

3 MAR 2009

LEGAL, CONSTITUTIONAL AND
ADMINISTRATIVE REVIEW
COMMITTEESubmission**Development of a Preamble
for the
*Queensland Constitution 2001***

For Dr Jackie Huggins AM FAHA 2nd of March, 2009

The Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House, George Street
BRISBANE QLD 4000

Members of the Legal, Constitutional and Administrative Review Committee,

I request that the review board take this submission, regarding the inclusion of a preamble into the Queensland Constitution, as one made on my personal behalf as an individual and not one associated with any organisation or body.

Introduction

I welcome this opportunity to share my perceptions of the proposed changes and to explore the impact such changes may have among Indigenous Australians. I will do this with reference to;

- **Issue One**¹ - What form should the statement in the preamble to give due recognition to Queensland's Aboriginal and Torres Strait Islander people take?
- **Issue Three**² - Can a preamble be included in the *Constitution of Queensland 2001* and not be able to be used as an aid in statutory interpretation? If so, what is needed to ensure that the preamble does not include information which can be used as an aid in any statutory interpretation of the *Constitution of Queensland 2001*?

¹ Legal, Constitutional and Administrative Review Committee, 'A preamble for the Queensland Constitution', Issues Paper, February 2009.

² Ibid

Issue One

I fully support the statements made by the Queensland Premier, Anna Bligh, for the proposed preamble to the Queensland Constitution to include an acknowledgement of Aboriginal and Torres Strait Islander peoples as the first peoples of Queensland. The statement is a strong symbolic gesture of union between Indigenous and non-Indigenous Australians. This will be a positive step forward in the process of reconciliation.

A statement of recognition similar to that of the Queensland Constitutional Review Commission's (QCRC) in 2000 – *'In a spirit of reconciliation, we recognise the contribution of both Aboriginal and Torres Strait Islander peoples as the original occupants and custodians of this land'* – would be suitable and appropriate.

However that was 9 years ago and my position has somewhat changed in perspective in that Aboriginal people are in fact the true and original owners of Australia as deemed by the Mabo decision. And have made a continuing contribution. Therefore this would read

“in a spirit of reconciliation, we recognize the continuing contribution of both Aboriginal and Torres Strait Islander peoples as the traditional owners of this land”.

Depending on legalities this would now be my position.

Issue Three

The proposed statement of recognition is directly affected by issue three, namely, by the Parliamentary referral which states that the text of the preamble does not include information which could be used as an aid in statutory interpretation of the Constitution.

A preamble of an act is generally used in explaining why the act was passed and what it was intended to do, and the same is said to be true for constitutional preambles. One has to wonder as to the worth of the preamble if it cannot be used for the purpose for which it is created. Indeed, the framers (and early leading commentators) of the Federal constitution intended the preamble to be used in statutory interpretation³. To allow a qualification of use regarding the preamble diminishes its value, and the value of a statement of recognition to Indigenous Australians.

³ McKenna, M., Simpson, A. & Williams, G 'First Words: The Preamble to the Australian Constitution' [2001] UNSWLJ 28

It has been speculated that a proposed move such as this is conceived out of fear and the uncertainty of what a statement of recognition will legally entail⁴. However, the preamble is never the only influence in interpreting the constitution. In fact it has been stated that the “Justices of the High Court...have proved capable of deriving a wide range of rights and implications without recourse to the Preamble”⁵. The proposed restriction’s validity remains uncertain.

Regardless of this, Queensland needs to unreservedly declare their preamble’s statement of recognition is not qualified in any way. To do so would make it a meaningless gesture with no practical legal function.

The Victorian constitution (under s1A(3)(a)) has enacted a qualification to their constitutional statement of recognition, similar to the one proposed for Queensland. Not limiting the preamble’s use in statutory interpretation, as Victoria has done, would be a bold statement by Queensland in relation to their stance on reconciliation. Such a stance would hopefully encourage other states like South Australia and New South Wales – who do not have a preamble to their constitutions – to make similar, courageous legislative steps when the time comes.

Conclusion

I heartily support the proposition to include a statement of recognition in the preamble of Indigenous Australians.

However, I believe the statement of recognition would only be a hollow gesture on behalf of the Queensland government – and not practical action – if the preamble is not given the power to influence the interpretation of statutes enacted under the State’s constitution. Legal opinion is divided as to whether such a section restricting the preamble’s use in statutory interpretation is valid. Regardless, it would still be a disappointing move by the Queensland government to enact such a qualification.

In general, I support the insertion of a preamble into the *Queensland Constitution 2001*.

Dr Jackie Huggins AM FAHA

⁴ ‘One can only conjecture, for example, what effect might be given in legal proceedings to the presumption that Aboriginal peoples were the original occupiers and custodians of Australia, since these words import that the Aboriginal peoples had possession of the land of Australia and the power to direct what should be done with it.

The Samuel Griffith Society, Volume 11; Chapter Four, “A Preamble: The Issues”
Rt Hon Sir Harry Gibbs, GCMG, AC, KBE <<http://www.samuelgriffith.org.au/papers/html/volumel1/v11chap4.htm>>

⁵ McKenna, M. et al., ob cit