

CONSTITUTION OF QUEENSLAND 2001

EXPLANATORY NOTES

Title of the Bill

Constitution of Queensland 2001

Policy Objectives of the Bill

The Constitution is the fundamental law about how the people of Queensland are governed, yet not since 1867 has there been a consolidated or single Act of Parliament which sets out Queensland's constitutional arrangements.

Further, many of the provisions of the ten or so principal pieces of Queensland constitutional legislation were drafted using antiquated language, making them difficult to read and to understand.

The primary objective of this Bill is to enhance public access to, and understanding of, Queensland's Constitution by:

- consolidating, as far as practicable, Queensland's constitutional provisions into one Act; and
- modernising the drafting style of Queensland's constitutional provisions so that they might be more easily read and understood.

Consolidation of the Queensland Constitution has been the source of ongoing examination for over eight years by various independent commissions and parliamentary committees and, more recently, by the Government.

The Government acknowledges and commends the important contribution made to the development of this Bill, and its companion Bill, the Parliament of Queensland Bill 2001, by the Electoral and Administrative Review Commission (1993), the Parliamentary Committee for Electoral and Administrative Review (1993-1994), the Parliamentary Legal, Constitutional and Administrative Review Committee (1996-2001) and the Queensland Constitutional Review Commission (1999-2000).

Significantly, the Constitution of Queensland 2001 and the Parliament of Queensland Bill 2001 are, to a large extent, based on the Bills recommended by the Legal, Constitutional and Administrative Review Committee in its *Consolidation of the Queensland Constitution: Final Report* (report no. 13, April 1999) and *Review of the Queensland Constitutional Review Commission's recommendations relating to a consolidation of the Queensland Constitution* (report no. 24, July 2000).

Achieving the Policy Objectives of the Legislation

The consolidation of the Queensland Constitution has been largely achieved by re-enacting in the Constitution of Queensland 2001, in modern language, the constitutional provisions contained in the following Acts:

- *Constitution Act 1867*;
- *Legislative Assembly Act 1867*;
- *Constitution Act Amendment Act 1890*;
- *Constitution Act Amendment Act 1896*;
- *Officials in Parliament Act 1896*;
- *Demise of the Crown Act 1910*;
- *Constitution Act Amendment Act 1922*;
- *Constitution Act Amendment Act 1934*;
- *Royal Powers Act 1953*;
- *Constitution (Office of Governor) Act 1987*;
- *Parliamentary Papers Act 1992*; and
- *Parliamentary Committees Act 1995*.

Provisions from these Acts that are incidental to the operation of the Legislative Assembly have been consolidated into the companion Bill to the Constitution of Queensland 2001, the Parliament of Queensland Bill 2001.

Provisions of a constitutional nature from the following Acts have also been relocated into the Constitution of Queensland 2001:

- *Oaths Act 1867*;
- *Acts Interpretation Act 1954*;
- *District Court Act 1967*;

- *Supreme Court of Queensland Act 1991*;
- *Electoral Act 1992*; and
- *Supreme Court Act 1995*.

For the following reasons, the Bills are only able to achieve a partial, albeit substantial, consolidation of Queensland's constitutional legislation:

- a number of provisions are said to be entrenched such that they can only be repealed and relocated to the consolidated Bills if first approved by a majority of voters at a referendum (see the discussion following about entrenchment, also under the heading 'Achieving the Policy Objectives of the Legislation' in these explanatory notes);
- the repeal and re-enactment of sections 30 and 40 of the *Constitution Act 1867*, which relate to the Parliament's power to deal with the waste lands of the Crown, is likely to be an invalid future act under the Commonwealth *Native Title Act 1993* in which case it would be invalid under section 240A of that Act (this is discussed in more detail in the explanatory notes relating to chapter 6 (Lands) which follow); and
- the re-enactment of sections 23 of the *Supreme Court of Queensland Act 1991* and 14 of the *District Court Act 1967*, which require Supreme and District Court Judges to retire at age 70, would be inconsistent with section 106A of the *Anti-Discrimination Act 1991* which seeks to phase out mandatory retirement ages (this is discussed in more detail in the explanatory notes relating to chapter 4 (Courts) which follow).

The consolidation of these provisions into the Constitution of Queensland 2001 and the Parliament of Queensland Bill 2001 might be achieved at some future date following further consideration of these matters by the Legal, Constitutional and Administrative Review Committee and, in the case of the entrenched provisions, endorsement by the voters of Queensland at a referendum.

References to Provisions Consolidated

These notes explain each clause of the Constitution of Queensland 2001, the clause's origins in existing law and any major changes that have been made in rewording the existing provision(s) which the clause represents. The notes also highlight proposed changes to existing law that might be regarded as substantial in nature.

At the beginning of the notes to most parts of the Bill is a list of the provisions of the existing law that are being consolidated by the corresponding part of the Bill. The references to the existing law are included as a guide only to the origins of the provisions of the Constitution of Queensland 2001.

The Entrenched Provisions

The Legislative Assembly can consolidate the majority of Queensland's constitutional provisions into a Constitution of Queensland by passing an ordinary Act of Parliament. However, to wholly consolidate the existing provisions of constitutional legislation would require a referendum as a number of the provisions of the Constitution are said to be 'entrenched'.

Entrenched provisions are laws that the Parliament has sought to protect so that the laws may not be repealed or changed through normal law-making procedures. Entrenched provisions may not be repealed, amended, or affected (depending on the terms of the entrenchment) unless Parliament follows certain special measures that are required, for example, first obtaining the approval of electors at a referendum.

In Queensland, constitutional provisions that are said to be referendum entrenched (the "entrenched provisions") are contained in the *Constitution Act 1867* (sections 1, 2, 2A, 11A, 11B and 53), the *Constitution Act Amendment Act 1890* (section 2) and the *Constitution Act Amendment Act 1934* (sections 3 and 4). These provisions concern the establishment and law-making power of the Parliament of Queensland and the Legislative Assembly, the duration of the Parliament and matters pertaining to the office of the Governor.

These provisions will not be relocated, therefore, into the Constitution of Queensland 2001 and will remain in the *Constitution Act 1867*, the *Constitution Act Amendment Act 1890* and the *Constitution Act Amendment Act 1934*.

The entrenched provisions have not been restated in modern drafting style in the Bill in the manner recommended by the Legal, Constitutional and Administrative Review Committee.

There is a concern that a court could find that modernised versions of the entrenched provisions included in the Bill would impliedly repeal the entrenched provisions by applying the general principle of statutory interpretation that a later enactment will repeal an earlier inconsistent provision. It may be open for a court to conclude that the fact the proposed

later provision purports to restate in modern language the precise effect of the earlier provision demonstrates that the two provisions are in law inconsistent and cannot stand together. In doing so, the court could strike the whole Act down on the basis that Assent should not have been given to a Bill which included a provision which had the effect of repealing the entrenched sections until a referendum had been held.

This interpretation may be applied even if the Parliament expressed an intention not to amend (or repeal) the entrenched provision. A court may be forced to the conclusion that the Parliament's statement of intention is inconsistent with the actual effect of what it has purported to do.

For these reasons, the entrenched provisions have not been modernised and restated in the Bill. However, to ensure that Queensland's constitutional legislation is as accessible as possible, signpost provisions have been included in the Bill. These signpost provisions refer to the entrenched provisions in their original Acts as containing the substantive law about the various matters pertaining to the Parliament and the office of the Governor. To further enhance accessibility, copies of the entrenched provisions have been included in attachments 1, 2 and 3 of the Bill.

The Constitution of Queensland 2001, in particular, the inclusion of the signpost provisions and attachments 1, 2 and 3, is not intended to expressly or impliedly in any way affect the entrenched provisions.

Administrative Cost

The Bill largely re-enacts, with little substantive change, the existing law relating to Queensland's constitutional arrangements. As a consequence, the processes and procedures of the Parliament and the Executive Government will be largely unchanged. The greatest administrative cost to the Government from the enactment of the Bill will be updating references in documentation to reflect the Constitution of Queensland 2001 and this cost will be met within existing budgetary allocations.

Consistency with Fundamental Legislative Principles

The Bill is consistent with the fundamental legislative principles defined in section 4 of the *Legislative Standards Act 1992*. Section 4 requires that legislation has sufficient regard to:

- (a) the rights and liberties of individuals; and
- (b) the institution of Parliament.

The Bill has sufficient regard to the institution of Parliament as it consolidates, in modern drafting style, the basic laws relating to the Parliament, including the procedures and the powers, rights and immunities of the Legislative Assembly, its members and committees.

Clause 9 of the Constitution of Queensland 2001 enhances the institution of Parliament by declaring that the Assembly has the powers, rights and immunities that the Commons House of Parliament of the United Kingdom had at the establishment of the Commonwealth on 1 January 1901—this provision clarifies that Queensland does not inherit any post-1901 changes made to the powers, rights and immunities of the House of Commons and that any such changes in Queensland originate in the Queensland Legislative Assembly.

The existing section 23 of the *Supreme Court of Queensland Act 1991* and section 14 of the *District Court Act 1967* require Supreme and District Court judges to retire at age 70. These provisions have not been relocated to the Bill as this would be inconsistent with the phased abolition of mandatory retirement ages from legislation, which is the object of section 106A of the *Anti-Discrimination Act 1991*. Despite the object of section 106A, these provisions will remain in their current Acts as previous drafts of the Constitution of Queensland have indicated that the mandatory retirement age for judges would be preserved. (See the Government's Discussion Draft Bills released in July 1999 and Exposure Draft Bills released in January 2001, as well as draft Bills released by the Legal, Constitutional and Administrative Review Committee.)

In the longer term, the desirability of retaining a mandatory retirement age for judges will be referred for consideration to the Legal, Constitutional and Administrative Review Committee (which has constitutional reform and anti-discrimination within its areas of responsibility).

Clause 79 of the Bill declares that the issue of compliance with certain provisions of the Bill is not justiciable in any court. The clauses are:

- clause 31 (Requirements concerning commission and oath or affirmation)—section 5 of the *Constitution (Office of Governor) Act 1987*;
- clause 40 (Delegation by Governor to Deputy Governor)—section 10 of the *Constitution (Office of Governor) Act 1987*;

- clause 41 (Administration of Government by Acting Governor)—section 9 of the *Constitution (Office of Governor) Act 1987*;
- clause 48 (Executive Council)—section 6 of the *Constitution (Office of Governor) Act 1987*; and
- clause 50 (Meetings of Executive Council)—section 7 of the *Constitution (Office of Governor) Act 1987*.

The clause re-enacts an existing provision, section 11 of the *Constitution (Office of Governor) Act 1987*, with the objective of protecting the practical administration of the State by ensuring that the validity of acts of the Executive Government cannot be challenged on the basis that, for example, the Governor has not made the oath or affirmation of allegiance and of office in accordance with clause 31 of the Bill.

Consultation

The Bill was developed in consultation with:

- the Department of the Premier and Cabinet;
- the Crown Solicitor;
- the Department of Justice and Attorney-General; and
- the Office of the Queensland Parliamentary Counsel.

The Bill is also based on the work performed by the Electoral and Administrative Review Commission, the Parliamentary Committee for Electoral and Administrative Review, the Legal, Constitutional and Administrative Review Committee and the Queensland Constitutional Review Commission. Extensive public consultation has been undertaken in the development of the Bill over a number of years through these entities.

Further, the Queensland Government released drafts of its proposed Bills in June 1999 and January 2001 for public comment and, in finalising the Bills for introduction, sought comments from the Chief Justice of Queensland, the Chief Judge of the District Court and the Local Government Association of Queensland Inc. about specific aspects of the Bill.

NOTES ON CLAUSES

CHAPTER 1—PRELIMINARY

Clause 1 of the Bill provides that the short title of the Act is to be the *Constitution of Queensland 2001*. The omission of the word ‘Act’ from the short title serves to distinguish the Constitution from other Acts and, in doing so, recognises its special status as the fundamental law of Queensland.

Clause 2 provides that the Act commences on 6 June 2002, Queensland Day. Queensland Day commemorates the anniversary of Letters Patent establishing Queensland as a colony separate from New South Wales being issued by Queen Victoria in 1859.

Clause 3 provides the object of the Bill—that the Bill brings together existing constitutional provisions in a modernised form and declares them to be the Constitution of Queensland. However, a note to the clause recognises that certain entrenched and other provisions in current constitutional legislation have not been consolidated and remain untouched in their original Acts, for reasons explained elsewhere in these notes.

Clause 4 provides that a reference to the Sovereign in the Bill is a reference to the reigning Queen or King, or Her or His heirs or successors, as the case may be.

Clause 5 provides that a note in the text of the Act is part of the Act. A number of examples also appear within the text of the Bill. For the legislative effect of examples see sections 14(3) and 14D of the *Acts Interpretation Act 1954*.

CHAPTER 2—PARLIAMENT

PART 1—CONSTITUTION AND POWERS OF PARLIAMENT

Provisions consolidated:

- *Constitution Act 1867*, s 10 Power to alter system of representation
- *Constitution Act 1867*, s 28 Members of Assembly
- *Constitution Act 1867*,
s 40A Powers, privileges and immunities of
Legislative Assembly
- *Legislative Assembly Act*
1867, s 3 Number of members of Assembly
- *Legislative Assembly Act*
1867, s 4 One member for each electoral district

Provisions signposted (but not consolidated):

- *Constitution Act 1867*, s 1 Legislative Assembly
- *Constitution Act 1867*, s 2 Legislative Assembly constituted
- *Constitution Act 1867*, s 2A The Parliament

Clause 6 states that section 2A of the *Constitution Act 1867* provides for the Parliament in Queensland. A note to this clause indicates that section 2A is subject to, or entrenched by, section 53 of that Act and a footnote advises that a copy of sections 2A and 53 of the *Constitution Act 1867* is included at attachment 1 of the Act.

A further note to clause 6 indicates that section 3 of the *Constitution Act Amendment Act 1934* is also entrenched so as to require a referendum to re-establish the Legislative Council or another legislative body in Queensland. A footnote advises that a copy of section 3 of the *Constitution Act Amendment Act 1934* is included in attachment 3 to the Act.

Clause 7 states that section 1 of the *Constitution Act 1867* provides for there to be a Legislative Assembly in Queensland. A note to this clause indicates that section 1 is subject to, or entrenched by, section 53 of that

Act and a footnote advises that a copy of sections 1 and 53 of the *Constitution Act 1867* is included at attachment 1 of the Act.

Clause 8 states that section 2 of the *Constitution Act 1867* provides for law-making power in Queensland. A note to this clause indicates that section 2 is subject to, or entrenched by, section 53 of that Act and a footnote advises that a copy of sections 2 and 53 of the *Constitution Act 1867* is included at attachment 1 of the Act.

Clause 9 provides generally for the powers, rights and immunities of the Legislative Assembly. The more specific provisions of the *Constitution Act 1867* which deal with the Legislative Assembly's powers, rights and immunities (*Constitution Act 1867*, sections 41 to 52) are consolidated in chapter 3 of the Parliament of Queensland Bill 2001.

Clause 9 states that the powers, rights and immunities of the Legislative Assembly, its members and committees are those defined under an Act (for example, the Parliament of Queensland Bill 2001) and, until defined under an Act, are those of the House of Commons of the United Kingdom as at the establishment of the Commonwealth (1 January 1901).

Clause 10 provides that the Legislative Assembly consists of directly elected members who are eligible to be elected by the inhabitants of Queensland who are eligible to vote. *Clause 10* faithfully reproduces the essence of the existing section 28 of the *Constitution Act 1867*, modernising the provision and updating the references in the footnotes.

Clause 11 provides that the Legislative Assembly is to consist of 89 members.

Clause 12 provides that the State is to be divided into the same number of electoral districts as there are members of the Legislative Assembly (that is, 89). A note advises that the *Electoral Act 1992* sets out the process for dividing the State into electoral districts.

Clause 13 provides that each member of the Legislative Assembly is to represent one electoral district.

Clause 14 provides that Parliament has the specific power to alter the system of electoral representation.

Clauses 10 to 14 recognise the democratic and representative nature of Queensland's Parliament by providing for the members of the Legislative Assembly to be directly elected by the eligible voters of Queensland, for the State to be divided into electoral districts and for each member to represent one electoral district.

PART 2—PROCEDURAL REQUIREMENTS FOR THE LEGISLATIVE ASSEMBLY

Provisions consolidated:

- *Constitution Act 1867, s 3* One session of Parliament to be held each year
- *Constitution Act 1867, s 12* Place and time of holding Parliament
- *Constitution Act 1867, s 27* Constitution of Legislative Assembly

Provisions signposted (but not consolidated):

- *Constitution Act Amendment Act 1890, s 2* Duration of Legislative Assembly to be 3 years only

Clause 15 empowers the Governor to summon the Assembly and, when the Governor considers it expedient, to prorogue or dissolve the Assembly.

Clause 16 states that section 2 of the *Constitution Act Amendment Act 1890* provides for the duration of the Legislative Assembly. A note to this clause indicates that section 2 is subject to, or entrenched by, section 4 of the *Constitution Act Amendment Act 1934* and a footnote advises that a copy of these sections is included at attachment 2 of the Act.

Clause 17 clarifies that on the ending of the Sovereign's reign, the Assembly continues in existence, subject to its dissolution by the Governor, for as long as it would have continued if the Sovereign's reign had not ended.

Clause 18 empowers the Governor to set the time and place for holding Parliament as the Governor considers appropriate.

Clause 19 prescribes how regularly the Parliament must sit. The Legislative Assembly must sit at least twice in every calendar year. Further, six months must not pass between a sitting of the Legislative Assembly and the next sitting of the Legislative Assembly.

PART 3—APPROPRIATION FOR LEGISLATIVE ASSEMBLY

Clause 20 provides that there must be a Bill, separate from any other Bill for appropriations, for the Assembly and the parliamentary service. This has been the practice for a number of years.

PART 4—MEMBERS

Division 1—Generally

Provisions consolidated:

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| • <i>Constitution Act 1867, s 4</i> | No member to sit or vote until the member has taken the following oath of allegiance |
| • <i>Constitution Act 1867, s 5</i> | Affirmation may be made instead of oath |
| • <i>Constitution Act 1867, s 7</i> | Election of disqualified persons void |
| • <i>Electoral Act 1992 s 83(1)</i> | Who may be nominated |

Clause 21 is a basic statement about eligibility to be a candidate and to be elected as a member of the Legislative Assembly. Subclause (1) provides that a person is eligible if the person:

- is an adult Australian citizen living in Queensland;
- has any further qualification required under an Act; and
- is not disqualified under an Act.

Subclause (2) provides that subsection (1) is subject to any conditions imposed by an Act. For example, in order for a person to nominate as a candidate for election, an Act may require a person to nominate by a certain time or to pay a fee. The Act may further provide that failure to meet these conditions precludes the person from being a candidate for election.

Clauses 64 and 72 of the Parliament of Queensland Bill 2001 are where most existing provisions regarding the eligibility and disqualification of candidates and the disqualification of sitting members are consolidated.

Clause 22 requires a member of the Legislative Assembly to take the oath of allegiance and of office provided in schedule 1, or to make a corresponding affirmation, before the member can sit or vote in the Assembly. Subclause (3) declares that the member takes the member's seat in the Legislative Assembly upon taking the oath or making the affirmation required by subclause (1).

Division 2—Members who are Ministers or Parliamentary Secretaries

Provisions consolidated:

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| • <i>Constitution Act 1867, s 57</i> | Appointment of Parliamentary Secretaries |
| • <i>Constitution Act 1867, s 58</i> | Functions of Parliamentary Secretary |
| • <i>Constitution Act 1867, s 59</i> | Duration of appointment as Parliamentary Secretary |
| • <i>Officials in Parliament Act 1896 s 6(1)</i> | Parliamentary Secretary not officer liable to retire on political grounds |

Clause 23 refers the reader to chapter 3, part 3 for provisions relating to the appointment of members of the Legislative Assembly as Ministers or acting Ministers.

Clause 24 provides for the Governor in Council to appoint members of the Legislative Assembly as Parliamentary Secretaries. A Minister or member of the Executive Council may not be appointed as a Parliamentary Secretary.

Clause 25 provides that a Parliamentary Secretary has the functions decided by the Premier.

Clause 26 sets out when the appointment of a Parliamentary Secretary ends.

CHAPTER 3—GOVERNOR AND EXECUTIVE GOVERNMENT

PART 1—INTERPRETATION

Provisions consolidated:

- *Acts Interpretation Act* Definitions—“Governor in Council”
1954 s 36

Clause 27 states that the Governor in Council is the Governor acting with advice of the Executive Council.

PART 2—GOVERNOR

Provisions consolidated:

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| • <i>Constitution Act 1867</i> , s 14 | Officers liable to retire from office on political grounds |
| • <i>Constitution (Office of Governor) Act 1987</i> , s 3 | Governor |
| • <i>Constitution (Office of Governor) Act 1987</i> , s 4 | Authorities and powers of Governor |
| • <i>Constitution (Office of Governor) Act 1987</i> , s 5 | Publication of Governor's commission-declaration of Governor's allegiance |
| • <i>Constitution (Office of Governor) Act 1987</i> , s 8 | Specific power of Governor |
| • <i>Constitution (Office of Governor) Act 1987</i> , s 9 | Administration of Government in absence etc. of Governor |
| • <i>Constitution (Office of Governor) Act 1987</i> , s 10 | Appointment of deputy for Governor |
| • <i>Royal Powers Act 1953</i> , s 2 | Exercise of statutory powers by Her Majesty |

Provisions signposted (but not consolidated):

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| • <i>Constitution Act 1867</i> , s 11A | Office of Governor |
| • <i>Constitution Act 1867</i> , s 11B | Definition of Royal Sign Manual |

This part contains provisions that relate to the office of Governor.

The *Constitution (Office of Governor) Act 1987* was introduced to give legislative effect to the Letters Patent issued by Her Majesty The Queen on 14 February 1986 (proclaimed by the Governor on 6 March 1986). Those Letters Patent reconstituted the office of Governor in anticipation of the commencement of the *Australia Acts 1986* (Cth and Imp) on 3 March 1986.

Section 13 of the *Constitution (Office of Governor) Act 1987* suspended the operation of the 1986 Letters Patent so long as the various provisions of the *Constitution (Office of Governor) Act 1987* were in force. This Bill repeals the *Constitution (Office of Governor) Act 1987* and the 1986 Letters Patent, however, section 13 of the Act is not re-enacted in this Bill. This follows recommendations made by the Electoral and Administrative Review Commission and the Parliamentary Legal, Constitutional and Administrative Review Committee to repeal the 1986 Letters Patent on the basis that all of the matters previously dealt with by the Letters Patent are contained in this Bill and there is now sufficient protection to deter any unconsidered amendment or repeal of those provisions by a future Parliament.

The *Australia Acts* themselves confirm the status and functions of the Governors of each State.

Section 7 of the *Australia Acts* provides that:

- the Governor is the Queen’s representative in each State;
- all powers and functions of the Queen in respect of each State are exercisable only by the Governor, but this:
 - does not apply to the power to appoint and to terminate the appointment of the Governor; and
 - does not preclude the Queen, while personally present in the State, from exercising any of the Queen’s powers and functions in respect of the State (see the notes to clause 40); and
- the Premier shall advise the Queen in relation to the powers and functions of the Queen in respect of the State.

Section 7 describes the powers and functions of the Queen as being exercisable “only” by the Governor to avoid the possibility of Her Majesty being advised to override a decision reached by the Governor, or of Her Majesty being advised to act in respect of a matter which has not been placed before the Governor. Section 7 was framed this way at Her Majesty’s suggestion.

Clause 28 defines the Royal Sign Manual for chapter 3, part 2 of the Bill to mean the signature or royal hand of the Sovereign. This is a restatement of the definition of Royal Sign Manual contained in section 11B of the *Constitution Act 1867* with minimal stylistic changes.

(Section 11B of the *Constitution Act 1867*, is currently entrenched by the requirement for a referendum under section 53 of the *Constitution Act 1867*. However, clause 28 does not trigger the requirement for a referendum because it merely applies the definition in section 11B for the relevant part of the Bill without in any way affecting section 11B itself.)

Clause 29 provides for the office of Governor of Queensland. The Governor is appointed by commission under the Royal Sign Manual.

Clause 30 states that sections 11A and 11B of the *Constitution Act 1867* provide for the office of Governor. A note to this clause indicates that sections 11A and 11B are subject to, or entrenched by, section 53 of that Act and a footnote advises that a copy of sections 11A, 11B and 53 of the *Constitution Act 1867* is included at attachment 1 of the Act.

Clause 31 provides that a person appointed as Governor must do certain things before the person undertakes any duties of that office.

Firstly, the appointee must ensure that the commission of his or her appointment is read and published at the seat of government of the State (that is, Brisbane). Secondly, the appointee must make the oath or take the affirmation of allegiance and of office contained in schedule 1. Both of these things must be done in the presence of the Chief Justice (or next most senior judge of the Supreme Court who is able to act) and at least two Executive Councillors.

In the past, the reading of the Governor's commission and taking or making of the oath or affirmation occurs at a swearing-in ceremony held at Parliament House in Brisbane. The commission is then published in the *Queensland Government Gazette*.

Clause 32 provides that the appointment of a person as Governor may be terminated only by instrument under the Royal Sign Manual. Importantly, the instrument takes effect only on its publication in the gazette or at a later time stated in the instrument.

Clause 33 authorises the Governor to do all things that belong to the Governor's office under any law. The long held democratic convention fundamental to the Westminster system of government requires the Governor to act in accordance with advice from his/her Ministers.

Clause 34 provides that the power to appoint and dismiss Ministers is vested in the Governor alone by providing for Ministers to hold office at the pleasure of the Governor. The clause further provides that the Governor is not subject to direction by any person and is not limited as to his or her sources of advice in exercising the power to appoint and dismiss Ministers.

More specific provision about the appointment of Ministers is contained in clause 43 of the Bill.

Clause 35 empowers the Governor—so far as it is in the Governor's power to do so and if the Governor considers there is sufficient cause—to remove or suspend from office a person appointed under authority of the Sovereign. *Clause 35* does not limit the operation of other provisions of the Bill (for example, clause 61) or another Act.

The current phrase in section 8(a) of the *Constitution (Office of Governor) Act 1987*, so far as it is within the powers of **Her Majesty**, is replaced in clause 35(2) by the phrase, *To the extent that it is within the Governor's power*. This is because the reference to the Sovereign's power is redundant. Whatever power the Sovereign has to remove or suspend an officer, the power is now vested solely in the Governor by section 7 of the *Australia Acts*, except when the Sovereign is personally present in the State (see section 7(4) of the *Australia Acts* and clause 39).

Clause 36 empowers the Governor, in the name of the Sovereign, to grant an offender a pardon, a commutation of sentence or a reprieve of execution of sentence or remission of a fine or other consequence of conviction. *Clause 36* does not limit the operation of another Act.

Clause 37 provides that the Governor may keep and use the Public Seal of the State for sealing instruments made or passed in the Sovereign's name.

Clause 38 has similar effect to clause 17 clarifying that upon the ending of the Sovereign's reign, a seal for Queensland issued by the Sovereign (which includes the Public Seal of the State and other seals such as the Governor's seal), in existence immediately before the end of the Sovereign's reign, may continue to be used until a new seal is issued by the next Sovereign as if the Sovereign's reign had not ended.

Clause 39 provides, amongst other things, that when the Sovereign is personally present in the State, the Sovereign may exercise any statutory power exercisable by the Governor.

Section 7(2) of the *Australia Acts* terminated the Sovereign's power to exercise all powers and functions of the Sovereign in respect of Queensland except the power to appoint and dismiss the Governor (section 7(3)) and except when the Sovereign is personally present in Queensland (section 7(4)). Thus, section 7(4) of the *Australia Acts* allows the Sovereign, when present in Queensland, to exercise those powers which are actually vested in the Sovereign. *Clause 39(1)* confers the additional power on the

Sovereign when present in Queensland to exercise any of the *statutory* powers which are actually vested *in the Governor*.

Clause 40 provides for the delegation of the Governor's powers to a Deputy Governor when the Governor is:

- temporarily absent for a short period from the seat of government (irrespective of whether or not the Governor has left Queensland) but not if that absence is due to the Governor administering the Government of the Commonwealth; or
- ill for what is expected to be a short period.

In these circumstances, the Governor may delegate the Governor's powers to the Lieutenant-Governor or, if there is no Lieutenant-Governor, to the Chief Justice or, if the Chief Justice is unavailable, to the next most senior judge of the Supreme Court of Queensland. The delegation must specify the powers being delegated (that is, whether a Deputy Governor can exercise and perform all, or only some, of the Governor's powers and functions) and it must be made by an instrument under the Public Seal of the State. There has not been a Lieutenant-Governor in Queensland since 1949.

Clause 40 refers to a 'delegation' of the Governor's powers to a person who serves as a Deputy Governor; the original provision (section 10 of the *Constitution (Office of Governor) Act 1987*) refers to the 'appointment' of the Governor's deputy. Reference in the Bill to a delegation, rather than an appointment, more accurately reflects the situation that is in fact currently provided for by section 10 of the *Constitution (Office of Governor) Act 1987*.

As clause 40 now expressly refers to a delegation, subclauses 10(2) to (4) of the *Constitution (Office of Governor) Act 1987* are not re-enacted. They are superfluous in light of sections 27A(1), (2) and (10) of the *Acts Interpretation Act 1954* and the insertion of 'may' in clause 40(1).

Clause 41 provides that a specified person must administer the Government whenever:

- the office of Governor becomes vacant;
- the Governor assumes the administration of the Government of the Commonwealth;
- the Governor is absent from the State and a Deputy Governor is not exercising the Governor's powers under a delegation under clause 40; or

- the Governor is incapable of performing the duties of office (for example, because of a long term illness) and a Deputy Governor is not exercising the Governor's powers under a delegation under clause 40.

The person who must administer the government during these periods is the Lieutenant-Governor or, if there is no Lieutenant-Governor available, the Chief Justice or, if the Chief Justice is not available, the next most senior judge of the Supreme Court of Queensland who is available and able to act. There has not been a Lieutenant-Governor in Queensland since 1949.

The person who administers the Government of the State under this clause acts in the office of Governor and performs the functions and exercises the powers of the Governor under the title of Acting Governor.

Subclause (5) requires the person to have taken the oath or made the affirmation in schedule 1 in the manner outlined in subclauses (6) and (7). It is not necessary for the person to take the requisite oath (or make the requisite affirmation) on every occasion prior to assuming the administration of the Government of the State. It is sufficient that the person has complied with subclause (5) at least once prior to assuming the administration of the Government of the State.

The person must cease administering the Government when the conditions outlined in clause 41(8) occur. That is, the Governor resumes or, as there is currently no Lieutenant-Governor in Queensland, a judge holding an office prior in title to administer the Government assumes the administration of the Government.

The corresponding provision in existing law (section 9(4) of the *Constitution (Office of Governor) Act 1987*) makes a distinction between the manner in which the Governor notifies that he or she has resumed administration of the State (by proclamation) and how a judge holding an office prior in title assumes administration (by notification published in the gazette upon the advice and under the hand of the Premier of the State). Currently, in practice, a judge assuming the administration of the State from another Administrator does so by also making a proclamation, which satisfies the requirements of section 9(4) because it is counter-signed by the Premier (signifying it is issued upon his advice) and published in the gazette. For this reason, clause 41(8) makes provision for both the Governor and a more senior Administrator to assume the administration of the State by making a proclamation which, by continuing current practice, will be published in the gazette.

Clause 41 restates section 9 of the *Constitution (Office of Governor) Act 1987* in such a way as to make it clear that section 24C of *Acts Interpretation Act 1954* (Acting appointments) applies to the clause. One consequence is that the title of *Administrator*, given to the person who would have assumed administration of the Government under the existing section 9 of the *Constitution (Office of Governor) Act 1987*, is changed to *Acting Governor*.

Other parts of this Bill also deal with specific powers and functions of the Governor. These include:

- summoning, proroguing and dissolving the Legislative Assembly (clause 15);
- setting the time and place for sessions of the Legislative Assembly (clause 18);
- appointing and dismissing Ministers and acting Ministers (clauses 34, 43, 45 and 46) and Executive Councillors (clauses 48 and 49); and
- recommending Bills for the appropriation of amounts from or to the consolidated fund (clause 68).

PART 3—CABINET AND MINISTERS OF THE STATE

Provisions consolidated:

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| • <i>Officials in Parliament Act 1896 s 3(1)</i> | Governor may declare what Ministers may sit in Legislative Assembly |
| • <i>Officials in Parliament Act 1896 s 3(2)</i> | Sick leave |
| • <i>Officials in Parliament Act 1896 s 3(3)</i> | When member of Legislative Assembly may act as officer |
| • <i>Officials in Parliament Act 1896 s 8</i> | Duties imposed by law on any Minister may be ordered to be performed by other Minister |
| • <i>Officials in Parliament Act 1896 s 8A</i> | Attorney-General is a Minister |
| • <i>Acts Interpretation Act 1954 s 33(14)</i> | Administrative arrangements |

Clause 42 provides statutory recognition for the first time in Queensland of the existence of Cabinet which comprises the Premier and other Ministers appointed under *clause 43*. The clause also provides a statement reflecting the principle of collective ministerial responsibility. That is, that Cabinet is collectively responsible to the people through the Parliament.

The statement is not intended in any way to alter the recognised constitutional position of the Cabinet. The constitutional relationship between the Cabinet and the Parliament recognised and practised by convention prior to the enactment of this clause is to continue in the same manner unaffected by the enactment of this clause.

Clause 43 provides for Ministers of the State.

While Queensland statutes are replete with references to Ministers, this clause includes for the first time the word *Ministers* within the constitutional provisions dealing with their appointment. Currently, the antiquated phrase *officers liable to retire from office on political grounds* is used to refer to Ministers in such fundamental provisions as section 14 of the *Constitution Act 1867* (clause 34 of this Bill), which provides that

Ministers hold office at the pleasure of the Governor, and section 3(1) of the *Officials in Parliament Act 1896*, which is the basis of this clause 43.

Clause 43(1) provides that the Governor, by proclamation, may declare the Ministerial offices that are to comprise the Ministry. The proclamation issued under this clause reflects current practice and is, in part, based on the proclamation required to be issued under section 3(1) of the *Officials in Parliament Act 1896*. Generally, this proclamation lists the Ministerial officers in order of seniority.

Clause 43(2) provides that the Governor may appoint a person to be a Minister of the State by commission. The subclause takes into account section 14 of the *Constitution Act 1867* and intends to give at least partial effect to the existing section 3(1) of the *Officials in Parliament Act 1896*.

Clause 43(3) clarifies that the Attorney-General is a Minister. The clause replicates *Officials in Parliament Act 1896*, section 8A. More detailed provisions dealing with the functions and powers of the Attorney-General are contained in the *Attorney-General Act 1999*.

Clause 43(4) provides that there are to be no more than 19 Ministers at any one time. The clause is based on *Officials in Parliament Act 1896*, section 3(1).

Subclauses 43(5) and (6) provide that a Ministerial appointee must take the oath or make the affirmation of allegiance and of office in schedule 1. The oath or affirmation must be made in the presence of the Governor or a person authorised by the Governor to administer the oath.

Clause 44 provides that the Governor in Council may make administrative arrangements for the distribution of the public business among Ministers and the declaration of the administrative units, or some of them or parts of them, and the Acts, or some of them or parts of them, administered by Ministers. Administrative arrangements are made by order published in the gazette.

(Note the proposed section 43A to be inserted into the *Evidence Act 1977* included in the consequential amendments in schedule 2 of this Bill, which provides for judicial notice to be taken of administrative arrangements made under this provision.)

Clause 45 provides that the Governor may appoint a Minister to act for another Minister. Clause 45 also provides that the Premier may appoint a Minister to act for another Minister for a period of up to 14 days. In both cases, the Minister may be appointed to perform all or part of the other Minister's functions and exercise all or part of the other Minister's powers.

Clause 118(1) of the Parliament of Queensland Bill 2001 provides for a Minister acting as another Minister to be paid a higher additional salary in certain circumstances.

Clause 46 provides that the Governor may appoint a member of the Legislative Assembly to act for a Minister. Such an appointment, which is made by proclamation, may be made when a Minister is absent from the State in the course of Ministerial duties or when a Minister is absent from duty due to sick leave approved under clause 47.

The member may be appointed to perform all or part of a Minister's functions and exercise all or part of a Minister's powers. Before assuming the duties of office, a member who is appointed to act as a Minister must make the oath or affirmation of allegiance and of office in schedule 1 before the Governor or a person authorised by the Governor.

Clause 46(6) allows a member to be appointed to act as a Minister even though there are already 19 Ministers, the maximum number allowed under clause 43(4).

Clause 118(2) of the Parliament of Queensland Bill 2001 provides for the member to be paid additional salary as a Minister if the member acts as a Minister for a continuous period of 30 days or more.

Clause 47 provides for the Governor, by proclamation, to grant leave of absence with pay—for a period not exceeding six months—for Ministers who are ill.

PART 4—EXECUTIVE COUNCIL

Provisions consolidated:

- *Constitution (Office of Governor)* Executive Council
 Act 1987 s 6
- *Constitution (Office of Governor)* Meetings of Executive Council
 Act 1987 s 7

Clause 48 provides for the Executive Council which consists of the persons appointed as members of Executive Council by the Governor by instrument under the Public Seal of the State. Before performing any duties, an Executive Council appointee must take the oath or make the affirmation of office and of secrecy contained in schedule 1.

Clause 49 provides that the appointment of a person as a member of Executive Council ends upon:

- the person's resignation as a member of Executive Council; or
- the person's removal as a member of the Executive Council by the Governor.

Clause 50 provides for Executive Council meetings. The clause requires the Governor to preside over Executive Council meetings (even though the Governor is not a 'member' of the Executive Council as such) and specifies who is to preside over meetings when the Governor is not able to do so. The clause also provides that Executive Council may not meet to dispatch business unless it has been summoned by the Governor's authority and the defined quorum of at least two members is satisfied.

PART 5—POWERS OF THE STATE

Provisions consolidated:

• <i>Acts Interpretation Act</i> 1954, s 47A	Meaning of “State” in part
• <i>Acts Interpretation Act</i> 1954, s 47B	Powers of the State
• <i>Acts Interpretation Act</i> 1954, s 47C	Commercial activities by State
• <i>Acts Interpretation Act</i> 1954, s 47D	Commercial activities by Minister
• <i>Acts Interpretation Act</i> 1954, s 47E	Delegation by Minister

Division 1—General

Clause 51 declares that the State (the Executive Government of Queensland) has all the powers and legal capacity of an individual and that those powers may be exercised beyond the boundaries of Queensland.

Division 2—Commercial Activities

Clause 52 provides definitions for the division, including a wide definition of “commercial activities”, and a definition of “State” which includes public sector units. Departments of government are public sector units (see section 36 of the *Acts Interpretation Act 1954*).

Clause 53 is a statutory grant of power to the State (the Executive Government) to carry out commercial activities.

Clause 54 provides that a Minister may carry out commercial activities for the State.

Clause 55 provides that a Minister may delegate a power of the State to an appropriately qualified officer of the State. In turn, an officer of the State may sub-delegate delegated powers to another appropriately qualified officer of the State.

CHAPTER 4—COURTS

Provisions consolidated:

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| • <i>Constitution Act 1867</i> , s 15 | Judges continued in the enjoyment of their offices during their good behaviour notwithstanding any demise of the Crown |
| • <i>Constitution Act 1867</i> , s 16 | But they may be removed by the Crown on the address of Parliament |
| • <i>Constitution Act 1867</i> , s 17 | Their salaries secured during the continuance of their commissions |
| • <i>District Court Act 1967</i> , s 4 | Establishment of the District Court |
| • <i>District Court Act 1967</i> , s 9 | Appointment and qualification of judges |
| • <i>District Court Act 1967</i> , s 15 | Removal from office |
| • <i>Supreme Court Act 1995</i> , ss 195 | Commission of judges |
| • <i>Supreme Court Act 1995</i> , s 196 | Judges' salaries |
| • <i>Supreme Court Act 1995</i> , s 199 | Laws of England to be applied in the administration of justice |
| • <i>Supreme Court Act 1995</i> , s 200 | Common law and general jurisdiction of the court-jurisdiction at common law |
| • <i>Supreme Court Act 1995</i> , s 201 | Equitable jurisdiction |
| • <i>Supreme Court Act 1995</i> , s 202 | Criminal jurisdiction |
| • <i>Supreme Court of Queensland Act 1991</i> , s 7 | Continuance |
| • <i>Supreme Court of Queensland Act 1991</i> , s 8 | Jurisdiction generally |
| • <i>Supreme Court of Queensland Act 1991</i> , s 12 | Appointment of judges |

• <i>Supreme Court of Queensland Act 1991</i> , s 25	Resignation
• <i>Criminal Justice Act 1989</i> s 28	Commission's report insufficient for judge's removal from Supreme Court

Clause 56 defines the terms 'judge' and 'office' for the purposes of this chapter of the Bill. The term 'judge' refers to a judge of the Supreme Court or District Court. The definition of 'office' lists the various judicial offices to which the provisions of this chapter apply.

Clause 57 provides that there must be a Supreme Court of Queensland and a District Court of Queensland. This Act, through both this clause and consequential amendments made to the *District Court Act 1967* (see schedule 2), effects a change in the name of the District Court to the District Court of Queensland. The District Court is not presently acknowledged in the *Constitution Act 1867*.

Clause 58 provides that the Supreme Court has all jurisdiction necessary for the administration of justice in Queensland. The clause also provides that the Supreme Court:

- is the superior court of record in Queensland;
- is the supreme court of general jurisdiction in and for the State; and
- has, subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise.

A transitional provision has been included in clause 88(2) of the Bill out of an abundance of caution to make it clear that the jurisdiction of the Supreme Court is unaffected by the commencement of the Constitution of Queensland 2001. This caution is taken particularly as provisions of the *Supreme Court Act 1995*, which deal with specific aspects of the court's jurisdiction, are repealed by the Bill.

Clause 59 provides that the Governor in Council may, by commission, appoint judges. Appointees must be barristers or solicitors of the Supreme Court of at least five years standing.

Subclauses (2) and (3) require a judge to take an oath or make an affirmation of allegiance and of office before entering on the duties of an office (defined in clause 56).

Clause 60 provides that a judge of the Supreme Court or District Court holds office as a judge *indefinitely during good behaviour*. Currently, section 15 of the *Constitution Act 1867* provides that the commissions of judges of the Supreme Court *shall remain in full force during their good behaviour*. (Provision for the length of a judge's appointment to another judicial office, such as Chief Justice of Queensland or Chief Judge of the District Court, is made in the legislation providing for appointment to such offices.)

Clause 60 also:

- refers to the *Supreme Court of Queensland Act 1991* and the *District Court Act 1967* which provide that a judge must retire at age 70 (although the judge may finish hearing a proceeding that commenced before the judge reached age 70); and
- provides that a judge may resign a judicial office by giving written notice of his or her resignation to the Governor.

Clause 60 represents an important change to the law by referring to the tenure of District Court judges alongside Supreme Court judges. Currently, the *Constitution Act 1867* makes no reference to the District Court or to District Court judges. Further, there is currently no express provision enabling a District Court judge to resign his or her judicial office.

Clause 61 provides that a judge may be removed from an office only by the Governor in Council on the address of the Legislative Assembly asking for the judge to be removed for proved misbehaviour or proved incapacity.

An address is the form ordinarily used by Houses of Parliament for making their desires and opinions known to the Crown.¹ In this case, the address may only be made after the Assembly has accepted a finding of a tribunal that, on the balance of probabilities, the person to be removed has misbehaved in a way that justifies removal from office or is incapable of performing the duties of office.

By providing for removal from office rather than for removal of a judge, clause 61 prescribes the manner in which a judge might be removed from one office, say Chief Justice of the Supreme Court or Chief Judge of the District Court, without being altogether removed as a judge of the Supreme or District Court.

1 D Limon & W R McKay (eds) 1997, *Erskine May's Treatise on The Law, Privileges, Proceedings and Usages of Parliament*, 22nd ed, Butterworths, London, pp. 606-609.

Clause 61 further provides for a tribunal, to consist of at least 3 members, to be established by an Act to inquire into the conduct or capacity of a judge. The tribunal members, who (subject to subclause 10) must be former judges or justices of Australian State or Federal superior courts, are to be appointed by resolution of the Legislative Assembly. Subclause (10) provides that a person cannot be a member of a tribunal if that person and the judge who may be removed were judges of the same court at the same time. The tribunal has the functions, powers, protection and immunity given by an Act. See, for example, the *Parliamentary (Judges) Commission of Inquiry Act 1988*.

Clause 61 makes important changes to the present law about the removal of judges from office. For Supreme Court judges, the grounds of removal by the Governor on an address of the Legislative Assembly are confined in the Bill to *proved misbehaviour* and *proved incapacity*. Under section 16 of the *Constitution Act 1867* and section 195(2) of the *Supreme Court Act 1995*, the power of removal is not presently confined to any specific grounds (although judicial commissions are referred to in section 15 of the *Constitution Act 1867* and section 195(1) of the *Supreme Court Act 1995* as continuing during the judge's good behaviour). The two prescribed grounds reflect the accepted grounds for removal of judges in Australia and those provided for under section 72 of the *Commonwealth Constitution* for the removal of Federal Justices. Both grounds are currently prescribed for the removal of District Court judges under section 15 of the *District Court Act 1967*, albeit without the specific requirement for the ground to be *proved*.

Largely, clause 61 reflects the procedure taken in respect of the Honourable Mr Justice Vasta of the Supreme Court of Queensland in 1989. The tribunal in that case was established by section 3 of the *Parliamentary (Judges) Commission of Inquiry Act 1988* and comprised three former judges appointed by resolution of the Legislative Assembly. The tribunal considered the civil standard of proof (that is, the balance of probabilities) appropriate.

Any other possible avenues for removing a judge from all or any of the judicial offices he or she may hold are now abrogated by clause 61, which is in turn supported by clause 63.

Clause 62 provides that a judge must be paid a salary applicable to the judge's office and that the amount of the salary may not be decreased. Note that the *Judges' (Salaries and Allowances) Act 1967* is relevant to clause 62.

By comparison, section 17 of the *Constitution Act 1867* merely provides that salaries of judges of the Supreme Court, as provided for in an Act or otherwise, *shall ...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.*

Clause 62 is a basic statement about judges' salaries. Other legislation makes more specific provision for judges salaries, for example, how the rate of salary is set, and other allowances payable to judges. See, in particular, the *Judges (Salaries and Allowances) Act 1967*.

Clause 63 provides protection for a judge who holds a judicial office that is abolished directly or because a court or part of a court is abolished. The judge is entitled to hold, without loss of salary, a judicial office of equivalent or higher status in the same court in which the judge held the abolished judicial office or in another court. Clause 63 has no counterpart in existing Queensland law. The provision attempts to prevent the removal of Supreme Court judges and District Court judges from office without following the formal procedure outlined in clause 61.

CHAPTER 5—REVENUE

Provisions consolidated:

- *Constitution Act 1867*, s 18 No money vote or Bill lawful unless recommended by Governor
- *Constitution Act 1867*, s 34 All duties and revenues to form consolidated revenue fund
- *Constitution Act 1867*, s 35 Such fund permanently charged with expenses of collection
- *Constitution Act 1867*, s 39 Consolidated fund to be appropriated by Act of the legislature

Clause 64 provides that all taxes and other revenues of the State are to form one consolidated fund to be appropriated for the public service of the State in the manner, and subject to the charges, specified in an Act. See, for

example, clauses 65 to 68 of the Bill, as well as the *Financial Administration and Audit Act 1977*.

Clause 65 provides that a requirement to pay a tax, impost, rate or duty must be authorised by an Act of Parliament.

Clause 65 provides one of the two rules which provide for the important principle that Parliament controls public finance: Government cannot raise revenue through taxation except as authorised by Parliament through legislation. That rule is provided for in article 4 of the Bill of Rights 1688 (Imp) which states: *That levying money for or to use of the Crown, by pretence of prerogative, without grant of Parliament ... is illegal.*

Clause 66 provides that expenditure from the consolidated fund must be authorised by an Act. Further, the Act authorising the payment must specify the purpose of the payment. The clause replaces the existing phrase in section 39(1) of the *Constitution Act 1867*, that the consolidated fund *shall be subject to be appropriated to such specific purposes as by any Act of the legislature of the State shall be prescribed in that behalf.*

Clause 66 provides the second rule concerning parliamentary control of public finance, namely, the Government cannot spend public revenue without Parliament's authorisation. Acts which authorise the expenditure of public money are known as Appropriation Acts and, in Queensland, are generally introduced into Parliament in conjunction with the Government of the day handing down the State budget, or reviewing the budget during the financial year.

Clause 67, which is an exception to clause 66(1), provides that expenses related to the collection and management of the consolidated fund are charged to the fund—as the first charge—without requiring specific appropriations for that purpose. This is an exception to the rule contained in clause 66 that payment from the consolidated fund must be authorised by an Act of Parliament.

Clause 68 represents a further balance between the Executive and Parliament in relation to finance. While clause 66 provides that the Executive must not spend public money without the Legislative Assembly's authorisation, clause 68 provides that the Legislative Assembly must not originate or pass a vote, resolution or Bill for the appropriation of an amount from, or an amount required to be paid to, the consolidated fund unless it has first been recommended by message of the Governor. The clause further provides that the message must be given to the Legislative Assembly during the session of Legislative Assembly in which the vote, resolution or Bill is intended to be passed.

CHAPTER 6—LANDS

Provisions signposted (but not consolidated):

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| • <i>Constitution Act 1867</i> , s 30 | Legislature empowered to make laws regulating sale and other disposal of waste lands |
| • <i>Constitution Act 1867</i> , s 40(1) | The entire management of Crown lands and all revenues thence arising to be vested in the local legislature |

Clause 69 provides that:

- section 30 of the *Constitution Act 1867* gives Parliament law-making power in relation to the waste lands of the Crown in Queensland; and
- section 40 of the *Constitution Act 1867* vests particular rights in relation to the waste lands of the Crown in Queensland in the Parliament.

A copy of these sections of the *Constitution Act 1867* is contained in attachment 4 of the Bill.

Sections 30 and 40 of the *Constitution Act 1867* have not been consolidated into this Bill because of concerns that the re-enactment of these sections would affect native title holders differently than it would affect freehold title holders and would therefore not be a valid future act under the Commonwealth *Native Title Act 1993*.

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

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

The proviso contained in *Constitution Act 1867*, section 40(2) is repealed because it is spent. The High Court of Australia in *Mabo & Anor v. The State of Queensland & Anor* (1988) 166 CLR 186 (Mabo No. 1) per Dawson at 239, with Wilson J at 201 and Mason CJ at 195 concurring, held that any contract, promise, engagement or right of the type referred to in the proviso to section 2 of the *New South Wales Constitution Act 1855* (Imp), which is the same as that contained in section 40(2) of the *Constitution Act 1867*, had long since ceased to exist nor were they in 1985 the source of any limitation upon the power of the Queensland parliament to deal with any waste lands. It would seem to follow that the repeal of section 40(2) of the *Constitution Act 1867* would not have any implications with respect to native title.

CHAPTER 7—LOCAL GOVERNMENT

Provisions consolidated:

- *Constitution Act 1867*, s 54 System of local government
- *Constitution Act 1867*, s 55 Manner of appointing persons to exercise powers, authorities, duties and functions of local government
- *Constitution Act 1867*, s 56 Procedure on Bills affecting local government

Clauses 70 to 78 are founded on sections 54 to 56 of the *Constitution Act 1867* which purport to give constitutional status to the State's system of local government. Sections 54 to 56 of the *Constitution Act 1867* were inserted by the *Constitution Act Amendment Act 1989*.

The local government provisions have been redrafted to enhance the logic and language of the provisions, to reflect the passage of the *Local Government Act 1993* and to adopt the terminology contained in that Act.

PART 1— SYSTEM OF LOCAL GOVERNMENT

Clause 70 provides that there must be a system of local government in Queensland which consists of a number of local governments.

Clause 71 defines a local government as an elected body that is charged with the good rule and local government of the area allocated to it. At the same time, the clause makes it clear that the constitution of a local government and its functions and powers are subject to control by statutes of the Parliament, for example, the *Local Government Act 1993*, the *City of Brisbane Act 1924*, the *Community Services (Aborigines) Act 1984* and the *Community Services (Torres Strait) Act 1984*.

PART 2—PROCEDURE LIMITING DISSOLUTION OF LOCAL GOVERNMENT AND INTERIM ARRANGEMENT

Clauses 72 to 76 transcribe the provisions of the lengthy section 55 of the *Constitution Act 1867*, essentially providing that an instrument purporting to dissolve a local government must be approved by the Legislative Assembly before it can have effect.

Clause 72 defines the term ‘Minister’ for the part as the Minister who administers the provision under which the local government may be dissolved. This definition identifies the Minister that must act in order for the Legislative Assembly to consider ratifying an instrument that purports to dissolve a local government.

Clause 73 provides that the Minister must table a copy of an instrument seeking to dissolve a local government in the Legislative Assembly within 14 sitting days of the instrument being made.

Section 164 of the *Local Government Act 1993* provides that the Governor in Council may dissolve a local government by regulation if the Minister is satisfied that the local government has acted unlawfully, corruptly, or in a way that puts at risk its capacity to exercise its jurisdiction or that the local government is incompetent or cannot properly exercise its jurisdiction. See also section 13F of both the *Community Services (Aborigines) Act 1984* and the *Community Services (Torres Strait) Act 1984*.

Clause 74 provides that until the instrument purporting to dissolve a local government is ratified by the Legislative Assembly, the instrument only has the effect of suspending the local government’s councillors from office.

Clause 75 provides that if the Legislative Assembly—upon the motion of the Minister (identified by the definition in clause 72)—ratifies the dissolution of a local government within 14 sitting days of the tabling of the instrument purporting to dissolve the local government, the local government is dissolved in accordance with the instrument.

Clause 76 provides that the effect of the instrument ends if a copy of the instrument is not tabled in Parliament within 14 sitting days of its making or the Legislative Assembly refuses to, or does not, ratify the dissolution within 14 sitting days of a copy of the instrument being tabled.

When the effect of the instrument ends:

- the local government's suspended councillors are reinstated in their respective offices; and
- the appointment of a body or a person appointed to perform the functions and exercise the powers of the local government because of its purported dissolution ends.

PART 3—SPECIAL PROCEDURES FOR PARTICULAR LOCAL GOVERNMENT BILLS

Clause 77 provides that a member who proposes to introduce any Bill for an Act that would be administered by a Minister who administers a provision of the *Local Government Act 1993* and would *affect* local governments generally or any of them, must—if the member introducing the Bill thinks it practicable—circulate a summary of the Bill to a local government representative body within a reasonable time before the Bill is introduced.

Clause 78 is a reproduction of sections 56(2) to (6) of the *Constitution Act 1867* and provides that a referendum on a proposal to end the system of local government must be held if a Bill would end the system of local government. However unlike, say, section 53(1) of the *Constitution Act 1867*, clause 78 does not entrench itself and could be expressly repealed by an ordinary Act of Parliament.

CHAPTER 8—MISCELLANEOUS

Provisions consolidated:

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| • <i>Constitution (Office of Governor) Act 1987</i> , s 11 | Issue of compliance not justiciable |
| • <i>Demise of the Crown Act 1910</i> , s 2 | Effect of demise of the Crown on holding of office |

Clause 79 provides that the issue of compliance with the following clauses is not justiciable. In other words, whether or not the requirements contained in the following clauses have been followed cannot be challenged in court. The clauses are:

- clause 31 (Requirements concerning commission and oath or affirmation)—section 5 of the *Constitution (Office of Governor) Act 1987*;
- clause 40 (Delegation by Governor to Deputy Governor)—section 10 of the *Constitution (Office of Governor) Act 1987*;
- clause 41 (Administration of Government by Acting Governor)—section 9 of the *Constitution (Office of Governor) Act 1987*;
- clause 48 (Executive Council)—section 6 of the *Constitution (Office of Governor) Act 1987*; and
- clause 50 (Meetings of Executive Council)—section 7 of the *Constitution (Office of Governor) Act 1987*.

Clause 79 relocates section 11 of the *Constitution (Office of Governor) Act 1987* and ensures that the five *Constitution (Office of Governor) Act 1987* sections (5, 6, 7, 9 and 10) that are declared not to be justiciable in that Act continued to be so declared here.

The phrase *[w]ithout affecting the justiciability of any other issue under this Act* is inserted in clause 79. This is done to prevent the clause being misinterpreted to affect the justiciability or otherwise of the other provisions in this Bill which might have occurred if section 11 of the *Constitution (Office of Governor) Act 1987* was simply reproduced outside its limited original environment of the provisions of the *Constitution (Office of Governor) Act 1987*.

Clause 80 consolidates the only substantive provision of the *Demise of the Crown Act 1910*. This provision continues the holding of any office under the Crown in the event of the end of the Sovereign's reign and makes provision about the continuing effect of oaths.

CHAPTER 9—TRANSITIONAL PROVISIONS

Clauses 81 to 93 provide for transitional arrangements for when the Bill is introduced.

CHAPTER 10—CONSEQUENTIAL AMENDMENTS AND REPEALS

This chapter provides for consequential amendments and repeals for when the Bill is introduced.

Clause 94 refers to consequential amendments to Acts listed in schedule 2 of the Bill.

Clause 95 refers to the repeal of Acts listed in schedule 3 of the Bill and Imperial Laws listed in schedule 4 so far as they are part of the law of Queensland.

SCHEDULE 1—OATHS AND AFFIRMATIONS

Schedule 1 contains the oaths and affirmations of allegiance and of office referred to in the Bill to be taken by the following office holders:

- members of the Legislative Assembly (clause 22);
- the Governor (clause 31) and an Acting Governor (clause 41);
- Ministers (clause 43) or a member appointed to act as a Minister (clause 46); and
- judges (clause 59).

Schedule 1 also contains the oath and affirmation of office and secrecy taken by members of the Executive Council under clause 48.

SCHEDULE 2—GENERAL AMENDMENTS

Schedule 2 contains the consequential amendments made to a number of Acts by clause 94 of the Bill. The Acts amended are as follows.

The *Acts Interpretation Act 1954* is amended to:

- change a reference to Ministers of the Crown to Ministers of the State;
- omit section 33(14) which provides for administrative arrangements to be made which is provided for by clause 44 of the Bill;
- update the general definitions of *Constitution of Queensland*, *Governor*, *Acting Governor* (formerly *Administrator*) and *Deputy Governor* and omit the existing definition of *District Court*; and
- omit part 12 of the Act which is relocated to chapter 3 (Governor and Executive Government), part 5 (Powers of the State) of the Bill.

The *Community Services (Aborigines) Act 1984*, the *Community Services (Torres Strait) Act 1984* and the *Local Government Act 1993* have been amended to update references to section 55 of the *Constitution Act 1867* (Manner of appointing persons to exercise powers, authorities, duties and functions of local government) which is being relocated into chapter 7 (Local Government), part 2 (Procedure limiting dissolution of local government and interim arrangement).

The *Constitution Act 1867* is amended to repeal all of the provisions that are consolidated into the Bill; that is, all of the sections of the *Constitution Act 1867* except for sections 1, 2, 2A, 11A, 11B, 30, 40(1) and 53.

The *Crime and Misconduct Act 2001* is amended to remove provision for the establishment of a tribunal to consider the conduct of a Supreme Court or District Court judge in light of clause 61 of the Bill. Section 70 of the Act has been recast to require the Crime and Misconduct Commission to provide to a tribunal established to inquire into the conduct or capacity of a

judge any material it has that relates to the inquiry, including any relevant reports.

The *District Court Act 1967* is amended to:

- change the court's name from the District Court to the District Court of Queensland and to change the short title of the Act to the *District Court of Queensland Act 1967*, including the insertion of a transitional provision to make it clear that the change is one of name only;
- make provision for the seniority of District Court judges; and
- repeal sections 4, 9, 14(3) and 15 which have been consolidated into chapter 4 (Courts) of the Bill.

Note that the provision for the seniority of District Court judges does not refer to senior judges of that court. This is because the office of senior judge of the District Court no longer exists, although judges who held that office retain the right to use the title 'Senior Judge'. The seniority of these judges is determined by the date of the commission originally appointing them as a judge of the District Court and is unaffected by their continued right to use the title 'Senior Judge'.

The *Evidence Act 1977* is amended to:

- replace a reference to the seal of Queensland with 'Public Seal of the State';
- provide for judicial notice to be taken of administrative arrangements set out in an order made under clause 44 of the Bill and published in the gazette and of documents under the Royal Sign Manual; and
- to replace a reference to the *Constitution Act 1867* with *Constitution of Queensland 2001* in relation to the certification of a copy of Letters Patent as conclusive evidence.

The *Oaths Act 1867* is amended to omit reference to the judicial oath of office in section 3 and a reference to section 4 of the *Constitution Act 1867*.

The *Public Sector Ethics Act 1994* is amended to update a reference to section 57 of the *Constitution Act 1867* which is to be repealed.

The *Registration of Births, Deaths and Marriages Act 1962* is amended to declare issuing a commemorative birth certificate to be a commercial activity for clause 52 of this Bill. This matter was previously dealt with by the *Acts Interpretation Regulation 1997*.

The *Statutory Instruments Act 1992* is amended to update the references in schedule 1A (Statutory rules that are not subordinate legislation) to instruments made under various provisions which are to be repealed with references to the corresponding provisions in the Bill.

The *Supreme Court Act 1995* is amended to repeal provisions that are consolidated into the Bill.

The *Supreme Court of Queensland Act 1991* is amended to:

- repeal provisions that are consolidated into the Bill;
- provide for the appointment of the Chief Justice of Queensland, to support the provisions of chapter 4 of the Bill; and
- insert cross-references to the requirement to take the oath or make the affirmation of allegiance and of office required by clause 59 of this Bill.

SCHEDULE 3—REPEALED LAWS

Schedule 3 lists the following Acts which are repealed by clause 95(1) of the Bill:

- *Legislative Assembly Act 1867*;
- Queensland Coast, Islands and Waters Proclamation dated 22 August 1872 and published in the gazette on 24 August 1872 at pages 1325-6;
- *Officials in Parliament Act 1896*;
- *Demise of the Crown Act 1910*;
- *Constitution Act Amendment Act 1922*;
- *Royal Powers Act 1953*;
- *Australia Acts (Request) Act 1985*;
- Proclamation of Letters Patent for Governor dated 6 March 1986 and published in the gazette on 8 March 1986 at pages 903-6;
- *Constitution (Office of Governor) Act 1987*; and
- *Acts Interpretation Regulation 1997*.

SCHEDULE 4—REPEALED IMPERIAL LAWS

Schedule 4 lists the Imperial Laws which are repealed so far as they are part of the law in Queensland by clause 95(2) of the Bill.

ATTACHMENT 1

Attachment 1 is a copy of sections 1, 2, 2A, 11A, 11B and 53 of the *Constitution Act 1867* which are referred to in clauses 6, 7, 8 and 30 of the Bill as containing the substantive law relating to the Parliament, the Legislative Assembly and the law-making power in Queensland and about the office of Governor.

ATTACHMENT 2

Attachment 2 is a copy of section 2 of the *Constitution Act Amendment Act 1890* and section 4 of the *Constitution Act Amendment Act 1934* which are referred to in clause 16 of the Bill as containing the substantive law relating to the duration of the Legislative Assembly.

ATTACHMENT 3

Attachment 3 is a copy of section 3 of the *Constitution Act Amendment Act 1934* which is referred to in the footnote to clause 6 of the Bill as prohibiting the establishment of another legislative body in Queensland except by referendum.

ATTACHMENT 4

Attachment 4 is a copy of sections 30 and 40 of the *Constitution Act 1867* which are referred to in clause 69 of the Bill as containing the substantive law relating to the Parliament's law-making power in relation to the waste lands of the Crown and the vesting of particular rights in relation to the waste lands of the Crown in the Parliament.