

**The expectations raised by  
*Constitution of Queensland 2001*  
and  
*Parliament of Queensland Act 2001***

An address by the Hon Alan Demack AO, Queensland Integrity Commissioner to  
Queensland Public Sector Ethics Network (QPSEN), Tuesday 6 May 2003.

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One of the disadvantages of living in a society with a long history of constitutional government is that community interest in the precise nature of the constitutional constraints upon Government is very limited. Consequently, it is not surprising that when the Queensland Parliament completed a lengthy process of constitutional review in November 2001, there was no dancing in the streets and no media frenzy. Yet the *Constitution of Queensland 2001* and the *Parliament of Queensland Act 2001* are two of the most significant pieces of legislation passed by Parliament in many years. This morning I will deal with some of the issues they raise within the area of responsibility of the Queensland Public Sector Ethics Network.

***Constitution of Queensland 2001***

For those who think of a constitution as a document which stands alone and is not easily altered, the *Constitution of Queensland 2001* will come as a surprise. It makes important references to earlier legislation and, indeed, includes the text of earlier legislation in attachments.

The reason for this is that, in a general sense, the *Constitution of Queensland 2001* is no different from any other Act of Parliament. It can be amended by any subsequent Act. Indeed it was amended this year to provide absolute protection for internet transmissions of proceedings in Parliament. However, there are certain constitutional structures which should be entrenched, so that they can only be altered by the decision of the voters of Queensland at a referendum. This has been recognised over the years, and some provisions are entrenched. These are the provisions in earlier legislation found in the attachments. These entrenched provisions are –

- ? There shall be a Legislative Assembly;
- ? The Parliament of Queensland consists of the Queen acting by and with the advice and consent of the Legislative Assembly;
- ? The Queen's representative is the Governor;
- ? Bills passed by the Assembly shall be presented to the Governor for assent;
- ? The term of each Parliament is three years;
- ? The Parliament of Queensland shall not be altered by re-establishing the Legislative Council.

While the *Constitution of Queensland 2001* does not introduce significant changes to our governmental structures, it does recognise matters which have in fact existed for a long time. For example, there must be a Cabinet consisting of the Premier and a number of Ministers, and the Cabinet is collectively responsible to the Parliament (s.42). The State's authority to carry out commercial activities is quite properly placed in the Constitution. It had previously been found in the *Acts Interpretation Act 1954*.

The system of local government is now recognised in the *Constitution of Queensland 2001* and it is entrenched. Any Bill to end the system of local government must be approved by the majority of electors.

The *Constitution of Queensland 2001* requires there to be both a Supreme Court of Queensland and a District Court of Queensland (s.57). This provision is not entrenched. However there is one provision about removal of judges from office for misbehaviour or incapacity which is worth mentioning. A judge's misbehaviour or incapacity must be proved to the satisfaction of a tribunal established under an Act. The tribunal must consist of at least three members who are former judges. A person is not eligible for appointment as a member of the tribunal if that person and the judge who may be removed were judges of the same court at the same time (s.61(10)).

It is a useful exercise to ask why such a prohibition exists. Because "conflict of interest" is used so broadly today, some may answer, there is the appearance of a conflict of interest. But what personal interest could the retired judge have in the outcome of the tribunal's decision? Certainly not a financial interest. It would be mere

supposition if it were said that the interest may be in protecting a friend. In fact, the reason why this provision exists has nothing to do with conflict of interest. The reason is that a tribunal dealing with such an important issue must appear in every sense to be independent of the judge whose conduct is under scrutiny. The tribunal must be impartial and be seen to be impartial. It is an application of the principle that justice must be seen to be done.

It is important to recognise that a conflict of interest is only one reason why a particular course of conduct should not be followed. Other reasons include the need for justice to be seen to be done, the need to keep full and accurate records and the need for honest and truthful conduct.

### **Parliament of Queensland Act 2001**

Three aspects of the *Parliament of Queensland Act 2001* are of particular interest to QPSen –

- ? The effect of holding “paid public appointment” on a candidate for election;
- ? The restrictions on a member from transacting business with an entity of the State;
- ? The responsibilities of the Members’ Ethics and Parliamentary Privileges Committee.

### **Candidates holding “paid public appointment”**

In summary –

- ? Some people holding a “paid State appointment” must resign immediately on being nominated as a candidate for election;
- ? All other persons holding a “paid State appointment” must take leave of absence for the election period;
- ? Persons holding a “paid public appointment” who are elected as members cannot take up their seat until they stop holding that appointment.

To understand this summary, the two phrases “paid State appointment” and “paid public appointment” must be explained.

**“Paid Public Appointment”**

A person holds a “paid public appointment” if the person, for *reward* –

- (a) holds an office under, or is employed by, the State, another State or the Commonwealth; or
- (b) holds an appointment to or in or is employed by or in –
  - i. An *entity* of the State, another State or the Commonwealth; or
  - ii. The parliamentary service of the Assembly or an administrative office or service attached to the legislature of another State or Commonwealth; or
  - iii. A court or tribunal or a registry or other administrative office of a court or tribunal, of the State, another State or the Commonwealth; or
  - iv. A local government of the State or another State.

(s.65(1))

Within that definition, two words need further explanation, “reward” and “entity”.

“Reward” does *not* include –

- (a) an amount decided under Chapter 7 (of the *Parliament of Queensland Act 2001* which deals with member’s salaries) or the *Parliamentary Contributory Superannuation Act 1970*; or
- (b) reasonable expenses actually incurred by or for the member for any one or more of the following –
  - i. accommodation:
  - ii. meals:
  - iii. domestic air travel:
  - iv. taxi fares or public transport charges:
  - v. motor vehicle hire: or
- (c) an amount (other than an amount paid at the pleasure of the State, another State or the Commonwealth) paid as a pension, entitlement, remuneration, allowance or otherwise for –
  - i. past service in a paid public appointment: or

- ii. past or existing service as a member of the Commonwealth's military reserve forces.

(s.65(6))

It is unusual for a definition in an Act to identify only the payments which are not rewards. The reason for this approach is clear enough. This makes it clear that a serving member does not hold a paid public appointment because members' salaries are excluded from the definition of "reward". Similarly, people who formerly held paid public appointments and who now receive pensions do not hold paid public appointments.

"Entity", of a State, means –

- (a) the relevant State; or
- (b) the Governor or Governor in Council of the relevant State; or
- (d) a Minister of the relevant State; or
- (c) a department, service, agency, authority, commission, corporation, instrumentality, board, office or other entity, established for a government purpose of the relevant State; or
- (d) an entity a majority or more of the members of which, or of the governing body of which, are appointed by –
  - i. an entity of the relevant State; or
  - ii. a Minister of, or a person holding a paid public appointment under, the relevant State; or
- (e) a part of an entity mentioned in paragraph (c) or (d).

(Dictionary in Schedule to Act)

The lettering given to each clause is printed from the authorised statutes and appears to involve a typographical error. I assume clause (e) refers to the second clause (d). There is a corresponding definition for entity of the Commonwealth.

Clause (c) is the one which embraces a very broad cross-section of public sector entities, and it may present many interesting questions of interpretation. For example, many entities are established for a government purpose, and it is conceivable that some people who aspire to become members of Parliament would be appointed to entities

which have an advisory role. If such a person is paid travelling expenses, does that mean that the person holds a “paid public appointment”? The definition of “reward” excludes travelling expenses incurred by a Member of Parliament, but does not refer to travelling expenses incurred by anyone else.

The fact that these definitions raise such issues makes it clear that candidates for election should not be seen to be gaining any benefit from the Government during an election campaign. This is an interesting concept, when it is readily observed that sitting Government members often receive electoral benefits.

### **“Paid State Appointment”**

A paid State appointment held by a person is a paid public appointment the person holds in connection with the State of Queensland. This suggests that the person appointed by a Minister to an advisory committee who receives travelling expenses holds a paid State appointment. Ministers, Parliamentary Secretaries, some Members of the Legislative Assembly and local government mayors and councillors are not holders of paid State appointments.

(s.65(3))

### **Persons holding paid State appointment who must resign if nominated.**

There is a list of eighteen office holders who must resign office immediately on being nominated under the *Electoral Act 1992*, s.84, as a candidate for election (s.67). Alphabetically, they range from the Anti Discrimination Commissioner to the Solicitor General. In each instance the office holder must be and be seen to be apolitical.

### **Other persons holding paid State appointments.**

Other people holding paid State appointments must be absent on leave from the appointment during the election period. That period begins when the person becomes a candidate and ends either on the day before the poll at which the person is elected or on the election of another candidate for the electoral district. A candidate may apply for

accrued leave or leave without reward. Failure to apply for leave will mean the person is taken to be on unpaid leave.

**Persons holding paid public appointments.**

If a member of the Commonwealth Parliament or of a legislature of another State, a mayor or councillor of a local government of another State or holder of a paid public appointment other than a paid State appointment, is elected as a member, that member cannot take up a seat in the Legislative Assembly until ceasing to hold the other memberships or appointments.

Mayors and councillors of a Queensland local government cease to be a mayor or councillor on becoming a candidate for an election as a member of the Legislative Assembly (*Local Government Act 1993*, s.224A).

A Member of the Legislative Assembly must not accept a paid State appointment and any purported appointment of a member to hold a paid State appointment is of no effect (s.69). If a member accepts a paid public appointment, other than a paid State appointment, the member's seat becomes vacant (s.72(I)(f)). Similarly, if a member is elected or appointed as mayor or councillor of a local government of the State or another State the member's seat becomes vacant (s.72 (i)(g)).

**Transacting Business with the State**

A member must not transact business, directly or indirectly, with an entity of the State (s.71(i)). This happens if the member has a direct or indirect interest in a contract with an entity of the State or performs a duty or service for reward for an entity of the State (s.70(i)).

Certain contracts are excluded from this prohibition –

- ? Ones required or permitted under an Act,

- ? Ones which allow the member to be provided with goods or services that are available to the public on the same terms the goods or services are available to the public, eg. supply of electricity;
- ? Ones which are lawful payment of compensation
- ? Ones which are made, entered into, or accepted, by a listed corporation or a corporation with more than 20 shareholders, one of whom is the member, if the member does not own 5% or more of the corporation's shares or have control of the corporation's board.

(s.70(2(a)))

The performance of some duties and services is also excluded, namely –

- ? Ones which an Act requires a member to perform,
- ? Ones where neither the member or any other person receives any reward other than the payment of the member's salary, allowances and expenses or the payment under the *Parliamentary Contributory Superannuation Act 1970*,
- ? Ones where the duty or service is the attendance at court in obedience to any court process.

(s.70(2(b)))

If a member enters into a contract with an entity of the State the contract is invalid to the extent of the contravention of these provisions, and the member cannot receive any reward in connection with this contract. Similarly, no reward can be received for the performance of a duty or service in contravention of these proceedings.

(s.71(2)&(3))

If a member acquires an interest in a contract with an entity of the State under a testamentary disposition, the interest must be disposed of within one year (s.71(4)).

If a new member has an interest in a contract with an entity of the State, the interest must be disposed of within six months of being elected (s.71(5)&(6)).

Three types of contracts are excluded from these prohibitions –

- ? Insurance contracts with Work Cover Queensland,

- ? Contracts for the repayment of principal and the payment of interest on money lent to an entity of the State,
- ? An agreement for the provision of legal assistance under the *Legal Aid Queensland Act 1977* by a member who is a lawyer.

### **Members' Ethics and Parliamentary Privileges Committee**

Under s.16 of the *Parliamentary Committees Act 1995*, the powers of the MEPP Committee were limited to recommending a proposed code of conduct and recommending a procedure for dealing with complaints about members. A proposed Code of Ethics Standards was presented to Parliament in a report dated 5 September 2000. A Code of Ethical Standards prepared on the basis of legislation, standing orders, resolutions of the House, practice and procedure was published on 4 September 2001.

The MEPP Committee now has responsibility for the ethical conduct of members and parliamentary powers, rights and immunities (s.90). Its responsibilities in respect of ethical conduct fall into two areas, the registration of interests and a code of conduct. As to the first, the MEPPC now has the obligation to consider complaints referred to it about failure to register particular interests (s.91(c)), as well as having general responsibility about the registers.

The Committee's area of responsibility about ethical conduct of members includes –

- (a) Publishing and reviewing a code of ethical conduct for members (other than members in their capacity as Ministers), including procedures for complaints about a member not complying with the code,
- (b) Reform of legislation and standing rules and orders about the ethical conduct of members,
- (c) Considering complaints against particular members for failing to comply with the code of ethical conduct, reporting on complaints to the Assembly and recommending action by the Assembly (s.92(1)).

In reviewing the code of ethical conduct for members, the committee must have regard to –

- (a) The ethics principles and obligations set out in the *Public Sector Ethics Act 1994*, and
- (b) The desirability of consistency between standards in the code of ethical conduct and the ethics principles and obligations to the extent the principles and obligations are relevant to members and their functions (s.92(2)).

A complaint about a member not complying with the code of ethical conduct for members may be considered only by the Assembly or the Committee (s.92(3)).

These provisions establish the central place that the *Public Sector Ethics Act 1994* has within the public sector. In my annual reports I have referred to the fact that in giving advice to designated persons I must have regard to approved codes of conduct. This implies that regard must be had to the ethics obligations found in the *Public Sector Ethics Act 1994*, upon which codes of conduct are based. Consequently, advice given to Ministers, who are designated persons, must have regard to those ethics obligations. The *Public Sector Ethics Act 1994* also requires me to have regard to the ethical standards or codes of conduct adopted by the Legislative Assembly by resolution (s.32 (a)(ii)). This now adds further emphasis to the importance of the *Public Sector Ethics Act 1994*.

### **Implications for QPSSEN**

Now that the MEPP Committee is required to have regard to the ethics principles and obligations in the *Public Sector Ethics Act 1994* when reviewing the code of ethical conduct for members, that Act is central to the whole public ethics regime in Queensland. This raises the importance of QPSSEN as a forum for the discussion of public sector ethics.

On the other hand, the prohibition upon members transacting business with an entity of the State is drawn very broadly to include all entities established for a State purpose. In these circumstances, it is unlikely that Parliament will favour any changes to s.89 of the *Criminal Code*, which prohibits a much narrower band of commercial dealings by public officials.