tribunal's inquiry".

The model available pursuant to the Criminal Justice Act 1989 has some merit in the Committee's view. Appropriately, the decision of whether further investigation is warranted rests with Parliament and, if Parliament decides that it is necessary to establish a tribunal, no further action can be taken against a Judge until the findings and recommendations of the tribunal are known. However, as the Litigation Reform
Commission pointed out, the *Criminal Justice Act 1989*:

"does not address the situation where the complaint against a judge relates to incapacity, and not to misbehaviour".

Indeed, s.29(4)(a) of the Act limits an investigation by the Criminal Justice Commission to "misconduct, such as, if established, would warrant his or her removal from office".

51 The Committee has reservations about recommending an amendment of the *Criminal Justice Act 1989* to include incapacity as a ground for dismissal of judges as it is not clear whether doing so goes beyond the scope of the responsibilities of the Criminal Justice Commission in s.23 of that Act. If the misbehaviour provision is retained in the *Criminal Justice Act 1989* and amended to include judges of the District Courts, dismissal on the ground of incapacity would then have to be provided for in another Act such as the *Commissions of Inquiry Act 1950*, which has a general function of facilitating inquiries by commissions of inquiry issued by the Governor in Council. This option seems rather disjointed and confusing.

52 A better option in the Committee's view is to stipulate the procedure regarding dismissal of judges, entailing the grounds for dismissal, the necessity of an address of Parliament, and the necessity of a tribunal, in the Constitution. The process, involving the powers, duties and responsibilities of the tribunal can be specified in another Act such as the *Commissions of Inquiry Act 1950*, but must be linked to the procedure stipulated in the Constitution. The simplest way of achieving a link may be to have the draft Constitution Bill provide that the powers, duties and responsibilities of the Tribunal shall be those prescribed by an Act of Parliament.

The Committee recommends that the draft Constitution Bill contain a provision that the powers, duties and responsibilities of the tribunal shall be those prescribed by an Act of Parliament.

(b) Terminology; Misconduct or Misbehaviour?

53 The Committee notes that the wording in clause 28(2) elaborates on the wording used in EARC's recommendation. Rather than referring merely to 'misconduct or incapacity,' clause 28 provides that address of Parliament for the removal of a Supreme Court judge or District Courts judge can only be made after a tribunal has "found that the person to be removed has been guilty of misconduct justifying removal or is incapable of performing the duties of office". The heading for clause 28(2) also uses the word "misbehaviour" instead of "misconduct". EARC do not explain why a different phrase is used in clause 28.

54 There appears to be no material difference between the meaning of the two expressions. However, the word "misbehaviour" is the traditional term that has been used regarding the removal of judges, and has the advantage of consistency of interpretation. Also, misconduct may have a narrower interpretation of relating to a Judge's official duties, whereas misbehaviour has been interpreted to include behaviour outside a Judge's official duties. The Commission of Inquiry into the behaviour of Justice Vasta considered the interpretation of "misbehaviour" by the Commonwealth Parliamentary Inquiry of 1986, in which Sir George Lush stated:
"Judges...cannot, however, be protected from the public interest which their office tends to attract. If their conduct, even in matters remote from their work, is such that it would be judged by the standards of the time to throw doubt on their own suitability to continue in office, or to undermine their authority as judges or the standing of their courts, it may be appropriate to remove them" (First Report, 1989, para.1.5.8)

55 The Commission of Inquiry concluded that it was necessary to apply community standards in their task of assessing whether the behaviour of the Judge warranted his removal from office:

"...if the behaviour is such that, in the circumstances, the judge would, in the eyes of right thinking members of the community, no longer be fit to continue to remain a judge, then the judge has fallen below the standard demanded of members of the judiciary" (First Report, 1989, para.1.5.9).

56 It can be seen from this broad interpretation of misbehaviour, that a Judge is answerable to the community for conduct within and outside of a Judge's official duties. This does not appear to be a well known fact if Matthew's submission to this Committee is typical of community opinion:

"There is no [EARC] recommendation to make judges more accountable to the people for their decisions. There is no recommendation for the community being reassured that the judiciary is not above reproach".

57 Although the judiciary are not elected officials who are accountable to the people in the way that members of Parliament are, it is nevertheless clear from the above discussion that judges are accountable to the community for their behaviour. All judges and magistrates take office subject to observation of certain conditions of appointment, and may be removed from office for breach of those conditions. EARC's recommendations with respect to the accountability of the judiciary appropriately relates to the grounds upon which a Judge may be removed from office.

58 On the matter of the wording of clause 28(2) of the draft Constitution Bill, the Committee recommends that clause 28(2) be amended to replace the word "misconduct" with the word "misbehaviour".

(c) The Standard of Proof

59 The word "guilty" in clause 28(2) of the draft Constitution Bill requires attention. Associate Professor Carney drew attention to the effect this word may have on the degree of proof applied to facts relevant to an inquiry. The word "guilty" seems inappropriate for a civil standard of proof, and may be interpreted by some to indicate a criminal standard of proof. The Commission of Inquiry considered a civil standard of proof to be the necessary and proper standard of proof when inquiring into the behaviour of Justice Vasta:

"In criminal proceedings every fact necessary to be established in order that there may be a conviction must be proved to such a degree that the tribunal can be satisfied beyond reasonable doubt of the guilt of the accused. In most civil
proceedings proof of any fact is required only to the extent that the tribunal can reach its decision on a balance of probabilities. In other words there is a criminal standard of proof and a civil standard ...

After due deliberation, the Commissioners decided that the criminal standard of proof would not be an appropriate yardstick. In Australia it is well settled that, subject to statute, the standard of proof beyond reasonable doubt is applicable only in criminal proceedings ... The Commission of Inquiry is not a criminal proceeding. The Commissioners are not required to determine the criminality of any of the behaviour in question. The Commissioners considered that the civil standard of proof on the balance of probabilities was the proper standard to apply" (First Report, 1989 paras. 1.6.3 and 1.6.8-1.6.9).

The Committee does not think it appropriate to impose a criminal standard of proof on commissions of inquiry into the behaviour of a Judge. The Committee recommends that clause 28(2) be redrafted to imply that a civil standard of proof be applied by a commission of inquiry into the misbehaviour or incapacity of a Judge.

The Committee recommends that clause 28(2) of the draft Constitution Bill be redrafted to provide that the address of the Legislative Assembly may only be made after a tribunal appointed pursuant to subsection 3 has reported to the Legislative Assembly that there is proved misbehaviour or incapacity on the part of the Judge, warranting removal from office.

(d) Incapacity as a Ground for Removal

61 Incapacity has not been used as a ground for removal of Queensland Supreme Court judges before, although incapacity as a ground for dismissal can apply to magistrates (s.17 Stipendiary Magistrates Act 1991) and to District Courts judges (s.13(1) District Courts Act 1967). The Litigation Reform Commission voiced support for:

"the EARC proposal to limit the grounds of dismissal to proved misconduct justifying removal or proved incapacity as outlined in clause 28 of EARC's draft Constitution Bill".

62 The Chief Justice informed the Committee that:

"Judges of the Supreme Court and also judges of District Courts should be subject to removal only by address of Parliament and this should, in the case of judges at both those levels, be only on the grounds of proved misbehaviour or incapacity".

63 The Committee notes that the Constitutions of the Commonwealth and the Territories have contained these grounds for removal of judges for many years, and that New South Wales recently amended its Constitution to include incapacity as a ground for removal. The Committee understands and supports the need to include incapacity as a ground for removal from office of District Courts and Supreme Court judges.

The Committee endorses EARC's inclusion at para.7.51(b), of incapacity as a ground for removal from office of Supreme Court or District Courts judges.
Clause 28(3) of the draft Constitution Bill

(a) The Independence of the Tribunal

The Committee supports the establishment of a tribunal to deal with findings relevant to possible dismissal of Supreme Court and District Courts judges. However, the term "independent" in clause 28(3)(a) is not defined in the draft Constitution Bill. The independence of the tribunal is linked to the method of appointing tribunal members. EARC state regarding appointment of tribunal or Commission members:

"... but if that Commission [tribunal] were appointed by the Executive the problem of possible bias may not be effectively resolved ...

the Government Departments' submission (S20) suggested that a Commission could not be independent where they were appointed by the Executive. Whilst this situation could be avoided by having the judiciary itself select the members of such a Commission, this would represent a lack of accountability contrary to most contemporary expectations" (EARC 1993, paras.7.15 and 7.25).

Hence, although EARC recommends the establishment of an independent tribunal no conclusion is reached as to how the tribunal should be established. Appointment of tribunal members by the Executive, or by the judiciary itself are dismissed by EARC as lacking in accountability. Without clear definition, the provision in clause 28(3)(a) of the draft Constitution Bill that the tribunal "be independent" is meaningless.

In the opinion of the Chief Justice, members of a tribunal:

"... should be appointed in a mode specified in the legislation desirably by a resolution of the Assembly as s.28 of the [Criminal Justice Act 1989] ... requires".

The Committee notes that a resolution of the Assembly was also used to appoint the three members of the Commission of Inquiry pursuant to the Parliamentary (Judges) Commissions of Inquiry Act 1988. The Committee considers that it would be appropriate to appoint tribunal members by resolution of the Legislative Assembly. The words "be independent" should be deleted from clause 28(3)(a) of the draft Constitution Bill, and replaced with a provision for tribunal members to be appointed by a resolution of the Legislative Assembly.

The Committee recommends that the words "be independent" in clause 28(3)(a) of the draft Constitution Bill be deleted and replaced with a provision that members of the tribunal are to be appointed by a resolution of the Legislative Assembly.

(b) The Composition of the Tribunal

On the matter of the composition of the tribunal, the Chief Justice informed the Committee that:

"a tribunal of the type contemplated by s.28 of the Criminal Justice Act 1989 has some advantages over that described in clause 28 of EARC's draft Bill. The
judges or retired judges constituting the tribunal should be from one or more of the following Courts: the High Court, the State Supreme Courts and the Federal Court of Australia; should be of a number specified in the legislation ..."

69 Section 28 of the Criminal Justice Act 1989 provides that the members of a tribunal are drawn from "serving or retired Judges of any one or more of the State or Federal superior courts of Australia". EARC's recommendation at para.7.51(b) states that the tribunal should consist of "at least three current or retired judges". On the other hand, clause 28(3)(b) of the draft Constitution Bill provides that the tribunal "consist of at least 3 persons each of whom is a Judge or retired Judge of the Supreme Court or the High Court", thereby excluding judges of the Federal Court. It does not appear to the Committee that EARC intended to exclude any particular group of judges from serving on a tribunal. Therefore, the Committee supports the view that members of a tribunal ought to be chosen from any one or more of the High Court of Australia, the State Supreme Courts, or the Federal Court of Australia. The Committee recommends that clause 28(3)(b) of the draft Constitution Bill be amended to reflect this.

The Committee recommends that clause 28(3)(b) of the draft Constitution Bill be amended to provide that the tribunal consist of at least 3 serving or retired Judges of any one or more of the High Court of Australia, the State Supreme Courts, or the Federal Court of Australia.

70 As regards the number of judges to sit on a tribunal, the Committee is not aware of any information suggesting that EARC's stipulation of at least three judges would be unsatisfactory. Hence, the Committee believes that it would be appropriate that a tribunal would consist of three or more judges from the Courts specified in the recommendation above.

Judges' Salaries

71 Section 17 of the Constitution Act 1867 provides for the continuation of Supreme Court judges' salaries:

"17. Their salaries secured during the continuance of their commissions. Such salaries as are settled upon the judges for the time being by Act of Parliament or otherwise and all such salaries as shall or may be in future granted by Her Majesty her heirs and successors or otherwise to any future judge or judges of the said Supreme Court shall in all time coming be paid and payable to every such judge and judges for the time being so long as the patents or commissions of them or any of them respectively shall continue and remain in force".

72 EARC states that the s.17 heading used to have a marginal note which referred to the salaries being "secured" during the continuance of their office and that in Cooper v Commissioners of Taxation (NSW) (1907) 4 CLR, the High Court interpreted this to mean that the salary should not be diminished. However, EARC argue that this is an imperfect guarantee if the real value of the salary diminishes over time:

"Concern was expressed by Sir Ninian Stephen (1989), a former Justice of the High Court, that dependence of the judiciary on the Executive for salary increases in a period of high inflation could reduce the judges' feeling of independence" (EARC 1993, para.7.69).
Consolidation and Review of the Queensland Constitution

73 EARC therefore recommends a provision for indexation of salaries to be developed by Parliament, although the details would not belong in the Constitution (EARC 1993, para.7.69-7.72). Clause 29(1) of the draft Constitution Bill provides that judges of the Supreme and District Courts cannot have their salaries decreased and that salaries remain equivalent to at least their original value. Clause 29(2) provides that a Judge of the Supreme Court or a Judge of the District Courts is entitled to have the amount of the salary increased at reasonable intervals to ensure that its amount continues to be at least equivalent to its original value.

74 Although it is mentioned that the Salaries and Allowances Tribunal is responsible for the setting of all judges salaries and allowances, no discussion or evaluation of this means of determining judges salaries and allowances is provided by EARC. Pursuant to the Judges (Salaries and Allowances) Act 1967 the Tribunal consists of 3 members appointed by the Governor in Council, who shall not be judges of the Supreme or District Courts, the Land Court or a Commissioner appointed under the Industrial Relations Act 1990. The Chairperson of the Tribunal can convene a meeting of the Tribunal at any time, and the Tribunal must report at least annually to the Minister.

75 The Committee notes that some significant amendments to the Judges (Salaries and Allowances) Act 1967 are proposed in the Judicial Legislation Amendment Bill 1994, (the Bill) currently before Parliament. The Bill would enable the Salaries and Allowances Tribunal to set the salaries and allowances of Industrial Commissioners and Members of the Land Court, in addition to Supreme Court judges, District Courts judges and magistrates. It would also enable the Tribunal to combine allowances and expenses of judges and magistrates with the relevant salary component, if it is considered appropriate.

76 Importantly, EARC's concern that salaries of Supreme and District Courts judges should not be reduced is addressed in the Bill, which provides that the total of salaries and allowances of the various judges (except Supreme Court judges) and of magistrates cannot be reduced by a determination of the Salaries and Allowances Tribunal. With respect to Supreme Court judges, the explanatory notes accompanying the Bill state that:

"This protection has always applied to Supreme Court Judges by virtue of section 17 of the Constitution Act 1867" (p.5).

77 It is clear from this statement that s.17 of the Constitution Act 1867 is relied upon to provide the basis for the non-reduction of Supreme Court judges’ salaries, since the Bill itself does not make such provision. The Committee supports the retention of this protection for Supreme Court judges and its extension to District Courts judges.

The Committee endorses clause 29(1) of the draft Queensland Constitution Bill, which provides that the amount of the salary of a Judge of the Supreme Court or a Judge of District Courts may not be decreased.

78 However, the Committee does not support the indexation of judges' salaries as reflected in clause 29(2) of the draft Constitution Bill. EARC has not demonstrated the merits of this, or shown any existing inequities in the present system of determining judges' salaries. Under the Judges (Salaries and Allowances) Act 1967 s.13(2) provides that:
"(2) The Tribunal must not decide that changes should be made to the salaries and allowances of a Judge or the salaries of a Magistrate unless it considers that the changes are equitable after having had regard to the rate of salaries and allowances payable to Judges or Magistrates of the Commonwealth and of other States and the Territories and to any other matter that in the opinion of the Tribunal has relevance to the responsibilities and conditions of service of such a Judge or such a Magistrate".

This provision is preserved in s.15 of the Judicial Legislation Bill. The Committee considers that this and the provision that salaries cannot be decreased, provides a reasonable basis for changes to salaries and allowances. The amendments provided for in the Judicial Legislation Amendment Bill indicate that judges' remuneration is a very complicated matter, and that circumstances may differ for certain groups of judges. The Committee believes that the financial remuneration of these groups are best dealt with within the present system, and that clause 29(2) should be deleted from the draft Constitution Bill.

The Committee recommends that clause 29(2) of the draft Constitution Bill, which pertains to increases in the salaries of Supreme Court or District Courts judges, should not be adopted.

OPERATIONS OF PARLIAMENT

Quorum

In its Report on Review of Parliamentary Committees EARC recommended that s.13 of the Legislative Assembly Act 1867 be incorporated into the Standing Rules and Orders of the Parliament, but has now decided that its constitutional significance warrants its inclusion in the Constitution (EARC 1992, paras.6.12 and 6.14). In the Parliamentary Committees Report EARC noted:

"... although the size of the House has increased by more than 300 percent since 1859, the size of a quorum for the conduct of business has not been increased from 16 in all that time" (EARC 1993, para.11.29).

Section 13 of the Legislative Assembly Act 1867 provides that the quorum of the Legislative Assembly consists of 16 Members. In EARC's view that figure is too low:

"The Commission believes that as the Constitution is to specify 89 Members to represent the 89 electoral districts of the Legislative Assembly, a more appropriate quorum would be 23 rather than the 16 Members provided in the Legislative Assembly Act 1867 or the "one quarter of the Members of the House' recommended previously by the Commission" (EARC 1993, para.6.17).

Clause 8 of the draft Constitution Bill proposes that the quorum be 23 members of the Legislative Assembly. The Committee however believes that the quorum should remain at 16. A large number of members now serve on various Parliamentary committees. Not counting Estimates Committees, 45 Members currently serve on 7 Parliamentary committees. Four of those Members serve on two committees. Of the total of 89 members, the 18 Ministers and the Speaker do not serve on committees, leaving 70
members available for committee service. Most committee business is conducted when the Legislative Assembly sits, so that a quorum of 16 enables members to meet their obligations to attend Parliamentary sittings and to meet with their respective committees.

83 The number of members serving on committees will be similar when the Standing committee system proposed by this Committee in the Report on Review of Parliamentary Committees is implemented. Both the proposed committees and the present committees have large areas of responsibility requiring considerable time and energy of committee members. As yet, the recommendation of this Committee, that a half day per parliamentary sitting be set aside for committee meetings has not been implemented, necessitating the holding of meetings during sitting times. Raising the quorum to 23 would unnecessarily hinder the ability of members to attend to committee business and fulfil sitting obligations in the House.

84 Further, the Committee is unaware of evidence demonstrating that a quorum of 23 rather than 16, would facilitate better performance of the institutional functions of Parliament. Modern technology allows members to monitor the business of the House from private offices and other locations within Parliamentary buildings. Members may therefore follow debates and proceedings of Parliament without having to be physically present in the Legislative Assembly.

85 The Committee reaffirms the view expressed in its Report on Review of Parliamentary Committees where it was recommended that the Standing Orders Committee should assess EARC's recommendation of raising the quorum (PCEAR 1993, p.87). The Committee notes that the ratio of members of the Commonwealth House of Representatives necessary to constitute a quorum is one fifth of the whole number of members. In Queensland this would result in raising the quorum from 16 members to 18 members.

The Committee recommends that clause 8 of the draft Queensland Constitution Bill be amended to retain a quorum of 16 members to sit in the Legislative Assembly pending the findings of the Standing Orders Committee on this matter.

The Speaker

86 In a submission to this Committee Matthews recommended that:

"... a clause be written in our Queensland Constitution defining the position of Speaker and ensuring this position is elected by a full sitting of each new parliament".

87 Matthews is obviously unaware that such a provision has existed since 1867 and is embodied in s.12 of the Legislative Assembly Act 1867:

"12. Election of the Speaker. 18 and 19 Vic. c.54. The members of the Legislative Assembly shall upon the first assembling after every general election proceed forthwith to elect one of their number to be Speaker, and in case of his death resignation or removal by a vote of the said Legislative Assembly the said members shall forthwith proceed to elect another of such members to be such Speaker..."
The issue of the election of the Speaker was dealt with in EARC's Report on Review of Parliamentary Committees where it was recommended that as a provision relating to Parliament, s.12 of the Legislative Assemblies Act 1867 should be contained in the Queensland Parliament Bill (EARC 1992, para.10.35). Consequently, clause 76 of EARC's draft Queensland Parliament Bill provides that the Speaker is "chosen in accordance with the standing rules and orders."

In its Report on Parliamentary Committees, this Committee agreed with that recommendation and clause 66 of the Committee's draft Queensland Parliament Bill also provides that the Speaker is "chosen in accordance with the standing rules and orders". The Committee reaffirms that view.

Submissions to EARC proposed a need for a mechanism to protect the independence of the Speaker:

"David Russell QC pointed to the tradition in the Parliament of the United Kingdom, where the Speaker, once elected, adopts a completely non-partisan role and is unopposed, at least by the major parties, at subsequent elections" (EARC 1993, para.8.59)

EARC considers that making a recommendation on this matter would go beyond the consolidation exercise undertaken for the Report on the Constitution. Therefore, EARC recommend that the proposed Legal and Constitutional Committee further review the matter of the independence of the Speaker (para. 8.62). The Committee supports this recommendation.

The Committee endorses EARC's recommendation at para.8.62 that the proposed Legal and Constitutional Committee further review the matter of the independence of the Speaker.

ELECTORAL DISTRICTS

In the Report of Review of Parliamentary Committees EARC outlined various changes to the numbers of members in the Legislative Assembly:

"For the first Parliament in 1859 there were 26 MLAs. This number had increased to 72 by 1887. The Legislative Assembly then remained at 72 until 1931 when it was reduced to 62. Since then the size of the House has increased progressively: to 75 in 1949; to 78 in 1958; to 82 in 1971; and finally to its current level of 89 in 1985" (EARC 1992, para.11.28).

In 1992, ss.1A and 1B of the Legislative Assembly Act 1867 was amended to provide that the Assembly will consist of 89 members and that each member is to represent 1 of the 89 electoral districts provided for in the Electoral Act 1992. Clauses 4 and 5 of the draft Constitution Bill reflect this and the Committee agrees with those provisions. However, should there be a fully entrenched Constitution in the future it would be wise in the Committee's view to refer to electoral districts without specifying a particular number in light of the population growth predicted to occur in Queensland. (Skinner, J.L., Barker, R.A., and Gillam, M.E., 1988).
In that event it would be sufficient to have a general provision stating that each member of the Legislative Assembly represents one of the electoral districts provided for in other legislation - currently the *Electoral Act 1992*. Such provision would entrench the method of representation in the Constitution while allowing the various electoral matters which are the responsibility of the Electoral Commission to be administered. Currently under the *Electoral Act 1992* these responsibilities include electoral redistribution, conduct and promotion of research into electoral matters and provision of information on electoral matters to the Legislative Assembly, the government, government departments and government agencies (ss.8 and 35).

**PROXY VOTING**

Provision is made in ss.15 and 16 of the *Legislative Assembly Act 1867* for proxy voting. EARC reaffirms its recommendation in the *Report on Review of Parliamentary Committees* that these sections be repealed:

"These sections provide that members may notify the Speaker that they wish to nominate another member as a proxy because ill-health precludes them attending and voting in the House. The sections were inserted into the Act during the post-World War I influenza epidemic when, according to Alan Morrison:

"In 1922, during a most bitter session, the Opposition took advantage of the reduction of the government's majority by defections and illness and refused to grant pairs. For a short while legislation was being passed only by the casting vote of the speaker or Chairman of Committees ... so the Premier (EG Theodore) secured the passage of a measure giving the Speaker power to allow a member on production of sufficient medical evidence to authorise a proxy to vote on his behalf. During the remainder of the session, more than 120 proxy votes were exercised".

The Commission considers that these sections have no place in either the proposed Queensland Parliament draft Bill or the Legislative Assembly Act 1867. There is no need in a modern statute for provisions designed to ensure the political survival of a government of the 1920s. Sections 15 and 16 of the Act should be repealed" (EARC 1992, paras.10.36-10.37).

Research conducted by this Committee revealed that the provision has in fact been utilised 3 times since 1923. On all 3 of those occasions in 1986 Members were incapacitated due to a surgical operation. Technically the provision functions as a last resort, available only if the absent Member "through no fault on his part has failed to secure a "Pair" during the period specified..." (s.15). Pairing is an informal method which "enables a Member on one side of the House to be absent for any votes when a Member from the other side is to be absent at the same time or when, by agreement, a Member abstains from voting" (Browning, 1989 p.311).

In the light of this the Committee believes that the provision for proxy voting has not been abused and should be retained to be used as a last resort in case of medical emergencies. However, the Committee does not think it appropriate that the provision should based on the inability of a member to obtain a pair. The practice of pairing has no legal status. The Committee recommends that approval of a Member's notification of a proxy vote should be
based on a justified medical emergency, evidenced by at least two medical certificates presented to the Speaker in the manner currently prescribed in s.15 of the Legislative Assembly Act 1867.

The Committee recommends that clause 9 of the draft Constitution Bill make provision for proxy voting based on a justified medical emergency, certified by at least two medical certificates.

**SALARIES AND ALLOWANCES OF MEMBERS OF PARLIAMENT**

98 Submissions to EARC did not support inclusion in the Constitution of provisions related to payment of members' salaries. EARC agrees that this is an administrative matter that no longer has constitutional status. EARC reaffirms an earlier recommendation with respect to members' salaries and allowances stated in the *Report on Review of Parliamentary Committees* (EARC 1992, para.6.127). In that Report EARC recommended that an independent tribunal to determine salaries and allowances of members of Parliament be established, and that the *Parliamentary Members’ Salary Act 1988* be redrafted and incorporated into the draft Queensland Parliament Bill to authorise the payment of salaries and allowances to members and to provide for the establishment of such a Tribunal.

99 The Committee considers that it is unnecessary to redraft the *Parliamentary Members’ Salaries Act 1988*. That Act provides that the rate of members' salaries is at all times $500 per annum less than the annual salary rate of a member of the Commonwealth House of Representatives. Provision is also made for additional salary applicable to Office Holders in the Assembly and Ministers. In the Committee's opinion, salary provisions are already adequately catered for in the *Parliamentary Members' Salaries Act 1988*.

100 The Committee's response to the recommendation regarding allowances was contained in the *Report on Review of Parliamentary Committees*:

"The Committee recommends against the establishment of a Parliamentary Allowances Tribunal as recommended by EARC, and supports the determining of members' Allowances by Governor in Council. The Committee recommends that allowances should also be paid to the Chairs and members of select committees appointed by Parliament" (PCEAR 1993, para.12.6.6).

101 The Committee reaffirms that view and notes that a statutory basis for the payment of members allowances is contained in the *Parliamentary Legislation Amendment Bill 1992* currently before the House. Whilst the Committee has recommended the withdrawal of this Bill, a similar statutory basis exists in the proposed *Queensland Parliament Bill* for the determination of allowances by the Governor in Council. Therefore the Committee does not support EARC's recommendations in paras. 6.127 and 6.128 of the *Report on Review of Parliamentary Committees*:

(a) that upon the passage of the Queensland Parliament draft Bill through the Legislative Assembly an independent tribunal be established to determine salary and allowances of members of Parliament (para.6.127);

(b) that section 6(2) and (3) of the Constitution Act Amendment Act 1896 be re-
drafted and incorporated into the Queensland Parliament draft Bill together with other provisions concerning salaries (para.6.128).

**The Committee recommends that** salaries of members of Parliament continue to be paid according to the Parliamentary Members' Salaries Act 1988, or an equivalent Act, and that members' allowances be determined by the Governor in Council on a statutory basis.

### FUTURE CONSTITUTIONAL REFORM

**BACKGROUND**

102 In Chapter 8 EARC expresses its view regarding any future constitutional reform:

"As noted in earlier chapters, the Commission's recommendations for immediate constitutional reform are directed, in the first place, to a consolidation of existing constitutional provisions, with the addition only of matters which will supplement the Rights and Freedoms Review, that is, particularly, provisions relating to judicial independence. The Commission makes no further recommendations in this chapter for additional provisions to be included in the Queensland Constitution. However, the Commission has considered each of the matters listed below and makes some observations as to those that, in its opinion, may be particularly worthy of further consideration when steps are taken to draft a fully "entrenched" Constitution for the State" (EARC 1993, para.8.3)

103 EARC's reference to a fully "entrenched" Constitution needs to be seen in context. EARC acknowledges that:

"There is a preliminary question of constitutional law as to whether it is within the power of the Queensland Parliament to entrench all of the provisions that might be included in a Constitution Act" (EARC 1993, para.4.4)

104 The arguments concerning this issue are discussed in Chapter 4 of EARC's Report and need not be reiterated here. EARC acknowledges that until this question is clarified, it would be preferable not to proceed with the drafting of a new Constitution (EARC 1993, para. 4.83). EARC concludes:

"Lacking a settlement of this matter by the Supreme Court, the Commission has continued the review and consolidation on the assumption that a fully-entrenched Constitution would be legally binding". (EARC 1993, para.4.28)

105 The Committee respects this view and does not intend to enter into legal debate over the issue of entrenchment. Indeed, the Committee supports EARC's recommendation that the question be resolved by bringing an action for a declaration in the Supreme Court.

**The Committee endorses** EARC's recommendation at para.4.27 that the Attorney-General bring an action for a declaration in the Supreme Court of Queensland as to the effect of section
The Committee proceeds on the basis that the issue will have been resolved by the Courts by the time any future constitutional reform is considered.

The focus of Chapter 8 of EARC's Report is on the process that might be used to draft any future fully entrenched Constitution, and the possible content of any such Constitution.

DRAFTING A FUTURE CONSTITUTION

The Appropriate Parliamentary Committee

In EARC's view an appropriate process for drafting a new fully entrenched Constitution in the future would involve the establishment of a Constitutional Convention:

"The Commission recommends that the Parliamentary Electoral and Administrative Review Committee (or its successor in a restructured parliamentary committee system) conduct a more extensive review, either by itself or by commissioning some other independent body, with a view to the convening of a Constitutional Convention to draft a new Constitution for the State.

The Commission further recommends that the aim of this process be the production, within five years, of a Constitution which is, subject to the Constitution of the Commonwealth of Australia, the supreme law of Queensland and capable of amendment only with the approval of the majority of voters at a referendum" (EARC 1993, paras.4.90-4.91).

It is expected that the standing committee system proposed by this Committee will be implemented in the near future, at which time the work of this Committee will be terminated. This being so, the Committee considers it appropriate that the proposed Legal and Constitutional Committee give consideration to any future process involving the drafting of a new Constitution.

In its Report on Review of Parliamentary Committees the Commission recommended that all scrutiny committees should have:

"The power to generate their own inquiries and accept references from the House - the latter type of references to be accorded a high priority by committees". (EARC 1992, para.13.53)

EARC's draft Queensland Parliament Bill provided that one of the areas of responsibility of the Legal and Constitutional Committee was:

"legal, constitutional, parliamentary and electoral reform (other than the standing rules and orders). (EARC 1992, clause 46(3).

In anticipation of constitutional changes arising in the future, this Committee preferred that the Legal and Constitutional Committee be given a more specific role with respect to
Consolidation and Review of the Queensland Constitution

The Committee's draft Queensland Parliament Bill therefore gave the Legal and Constitutional Committee a general area of responsibility concerning constitutional reform and a specific area of responsibility to include:

"...examining and reporting on any Bill that expressly or impliedly repeals or amends any of the following Acts..." [being Acts relevant to the Constitution] (PCEAR 1993, clauses 38 and 40).

The limited life of this Committee means that it cannot do justice to a task that requires a great deal more research and consultation. The proposed Legal and Constitutional Committee, as a specialist Committee on constitutional matters, will have the requisite expertise and time to give consideration to the many matters regarding a new Constitution.

Consequently, the Committee endorses EARC's recommendations that the proposed Legal and Constitutional Committee;

review the constitutional conventions concerning membership of the Executive Council (para.6.194);

review the status of local government in the Constitution (para.6.241); and

should have referred to it the matter of selection of judges and other matters concerning the judiciary (para.7.81).

The Committee is aware of the need for greater public consultation and involvement in the making of a new Constitution. The public response to this Committee regarding the Constitution has been very poor. Only 22 submissions have been received, none of which advocated adoption of EARC's recommendations regarding a future Queensland Constitution. It seems to the Committee that community debate on constitutional issues is focused on changes to the Commonwealth Constitution rather than dissatisfaction with the Queensland Constitution.

The current debate at Commonwealth level regarding changes to the Commonwealth Constitution may have a significant impact on the Queensland Constitution in the future. Any new Queensland Constitution should harmonise with such changes to the Commonwealth Constitution, otherwise there is a danger of having parts of the Queensland Constitution negated by Commonwealth constitutional changes. Therefore, any future drafting of a new Queensland Constitution needs to be conducted in the context of the development and progress of the Commonwealth constitutional debate. It may be possible to generate the necessary level of public interest if changes to the Queensland Constitution are linked to future changes to the Commonwealth Constitution, since such changes will be widely publicised if they occur.

The Committee reaffirms its view that the proposed Legal and Constitutional Committee would be the most appropriate Parliamentary Committee to oversee matters relevant to drafting a new Queensland Constitution. Should that Committee not be established, the Committee is of the opinion that Parliament should establish a Standing Committee specifically for that purpose.

In this Committee's opinion, there are two additional matters which the proposed Legal and
Consolidation and Review of the Queensland Constitution

The Committee recommends that any future process, or other matters involving the drafting of a new Queensland Constitution, should be considered by the proposed Legal and Constitutional Committee.

ENTRENCHMENT ISSUES

120 The most fundamental question concerning entrenchment is whether it is desirable or not. In the Committee's opinion, entrenchment of a future Queensland Constitution should not be accepted without question. A brief discussion of the consequences which flow from entrenchment and an alternative option to changing the Constitution by referendum is contained below. However, the Committee considers that these issues require further exploration by the proposed Legal and Constitution Committee.

121 Walker defines an entrenched clause as:
"A clause in a constitution or statute which can be amended or repealed only by some special procedure or by a stated majority and is thereby to some extent protected from hasty or casual amendment. It normally deals with fundamental institutions or rules" (Walker, 1980 p.421).

122 EARC favours entrenchment on the grounds that:

"...entrenchment ensures the people must be asked before the Constitution is changed. This effectively overturns the doctrine of parliamentary sovereignty. In light of the fact of executive control of the Parliament, the removal of parliamentary sovereignty would be a strike for direct democracy as opposed to current applications of representative democracy. Because the Executive controls the Parliament, there is a strong possibility that a single political party could overturn the Constitution whenever it wished" (EARC 1993, para.4.103).

123 The Committee is aware of the dangers inherent in the Executive controlling the Parliament, but considers that there are two other matters worthy of note. The first point is the problems associated with entrenching matters that may seem timeless, but which may require further amendment to reflect changed values and attitudes of future generations. The difficulties associated with achieving changes to the Commonwealth Constitution by referendum are well documented. History has shown the impracticality of assuming that if changes to an entrenched Constitution are desired, they can be achieved simply by holding a referendum.

124 Since 1901, there have been 18 referendum days on which people have voted on 42 Constitution Alteration Bills to amend the Commonwealth Constitution, but only eight have been successful (Lane 1994, p.5). It has been almost impossible to make changes to the Commonwealth Constitution. Lane has noted that:

"The latest [referendum], in September 1988, was the most disastrous attempt since Federation. Despite a two-year education and research program by the 1986-1988 Constitutional Commission and expensive lead-up advertising, the national vote was 2:1 against the three proposals and nearly the same ratio against the fourth proposal. And the State-by-State vote was the same: to every proposal, 'No'" (Lane 1994, p.5).

125 The four unsuccessful proposals of 1988 concerned a variety of changes, some of which could have been expected to attract wide community support:

(a) Provision for 4 year maximum terms for members of both Houses of the Commonwealth Parliament;

(b) To ensure fair and democratic parliamentary elections throughout Australia;

(c) To recognise local government;

(d) To extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for person whose property is acquired by any Government.
126 EARC gives examples of matters worthy of entrenchment by referendum as representative parliament through a fair and just electoral system, and independence of the judiciary (EARC 1993, para.4.102). These matters may indeed be timeless. However, unless the drafting of such provisions can capture present community standards while catering for future social attitudes, changes may still be necessary. The difficulty of changing the Commonwealth Constitution by referendum has contributed to the increasing importance of the role of the High Court in interpreting constitutional issues which have a direct impact on Australian society.

127 In a submission to EARC, the Crown Solicitor observed:

"I don't think it's being cynical to suggest that if the Founding Fathers of the Commonwealth Constitution (or the people who voted for it in the State Referenda in 1899) had been able to foresee what the High Court would ultimately make of its provisions over the years, there would never have been a Federation, or if there had been, it would have been framed in different terms with different safeguards.

Yet because the Commonwealth Parliament must initiate any Referendum for change, (and traditionally, has only done so when it wants to increase its powers), the fundamental changes that have been made to it, have been made by the High Court, not by the people, as the Constitution envisaged.

I am therefore of the opinion that rigid or entrenched Constitutions are of limited use, and have the potential for creating more problems than they will ever solve."

128 A second consideration with respect to a fully entrenched Constitution is the cost of unsuccessful referendums. The costs associated with printing, dissemination, and collation of referendum material are considerable. In 1988, the unsuccessful referendum cost approximately $40 million (The Australian Financial Review, 11 November 1988).

129 Of the 7 Queensland referendums, only two have concerned the Constitution and both failed. The first referendum was held in 1917 regarding the abolition of the Legislative Council and the second, held in 1991, proposed an extension of Parliamentary Terms to 4 years. The referendum on Parliamentary Terms cost $3.02 million.

130 If entrenchment is preferred, an alternative to holding a referendum is to require the approval of a majority of the Legislative Assembly for changes to the Constitution. The ratio chosen should be such that it requires support from opposition parties even when the government holds a large majority. This special measure is consistent with the definition of entrenchment referred to in para.121 in so far as it would protect the Constitution from "hasty or casual amendment". Section 18 of the Victorian Constitution Act 1975 requires the support of an absolute majority in both Houses before certain constitutional changes can be made. The range of matters is fairly broad and relates to the constitution of Parliament, the constitution of the Council or the Assembly, the Governor, local government, and the Supreme Court.

131 In 1988 the method of changing the Commonwealth Constitution by a specified Parliamentary majority was considered and rejected by the Constitutional Commission, which considered that:
"More than five hundred submissions were received opposing any change which denied electors a say in the constitutional alteration process ..."

We believe that the democratic feature of the Australian Constitution which requires that it not be altered in any respect except by a vote of the people at referendum should be preserved" (Constitutional Commission 1988, p.877).

However, it has been acknowledged that the most important source of opposition to referendums has been organised either around partisan political interests, or at state level. The history of both Commonwealth and State referendums demonstrates that a majority 'yes' vote has only resulted when there has been bipartisan support for the changes proposed at referendum, or when no party political position has been taken. Indeed, on this point it has been observed that

"Whether a [Commonwealth] referendum proposal has been subject to organised opposition has been a critical factor. None of the eight successful proposals encountered any substantial body of opposition. Each of those rejected did" (McMillan, Evans and Storey, 1983, p.29).

This suggests that representative democracy can, via a majority of Parliament, effect change to the Constitution that achieves the same outcome as a referendum, in that broad community support is required for a bipartisan approach to change. It is notable that after the defeated Commonwealth referendum of 1988, the Federal Labor Party reportedly inferred that it did not intend to pursue future Constitutional change "unless it can first win Opposition support for its proposals" (Canberra Times, 4 November 1988). The Committee is of the view that entrenchment by the methods of referendum or by a majority of Parliament require further investigation by the proposed Legal and Constitutional Committee.

The Committee recommends that:

(a) the question of whether entrenchment of a new Queensland Constitution is warranted should be referred to the proposed Legal and Constitutional Committee; and

(b) prior to any recommendation made in favour of entrenchment, the proposed Legal and Constitutional Committee should evaluate the merit of entrenchment by means of a specified majority of the Legislative Assembly as well as entrenchment by referendum.

ENTRENCHMENT AND THE PRESENT CONSTITUTION

As regards the present Queensland Constitution, EARC observed that:

"The provisions currently in Queensland law requiring referendum were inserted by Parliament without being put to the people by way of referendum. Parliament thereby transferred a tiny slice of its power to the people without first consulting the people" (EARC 1993, para.4.92).

Leaving aside the earlier legal issue regarding Parliament's power to entrench certain provisions, EARC identified an additional legal problem relevant to the present Queensland
"It may be the case that further entrenchment will not be binding unless it has been approved by referendum. Several of the legal opinions received by the Commission suggest that the addition of new entrenched provisions without referendum would breach the requirements of one or the other of the present entrenched sections - though opinions differ as to which sections would be breached ...

The Commission is unable to determine an authoritative answer to this legal question, but notes that the legal doubts reinforce its conclusion, on philosophical grounds, that the approval of the electorate should be sought before any further entrenched provisions are added to the Queensland Constitution.

The Commission recommends that without the prior approval of the people by referendum there should be no further entrenchment of any part of the Queensland Constitution” (EARC 1993, paras.4.104, 4.109, and 4.110).

The Committee has expressed reservations with respect to a future fully entrenched Constitution. It therefore supports EARC's recommendation that there should be no further entrenchment of the present Queensland Constitution without the prior approval of the people by referendum. In the 22 submissions received by the Committee, there was overwhelming support for public involvement in changes to the present Constitution by way of referendum. The following statement from the submission of D N Foster encapsulates the general view of those submissions:

"The Queensland Constitution must be guarded against any change, except where open debate had made the public aware of the intended changes, and those changes are passed at referendum".

The Committee endorses EARC's recommendation at para.4.110 that without the prior approval of the people by referendum, there should be no further entrenchment of any part of the present Queensland Constitution.

CONTENT OF A FUTURE CONSTITUTION

EARC Recommendations Regarding Content of a Future Constitution

Generally the Committee agrees that EARC's recommendations listed below could appropriately be considered prior to the future drafting of a new Constitution:

EARC notes that the Commission may be criticised for not providing enough detail of the powers of the Executive in the draft Constitution Bill. The omission results from the historical origins of the Constitution when executive power was not then and has never has been defined, and the fact that EARC's Report is confined to the consolidation of existing Acts relevant to the Constitution. However,
may not be satisfactory. It sees merit in the suggestion that the Constitution should contain an express statement of the principle that members of the Executive have only those powers which are assigned to them by law and which must be exercised according to law” (EARC para.8.54).

Consequently, the Commission recommends that:

"... in the drafting of an entrenched Constitution, the proposed Constitutional Convention should consider whether there should be some constitutional rules defining the scope of executive power, specifying that the executive must exercise its power according to law, and guaranteeing the availability of remedies against abuses of power or wrong decisions by the executive". (para. 8.57)

The Committee agrees that the scope of executive power could appropriately be considered by the proposed Legal and Constitutional Committee in the drafting of a new Constitution.

At para.8.80 EARC recommends that the proposed Constitutional Convention should consider what matters concerning the conduct of the Parliament should be included within the Constitution. This recommendation resulted from some submissions to EARC suggesting various legislature reforms, such as giving the opposition the right to recall Parliament and to discuss specific issues (EARC 1993, para.8.63). However, given that a majority in the House enables a party to control the proceedings of the House to a considerable degree, EARC believes that a more plausible remedy is to alter the procedure of the House to allow more effective avenues for presentation of private member's bills, or a different use of Question Time. Thus EARC recommends that the proposed Constitutional Convention further consider this matter. This Committee accepts that the matter warrants further consideration, but for the reasons stated on page 29 would assign that task to the proposed Legal and Constitutional Committee rather than the Constitutional Convention, particularly as the expertise of that Committee will relate to parliamentary reform as well as to constitutional matters.

The Committee recommend that the proposed Legal and Constitutional Committee should consider:

(a) whether, in the drafting of an entrenched Constitution, there should be some constitutional rules defining the scope of executive power, specifying that the executive must exercise its power according to law, and guaranteeing the availability of remedies against abuses of power or wrong decisions by the executive; and

(b) what matters concerning the conduct of the Parliament should be included within the Constitution.

However, the two matters outlined below require attention.

Constitutional Rules Regarding Subordinate and Delegated Legislation

In Chapter 8 of the Report, EARC acknowledges the practicality of Parliament allowing the Executive to develop subordinate legislation:

"The practice whereby Parliament provides basic principles in legislation and
allows the Executive to develop detailed regulations and implement the principles, relieves Parliament of significant burden and is not a threat to individual freedom as long as there are safeguards in place. The usual safeguard in most jurisdictions is a requirement that regulations must be tabled in Parliament (both Houses, where there is a bicameral Parliament), and may be disallowed by motion of the House (either House, in bicameral Parliaments). This is now required by the Statutory Instruments Act 1992, Part 5 (EARC 1993, para.8.19).

142 EARC doubts whether these safeguards are adequate and suggests that consideration should be given to imposing a limitation upon the ability of Parliament to make law allowing inconsistent subordinate legislation or regulations:

"The Commission recommends that in the drafting of an entrenched Constitution, the proposed Constitutional Convention should consider whether for the purpose of addressing separation of powers there should be some constitutional rules regulating and limiting the scope of subordinate and delegated legislation" (EARC 1993, para. 8.24)

143 The Committee sought a submission on this matter from the Parliamentary Committee of Subordinate Legislation, which did not support EARC's recommendation, on two grounds. The first ground concerns practical difficulties associated with entrenchment and the second concerns the role of Parliament as the ultimate law-maker.

144 On the first ground, the Subordinate Legislation Committee considered that if provisions concerning tabling and disallowance were entrenched in a future Constitution, it would be necessary to provide a definition of "subordinate legislation". If that definition were entrenched, it would require a referendum to change it. The difficulties experienced with respect to changing provisions in the Commonwealth Constitution were outlined earlier in this Report.

145 The necessity of a referendum to change the definition of subordinate legislation or to change tabling and disallowance procedures would appear to be an impractical and costly imposition as these matters are unlikely to remain static. To overcome problems resulting from an inability to make changes without a referendum, the Executive could simply create legislation that does not fall within the definition of `subordinate legislation'. As a result, such legislation would not be scrutinised by Parliament or the appropriate Parliamentary Committee. In effect, less subordinate legislation would be scrutinised.

146 The Subordinate Legislation Committee also drew attention to the principle of the sovereignty of Parliament.

"The role of Parliament needs also to be taken into account. If Parliament is the ultimate law-maker, then it should have the ability to expressly permit the making of subordinate instruments which are ultra vires in relation to either the principle act under which it is made or in relation to any other act. Such a decision would not be done lightly and only after due consideration and debate. To date this Committee in its role of scrutinising subordinate legislation is yet to find an act of Parliament in Queensland which has granted such a power to the Executive".

147 The Subordinate Legislation Committee further pointed out Queensland's uniqueness with respect to fundamental legislative principles.
"The Commission doubted the sufficiency of the safeguard that Parliament has the authority to repeal by a later act any subordinate legislation or the grant of any power to make subordinate legislation.

In general this argument would be sound, however Queensland is unique in relation to the inclusion of fundamental legislative principles which should as far as possible be abided by when both principle and subordinate legislation is made (Legislative Standards Act 1992). These fundamental legislative principles are directed at ensuring that the rights and liberties of individuals and the institution of Parliament are preserved. In addition to this our Committee, the Committee of Subordinate Legislation is required by its terms of reference to safeguard these principles unless there is sufficient justification for not doing so. This process is directed at ensuring that powers, such as the "inconsistency provision" are not abused at the expense of individual freedoms".

148 The Subordinate Legislation Committee concluded that:

"... it is unnecessary to entrench in the Constitution a provision which would prevent the ability of the Parliament to pass legislation which expressly permits subordinate legislation to be made in these [changing] types of circumstances".

149 However, the Subordinate Legislation Committee did express an area of concern regarding the 'necessary and convenient power' in s.22 of the Statutory Instruments Act 1992. The submission argued that this power gives the Executive too broad a base to make legislation.

150 The necessary or convenient power in s.22(1)(b) of the Statutory Instruments Act 1992 provides that where an Act authorises the making of a statutory instrument then such an instrument may be made where it is necessary or convenient for carrying out or giving effect to that Act. Section 26 of the Statutory Instruments Act 1992 further provides that:

"a statutory instrument may authorise any matter to be determined, applied or regulated from time to time, by any specified person".

151 The Subordinate Legislation Committee explained that when s.22(1)(b) is used in conjunction with s.26, there is a danger that:

"this necessary or convenient power may be used to permit the Executive to include provisions in subordinate legislation which were never envisaged by the Parliament at the time the Bill was passed. This ability does not depend upon such provision appearing in a specific act under which the subordinate legislation is made, but applies to all subordinate legislation due to the incorporation of the necessary and convenient power in s.22 of the Statutory Instruments Act 1992 ...

It is arguable that this necessary or convenient power has resulted in too broad a base for the Executive to make legislation. The Committee therefore feels that this power is undesirable in its present form.

152 The Subordinate Legislation Committee argued that problems like this which may arise from time to time are not best addressed by entrenching a provision in the Constitution to
prevent its exercise. It was suggested instead, that in the case of the necessary and convenient power:

"... a more feasible alternative would be to repeal s.22(1)(b) of the Statutory Instruments Act 1992 and insert a provision stipulating that the necessary or convenient power may only be exercised where the power is expressly provided in the specific act under which subordinate legislation is made".

This Committee is persuaded by the arguments of the Subordinate Legislation Committee, that entrenchment of rules limiting the scope of subordinate legislation would probably create unwarranted practical difficulties, and limit Parliament's ability to legislate to overcome problems as they arose. Therefore, this Committee does not endorse EARC's recommendation at para.8.24 that the Constitutional Convention should consider whether for the purpose of addressing separation of powers there should be some constitutional rules regulating and limiting the scope of subordinate and delegated legislation.

The Committee recommends that a new Queensland Constitution does not contain entrenchment of constitutional rules regulating or limiting the scope of subordinate or delegated legislation.

Consultation With Aborigines and Torres Strait Islanders

In Chapter 8 EARC makes the following recommendation:

"The Commission recommends that the proposed Constitutional Convention in drafting a final constitution for Queensland consults further with Aboriginal People and Torres Strait Islanders" (EARC 1993, para.8.144).

The submissions to this Committee from Matthews and the Associated Mens' Electoral Network mistook the EARC recommendation as implying 'special treatment' for Aborigines and Torres Strait Islanders. Matthews stated:

"There is no such recommendation for other racial groups within our nation. Especially no such recommendation for White middle-class Protestant male Queenslanders. As the Aboriginals consider themselves as both a racial and religious group of people, this oversight by EARC is both racial and religious discrimination".

The Committee does not agree with this view, nor does it believes that EARC intended any discrimination to result from the recommendation. It seems clear that the recommendation has been taken out of context. It is not a recommendation that recognition of indigenous rights must be included in a new Constitution. It is a recommendation that the issue remain open and be reviewed prior to any entrenchment of a new Constitution, in view of recent developments such as the Mabo decision, the eventual effects of which are not yet known.

EARC grouped submissions received by it on this issue into three groups, of which only two related to the Constitution. The first group argued that the Mabo decision has left Queensland with no choice than to keep pace with international laws and policies in relation to indigenous people. An extension of this argument was that fundamental change in the
common law as it affects indigenous people cannot be ignored in any current review of the State's constitution. The second group argued that there is no valid reason why the status of indigenous Queenslanders should be included in the Constitution.

The Commission considered it unhelpful to propose a Queensland constitutional formula for indigenous rights at this time in view of the fact that:

"The Reconciliation Council established under Commonwealth legislation is currently considering the establishment of a Compact to address the fact of prior occupation of the land by Aboriginal and Torres Strait Islander people and the consequent dispossession of indigenous people. That task is expected to take some years" (EARC 1993, para.8.141).

The Committee notes the observations in a recent issues paper published by the Constitutional Centenary Foundation which outlines a broad range of possibilities for Commonwealth constitutional recognition of Aboriginal rights, including no change. The Foundation believed that the issue requires ongoing discussion and public education of the Australian constitutional system as it relates to Aborigines and Torres Strait Islanders:

"We should use this decade to treat seriously with Aborigines to determine whether constitutional safeguards are desirable to protect their special interests without undermining the foundations of our democratic federation. Aborigines need to be assured a respected place at the table of constitutional deliberation ... Achieving this would require broad support from the Australian community and would necessarily be part of a long-term process of education and discussion" (1994, pp. 2 and 4).

Development of these issues at the Commonwealth level may impact on the legal obligations or on community values at the State level, so that the effect of any such changes and developments would need to be assessed by the proposed Legal and Constitutional Committee.

Another point requiring consideration are any relevant legal requirements under Queensland legislation regarding Aborigines and Torres Strait Islanders. EARC notes that s.4(3)(j) of the Legislative Standards Act 1992 requires that all proposed legislation in Queensland must have regard to the traditions and customs of Aborigines and Torres Strait Islanders. Such a requirement cannot be ignored.

The Committee believes that the wording of EARC's recommendation at para.8.144 does not accurately encapsulate EARC's intention of considering how the status of Aborigines and Torres Strait Islanders may relate to a future Constitution. The Committee makes the following recommendation instead:

The Committee recommends that the proposed Legal and Constitutional Committee consider the issue of specific constitutional recognition of Aborigines and Torres Strait Islander people.
BIBLIOGRAPHY


Constitutional Centenary Foundation Inc, 1994 *Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia*, An options paper prepared by Fr Frank Brennan SJ.


Lane, P H *An Introduction to the Australian Constitutions*, 1994, The Law Book Company.


APPENDIX D - LIST OF COMMITTEE'S RECOMMENDATIONS

Page

The Committee endorses EARC's recommendations at para.7.57 and para.7.67 that section 15 of the Constitution Act 1867 be amended to provide for the compulsory retirement of Supreme Court and District Courts judges at the age of 70 years. .......................................................... 11

The Committee recommends that clause 28(1) of the draft Constitution Bill be amended to provide that, subject to subsection (2), a Judge of the Supreme Court or a Judge of the District Courts may only be removed from office by the Governor on address of the Legislative Assembly on the grounds of proved misbehaviour or incapacity .......................................................... 15

The Committee recommends that the draft Constitution Bill contain a provision that the powers, duties and responsibilities of the tribunal shall be those prescribed by an Act of Parliament. .............. 16

The Committee recommends that clause 28(2) of the draft Constitution Bill be redrafted to provide that the address of the Legislative Assembly may only be made after a tribunal appointed pursuant to subsection 3 has reported to the Legislative Assembly that there is proved misbehaviour or incapacity on the part of the Judge, warranting removal from office .................. 18

The Committee endorses EARC's inclusion at para.7.51(b), of incapacity as a ground for removal from office of Supreme Court or District Courts judges .................................................. 19

The Committee recommends that the words "be independent" in clause 28(3)(a) of the draft Constitution Bill be deleted and replaced with a provision that members of the tribunal are to be appointed by a resolution of the Legislative Assembly .......................................................... 20

The Committee recommends that clause 28(3)(b) of the draft Constitution Bill be amended to provide that the tribunal consist of at least 3 serving or retired Judges of any one or more of the High Court of Australia, the State Supreme Courts, or the Federal Court of Australia. .............. 20

The Committee endorses clause 29(1) of the draft Queensland Constitution Bill, which provides that the amount of the salary of a Judge of the Supreme Court or a Judge of District Courts may not be decreased. .................................................................................. 22

The Committee recommends that clause 29(2) of the draft Constitution Bill, which pertains to increases in the salaries of Supreme Court or District Courts judges, should not be adopted. ....... 23

The Committee recommends that clause 8 of the draft Queensland Constitution Bill be amended to retain a quorum of 16 members to sit in the Legislative Assembly pending the findings of the Standing Orders Committee on this matter .......................................................... 24

The Committee endorses EARC's recommendation at para.8.62 that the proposed Legal and Constitutional Committee further review the matter of the independence of the Speaker. .............. 25

The Committee recommends that clause 9 of the draft Constitution Bill make provision for proxy voting based on a justified medical emergency, certified by a least two medical certificates. .............. 27
The Committee recommends that salaries of members of Parliament continue to be paid according to the Parliamentary Members' Salaries Act 1988, or an equivalent Act, and that members' allowances be determined by the Governor in Council on a statutory basis. ................................................................. 28

The Committee endorses EARC's recommendation at para.4.27 that the Attorney-General bring an action for a declaration in the Supreme Court of Queensland as to the effect of section 53 of the Constitution Act 1867 on the validity of any attempt to amend or repeal section 14 of that Act by an ordinary act of the Parliament. .................................................................................................................. 29

The Committee recommends that any future process, or other matters involving the drafting of a new Queensland Constitution, should be considered by the proposed Legal and Constitutional Committee. .............................................................................................................................................................................. 32

The Committee recommends that:

(a) the question of whether entrenchment of a new Queensland Constitution is warranted should be referred to the proposed Legal and Constitutional Committee; and

(b) prior to any recommendation made in favour of entrenchment, the proposed Legal and Constitutional Committee should evaluate the merit of entrenchment by means of a specified majority of the Legislative Assembly as well as entrenchment by referendum. .................................................................................................................................................................................................................................................. 35

The Committee endorses EARC's recommendation at para.4.110 that without the prior approval of the people by referendum, there should be no further entrenchment of any part of the present Queensland Constitution. .............................................................................................................................................................................. 36

The Committee recommend that the proposed Legal and Constitutional Committee should consider:

(a) whether, in the drafting of an entrenched Constitution, there should be some constitutional rules defining the scope of executive power, specifying that the executive must exercise its power according to law, and guaranteeing the availability of remedies against abuses of power or wrong decisions by the executive; and

(b) what matters concerning the conduct of the Parliament should be included within the Constitution. .................................................................................................................................................................................................................................................. 37

The Committee recommends that a new Queensland Constitution does not contain entrenchment of constitutional rules regulating or limiting the scope of subordinate or delegated legislation. .................................................................................................................................................................................................................................................. 40

The Committee recommends that the proposed Legal and Constitutional Committee consider the issue of specific constitutional recognition of Aborigines and Torres Strait Islander people.......... 41