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

Dear Madam

I write in relation to the Legal, Constitutional and Administrative Review Committee's June 2004 Issues Paper entitled "A Preamble for the Queensland Constitution?". I wish to provide the following comments in relation to the matters raised therein.

Issue 1 – Page 6 of paper

Should the Queensland Constitution contain a preamble?

Given the foundational importance of the Queensland Constitution, it is appropriate that it be accompanied by a statement outlining the background to, and reasons for, its enactment. However, since "*preambular declarations undoubtedly carry 'potential legal significance'*",¹ and since there is a potential for even ordinary statutes to be read in light of a constitutional preamble,² care would need to be taken to ensure that any values, principles and messages enshrined in a preamble to the Queensland Constitution were unifying, rather than divisive, in nature, and that they not have any unintended, adverse consequences for the State or its people. As was seen with the proposed 1999 preamble for the Commonwealth Constitution, the inclusion of too many messages and values which people either did not relate to or disagreed with contributed to its lack of support at the 1999 referendum.³ The former committee, in its consideration of whether or not Queensland should have a Bill of Rights, observed that "*the specific rights to be enshrined should be aspirational to all of Queensland society and should bring the community together, not divide it.*"⁴ The same principle should apply to the messages and values contained in any preamble to the Queensland Constitution.

¹ Advice by the Acting Commonwealth Solicitor General to the Republic Advisory Committee in 1993, cited by McKenna, M., "The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights", Research Paper 12 1996-97, Parliament of Australia, Parliamentary Library. Source: www.apb.gov.au/library/pubs/rp/1996-97/97rp12.htm Accessed: 17/8/2004

² As suggested in Johns, G., *The Adelaide Review*, March 1999. Source: www.ipa.org.au/Media/gjar010399.html Accessed: 17/8/2004

³ Wicks, B. 2000, *Understanding the Australian Constitution*, 2nd Edition, Libra Books Pty Ltd, Sandy Bay, Australia, p. 102. The Issues Paper also concurred by noting that "*if a preamble makes too many claims for specific interests and values then other Australians will not feel able to support it*" (page 7).

⁴ LCARC Report No 12, November 1998, p. 49

It is also important that any preamble to the Queensland Constitution not be imbued with messages and values that are of relevance only to the people of the current generation. To be able to resonate across the generations the preamble should be timeless in its appeal by highlighting messages and values which unite the people of the State both now and in the future. As observed by Sir Harry Gibbs, in speaking of the proposed 1999 preamble for the Commonwealth Constitution, "...if beliefs, values or aspirations are to be mentioned in the Preamble, they should not only be generally acceptable today, but also should be likely to be generally acceptable during the whole life of the Constitution ... It would be unwise to incorporate in a Preamble ideas which may be in favour today, but out of favour tomorrow, thus attempting to force future generations to accept notions current at present."⁵ One of the arguments of the former committee in recommending against the adoption of a Bill of Rights in Queensland was that stated rights can become dated (for example, the right to bear arms) which can then have adverse repercussions for future generations.⁶ Similarly, others have argued against a Bill of Rights on the basis that "*a bill of rights is politics without consent; it denies the right of future voters to make their own society.*"⁷ These observations are relevant to the messages and values that may be considered for inclusion in a preamble to the Queensland Constitution.

Issue 2 – Page 7 of paper

Should the Queensland Constitutional Review Commission's draft preamble be adopted in Queensland?

I agree with the observation recorded in the Issues Paper that the preamble proposed by the 2000 Queensland Constitutional Review Commission (QCRC) appears to be more straightforward than the proposed 1999 preamble for the Commonwealth Constitution. Nevertheless, in its current form the QCRC preamble would require at least two important changes before any move was made to offer it for public consideration. Firstly, while from an historical perspective it is appropriate for a preamble to the Queensland Constitution to recognise, such as the QCRC preamble provides, that "*previously the Parliament of the United Kingdom was the ultimate authority for the Acts, laws and Documents relating to the Constitution of the State of Queensland*", any preamble should also acknowledge that it is the people who are now recognised as being the ultimate source of authority in this regard.⁸

Secondly, the QCRC preamble rather submissively provides that "*we wish ... to be governed in accordance with the democratic processes contained in this Constitution*". In commenting on a similar expression in the proposed 1999 preamble

⁵ Source: www.samuelgriffith.org.au/papers/html/volume11/v11chap4.htm Accessed: 17/8/2004

⁶ LCARC Report No 12, November 1998, p. 49

⁷ Johns, G. "Government without consent", *The Courier Mail*, 15 December 1998, p. 15

⁸ While Queensland is a constitutional monarchy, it is through the consent of the people that true, legitimate authority is derived. As acknowledged by Dicey, the electorate is the "*true political sovereign of the state*" (cited in Funnell, W. 2001, *Government by Fiat*, UNSW Ltd, Sydney, p. 2). Similarly, the former committee previously stated that the people of Queensland are "*the actual font of sovereign power in this State*" (LCARC Report No 31, October 2001, p. 7). Also, the High Court of Australia has lately recognised that ultimate sovereignty rests with the people: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at para 17 per Deane and Toohey JJ; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at para 37 per Mason CJ; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at para 13 per Deane J.

for the Commonwealth Constitution Anne Winckel observed, "... the final draft preamble of 1999 had no enacting clause following, and instead it included within it a 'passive' alternative that: 'We the Australian people commit ourselves to this Constitution'. I call this passive, in that to 'commit' ourselves to the Constitution implies a constitution being imposed from above, rather than one being authorised by the will of the people. This choice of words had the effect of symbolically diminishing the sovereignty of the Australian people. To emphasise the popular sovereignty of the Australian people, it would be more appropriate to use assertive, authoritative words such as 'affirm and declare'..."⁹

Accordingly, it will be necessary for any preamble to the Queensland Constitution to explicitly recognise and declare that "we", the people of the State, have actually consented to the Constitution and that in so doing "we" have --

- accorded the Constitution with the popular legitimacy it needs;
- concurred with its enactment by the Queensland Parliament; and
- approved that the governance of Queensland be undertaken in accordance with its provisions.

With such changes the QCRC preamble would be more relevant to, and consistent with, the widely accepted principle of the sovereignty of the people and their status as citizens not subjects.

Issue 3 – Page 9 of paper

What purpose should a preamble to the Queensland Constitution serve?

A preamble to the Queensland Constitution should briefly relate the constitutional history of the State as well as indicate the ultimate source of the Parliament's authority (via the consent of the people) to enact laws. Bearing in mind my previous comments, a preamble could also serve to articulate the messages and values that are of common and unifying significance in the ongoing life of the State of Queensland.

Issue 4 – Page 9 of paper

What type of language should the preamble use?

To be readily understandable and of meaning to the people of the State a preamble to the Queensland Constitution should be written in the plain English style.

Issue 5 – Page 9 of paper

How extensive should the preamble be?

An important statement such as a constitutional preamble does not necessarily need to be lengthy or extensive to demonstrate its significance. In fact, as indicated by the experience with the proposed 1999 preamble for the Commonwealth Constitution, the

⁹ Winckel, A., "Preamble Politics: Problems with the 1999 Referendum and 21st Century Prospects", p. 6. Source: www.wcc2002.asn.au/program/papers/Anne_Winckel.doc Accessed: 17/8/2004

more extensive/ambitious a proposed preamble is, the higher the likelihood is that it will experience opposition during any public campaign for its adoption. One of the most memorable speeches in modern history, the *Gettysburg Address*, was only 235 words long yet the message it contains rings as true and powerful today as the day it was first delivered in 1863. In speaking of any new preamble to the Commonwealth Constitution Mark McKenna has suggested that, "... *the preamble must be couched in simple language. It should not be too long (the longer it is the more forgettable it will be) and it should pay attention to the cadences of language. Nor should it attempt to summarise Australian history, indulge in turgid prose, or provide a panacea for every social ill.*"¹⁰ In light of this advice, a preamble to the Queensland Constitution should—

- be concise and to the point;
- avoid being unnecessarily lengthy and wordy; and
- strive for quality (meaningfulness) rather than quantity.

Issue 6 – Page 9 of paper

Should the Queensland Constitution specifically state that the preamble cannot be used to interpret other provisions of the Constitution?

Were the Constitution to be recognised as the paramount law in the State, it would not make sense for its preamble to be non-justiciable. Doing so would diminish the reason for the preamble and any messages and values contained therein. A preamble would only be of meaning and relevance if it were justiciable. Thus, while care needs to be taken with respect to the particular messages and values that may be considered for incorporation in a preamble, I personally consider that if a preamble were not justiciable then there would be little point in having one at all.

Issue 7 – Page 10 of paper

Should there be a reference to the origins or history of the Constitution in the preamble?

Yes, see my previous comments.

Issue 8 – Page 10 of paper

Should the preamble refer to the sovereignty of the people and, if so, how?

Yes, see my previous comments.

¹⁰ McKenna, M., "The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights", Research Paper 12 1996-97, Parliament of Australia, Parliamentary Library. Source: www.apfl.gov.au/library/pubs/rp/1996-97/97rp12.htm Accessed: 17/8/2004

Issue 9 – Page 11 of paper**Should the preamble refer to God and, if so, how?**

The Issues Paper recorded how the Constitutional Centenary Foundation found that there was considerable support for inclusion of a reference to “Almighty God” in a preamble to the Australian Constitution, although there was also strong opposition to the notion from some quarters. The question of whether or not the Commonwealth Constitution should contain a reference to God was deliberated by the Constitutional Conventions of the 1890s. Even at that time there were many people who were either for or against the proposal. In the end, as Helen Irving notes, “*the Constitution’s Preamble had the simple words added, ‘humbly relying on the blessing of Almighty God’*”.¹¹ It is a fact that our system of government, based as it is on the concept of the rule of law, has been particularly influenced by the Judeo-Christian tradition.¹² While I personally would not object to this contribution being recognised in a preamble to the Queensland Constitution, I am mindful that others may consider differently. To minimise any potential objections, reference to the Judeo-Christian heritage could perhaps be reflected in any section of the preamble dealing with the constitutional history of the State. However, I suspect that just as the delegates to the Constitutional Conventions in the 1890s had to tread carefully on the issue, so too will it be necessary to do so in relation to a preamble to the Queensland Constitution particularly given our more multicultural society.

Issue 10 – Page 12 of paper**Should the preamble recognise Aboriginal and Torres Strait Islander people and, if so, how?**

It would be appropriate for any historical section in a preamble to the Queensland Constitution to acknowledge the Aboriginal and Torres Strait Islander people as the original inhabitants of the Australian continent and nearby islands. However, care should be taken to avoid the inclusion of any particular words that could generate community division and opposition.¹³ In discussing this issue in reference to any new preamble to the Commonwealth Constitution Mark McKenna has observed, “*Recognition in the preamble of Aboriginal and Torres Strait Islander people having a distinct cultural status is more complex. Any recognition may have legal implications relating to associated issues not directly within the terms of reference of the preamble such as Aboriginal sovereignty, self-determination, and the concept of a*

¹¹ Irving, H. 1999, *To Constitute a Nation*, Cambridge University Press, Cambridge, pp. 166 – 167

¹² Refer to: www.wsu.edu:8080/~dce/HEBREWS/TORAH.HTM and www.treasurer.gov.au/tsr/content/speeches/2004/007.asp?pf=1

¹³ The Commonwealth Government rejected calls for inclusion of the word “custodian” in the proposed 1999 preamble to the Commonwealth Constitution because of concerns of such a word being used as a basis from which land and compensation claims could be made. While there are those such as Sir Harry Gibbs (www.samuelgriffith.org.au/papers/html/volume11/v11chap4.htm) and Gary Johns (www.ipa.org.au/Media/gjar010399.html) who have voiced similar concerns, others such as Anne Winckel have disagreed that this would be an issue (www.wcc2002.asn.au/program/papers/Anne_Winckel.doc).

treaty.¹⁴ The wording of the preamble to the Northern Territory Constitution, as reflected in the Issues Paper, clearly recognises the unique status of Indigenous peoples in a way that would not be problematic for other people groups in that society. Perhaps any historical section in a preamble to the Queensland Constitution could be worded similarly in relation to Aboriginal and Torres Strait Islander people.

Issue 11 – Page 12 of paper

Should the preamble recognise cultural diversity and, if so, how?

While I would not have any objections in this respect, care should be taken to avoid any reference to “rights” such as was proposed for the preamble to the Northern Territory Constitution. I note on page 8 of the Issues Paper the point was made that a preamble “*is not a bill of rights and therefore should not include the phrase ‘right to’*”. Therefore, a preamble to the Queensland Constitution should simply acknowledge that Queensland is a multicultural society and that each person, irrespective of their people group, has a part in contributing to the ongoing facilitation of toleration and mutual acceptance and respect.

Issue 12 – Page 13 of paper

Should the preamble recognise the rule of law and, if so, how?

The Issues Paper described the concept of the rule of law as being associated with ideas of “limitation of state power” and “preventing excessive government action”. John Locke once described the concept thus: “*Freedom of men under government is to have a standing rule to live by, common to everyone of that society, and made by the legislative power elected in it; and not to be subject to the inconstant, unknown, arbitrary will of another man.*”¹⁵ The concept is referred to in the *Legislative Standards Act 1992* although no legislative guidance is provided concerning its meaning or possible application. Given the unicameral nature of Queensland’s Parliament and the subsequent ease for it to be dominated by disciplined political parties I consider the need exists for greater constitutional checks and balances to ensure that the abuse of power can never occur. Inclusion of a reference to the rule of law in a (justiciable) preamble to the Queensland Constitution could be one useful mechanism in this respect. However, to do so it would be necessary for the concept’s key precepts to be formally identified.¹⁶ This could be achieved by them either being—

- outlined in the preamble or in the Constitution proper (such as through the use of “examples”¹⁷); or

¹⁴ McKenna, M., “The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights”, Research Paper 12 1996-97, Parliament of Australia, Parliamentary Library. Source: www.apl.gov.au/library/pubs/rp/1996-97/97rp12.htm Accessed: 17/8/2004

¹⁵ Cited in Corkery, J. 2002, *Starting Law*, 2nd Edition, Scribblers Publishing, Mudgeeraba, Qld, p. 14

¹⁶ Based on Dicey’s articulation of the rule of law, Joseph Raz identified eight key principles associated with the concept (refer to:

http://www.ntu.edu.au/faculties/lba/schools/Law/apl/Homepage/rule_of_law.htm)

¹⁷ Under section 14D of the *Acts Interpretation Act 1954* “examples” can be validly included in legislation as a way of illustrating how a particular provision may be understood.

- contained in a dictionary schedule accompanying the Constitution; or
- related in the annotated Constitution or the explanatory notes to the Bill used to introduce the preamble to Parliament.

Possible arguments that might arise against formally identifying the concept and any of its key precepts include that—

- doing so could potentially limit the power of the Parliament to make laws for the “peace, welfare and good government” of the State; and
- any articulation of the concept’s key precepts in this manner might not only inadvertently omit important details but also limit its ongoing development.

Regarding the first possible argument, the essence of constitutionalism is the need for legislative and executive power to be subject to constitutional limitations. The Queensland Parliament is already limited to the extent that it is subject to the Commonwealth Constitution.¹⁸ With respect to the concept itself, the High Court has accepted it as being a fundamental principle in constitutional law.¹⁹ Therefore, as the concept of the rule of law already implicitly relates to the Queensland Constitution there would appear to be no logical reason why it or any of its key precepts should not be explicitly recognised in a preamble to the Constitution.

Regarding the second possible argument, while some might suggest that constitutional articulation of the key precepts could limit the concept’s ongoing development, I personally consider that doing so would actually assist to clarify the concept and emphasise its relevance by giving it more “teeth”.

Issues 13 and 14 – Page 14 of paper

Should the preamble refer to ‘equality’ and, if so, how? Should the preamble refer to gender equality and, if so, how?

While I certainly support the notion of the “equality of individuals, irrespective of gender, status or people groups, before the law” I query whether a statement in a preamble to the Queensland Constitution to this effect would be sufficient in and of itself to ensure such an outcome. Specific legislative action would still be needed, in accordance with the Parliament’s general power to make laws for the peace, welfare and good government of the State. As the Issues Paper notes, equality is already promoted through the anti-discrimination legislation that is in place.

Issue 15 – Page 14 of paper

Should the preamble recognise the status of the Constitution, and if so, how?

A preamble to the Queensland Constitution should recognise the Constitution as being the paramount law in the State, subject to the Commonwealth Constitution and any other legislative limitations. The Constitution’s status in this regard is derived from the fact that the Parliament would be unable to lawfully enact any statute relating to

¹⁸ Sections 106 to 109

¹⁹ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1

the peace, welfare and good government of the State were it not for the explicit authority of the Constitution for Parliament to do so. Having regard to my comments in response to Issues 2 and 22, this authority should ideally be popularly endorsed via a referendum on the preamble.

Issue 16 – Page 15 of paper

Should the preamble recognise the system of government the Constitution establishes and, if so, how and to what extent?

I concur with the view outlined in the Issues Paper that the most appropriate place for the system of government to be recognised is in the Constitution proper. If the suggestion I made in response to Issue 2 were to be adopted it would result in implicit preambular acknowledgement of the system of government operating in the State.

Issue 17 – Page 15 of paper

Should the preamble refer to the environment and, if so, how?

Concerns about the environment have been increasing in recent years. Many agree that the environment is vitally important to the ongoing existence of humanity and that this requires it to be protected from irresponsible development. However, concerns have also been raised about including any reference to the environment in a preamble. For example, it has been argued by Sir Harry Gibbs, in speaking of the proposed 1999 preamble for the Commonwealth Constitution, “*reliance could be placed on the words of the Preamble by interested groups seeking ... to prevent mining or development which it is claimed may damage the environment.*”²⁰ Given the potential legal significance of preambular declarations,²¹ any reference to the environment in a preamble to the Queensland Constitution should be carefully considered to ensure that the responsible and sustainable use of environmental resources was not inadvertently stifled.

Issue 18 – Page 15 of paper

Should the preamble contain other elements and, if so, what should they be?

I have previously commented on the need for care to be taken to avoid the inclusion of any element in a preamble to the Queensland Constitution that could divide, rather than unite, the people of the State or that would not have ongoing relevance for future generations. Some of the elements suggested by the Issues Paper for possible inclusion, such as “mateship”, have previously been identified as being potentially divisive in nature.²² Therefore, such elements should not be considered any further in this respect. I do suggest, however, that it would be appropriate and necessary for a preamble to recognise the principle that Parliament and Government exist in order to serve the best interests of the people of the State and that elected representatives are accountable, as are appointed officials through them, for the way in which power is exercised on behalf of the people. Other elements that should be considered for

²⁰ Source: www.samuelgriffith.org.au/papers/html/volume11/v11chap4.htm Accessed: 17/8/2004

²¹ See footnote 1

²² Refer to Issues Paper page 5.

inclusion in a preamble is recognition of the necessity for the people of the State to freely and regularly choose their elected representatives and that governments can only be formed from the representatives chosen by the people in this respect.

Issues 19, 20, 21 and 22 – Pages 17 and 18 of paper

How might text be developed around the identified elements of a preamble? How should the community be consulted in this process? Who should be consulted? Should a referendum be held to insert a preamble into the Queensland Constitution?

In speaking of the best approach to develop a new preamble to the Commonwealth Constitution Anne Winckel has commented, "*A new preamble should be inspiring and memorable, and it should evoke unity, consensus and a resounding 'yes' from the majority of Australians. The sovereignty of the Australian people should be highlighted both in the text itself, and in the consultative process that accompanies the drafting of the text.*"²³

Using these comments as a guide, it would be critical for the community to be involved in the development of the text of any preamble to the Queensland Constitution. However, the process of development would need to occur in accordance with clear criteria, ideally devised by the committee and endorsed by the Parliament, with respect to the purpose of a preamble and the matters it should relate. Perhaps the community involvement could be encouraged and stimulated through a competition such as suggested in the Issues Paper. The creation of the Australian National Flag was essentially achieved through this approach.

Finally, it would be essential for any preamble to the Queensland Constitution to be endorsed by the electorate at a referendum. While there may not be any legal requirement to do so, there would be little likelihood of community ownership of, and pride in, the preamble if this did not occur. Also, if the preamble were to be adopted at a referendum I suspect that this would lead to a widespread community expectation that any alteration of the preamble in response to changing social or other circumstances should only occur in accordance with the same process. Such an expectation would be reasonable particularly if the preamble recognised the sovereignty of the people. However, if this approach was accepted the following points would need to be kept in mind. Constitutional change proposals in Australia are notable for their lack of success at referendums. This record gives added weight to the imperative of ensuring that the contents of a preamble to the Queensland Constitution are appropriate so as to avoid any unnecessary change proposals.

²³ Winckel, A., "Preamble Politics: Problems with the 1999 Referendum and 21st Century Prospects", p. 8. Source: www.wcc2002.asn.au/program/papers/Anne_Winckel.doc Accessed: 17/8/2004

Issue 23 – Page 18 of paper

Should an ‘interim’ preamble to the Queensland Constitution be inserted by way of an Act of Parliament prior to a final version being confirmed by way of a referendum?

No. Even an “interim” preamble would need a high level of community support to ensure its acceptance. I consider that the effort necessary to achieve this would be more profitably expended in achieving a “final” preamble.

Issue 24 – Page 18 of paper

When is an appropriate time to consider a referendum on the issue of a preamble for the Queensland Constitution?

Given the past experience with failed referenda proposals, a referendum on a preamble to the Queensland Constitution should not be held until the community has been well prepared for it. Active community involvement in the development of the text of the preamble will greatly facilitate community acceptance of the need for a referendum. However, it is possible that it could still take some time for this acceptance to fully mature.

In the meantime it is important for a public education campaign to begin in order to articulate and explain the benefits of a preamble being developed for the Queensland Constitution. In fact, doing this is a necessary part of any change management strategy. While some resistance could still be expected, if the educational and developmental process is as inclusive as possible and the benefits of having a preamble are clearly explained, the need for the preamble will be more generally accepted with most people responding positively towards it at a referendum.

Thank you for the opportunity to provide this submission to the committee’s inquiry. I trust the comments offered will assist it in its deliberations.

Yours sincerely



Don Willis