25 August 2004

Dr Lesley Clark MP
Chair
Legislative, Constitutional and Administrative Review Committee
Parliament House
BRISBANE Q. 4000

Dear Dr. Clark,

RE: A PREAMBLE FOR THE QUEENSLAND CONSTITUTION

On behalf of the Bar Association of Queensland, I reply to your letter of 17 June 2004 addressed, care of the Association's office, to my predecessor as President, Mr. A. J. Glynn SC. The Association assumes that the intention of your letter was to request a response from it in relation to the above subject.

Your committee's Issues Paper of June 2004 has been considered by the Council of the Bar Association. This letter constitutes the Bar Association's response to your request for submissions.

Before addressing the subject of whether the Queensland Constitution should have a preamble, some precision is necessary as to exactly what is "the Queensland Constitution"? The issues paper takes that to mean the *Constitution of Queensland Act* 2001. Yet to refer only to that Act is apt to mislead. As the note to s. 3 of that Act records, that Act has several predecessors, which remain on our statute book.[1]

[1] *Constitution Act 1867*, sections 1, 2, 2A, 11A, 11B , 30, 40 and 53.
Constitution Act Amendment Act 1890, section 2
Constitution Act Amendment Act 1934, sections 3 and 4.

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Of these, the *Constitution Act* 1867 once contained a preamble. That preamble was repealed by the *Constitution of Queensland Act* 2001.[2] At the time of the enactment of the *Constitution Act* 1867, that preamble served the useful purpose of highlighting measures then relevant to Queensland constitutional law and also the consolidating purpose of that Act. Over time, with amendments to the *Constitution Act* 1867, the evolution of Queensland from British colony to a State within the Commonwealth of Australia and the latter's emergence as an independent nation, that preamble became, increasingly, something of an anachronism. There was certainly a basis for its repeal.

Of course, even though the *Constitution of Queensland Act* 2001 is not strictly the repository of all of the constitutional measures on our State's statute book, insofar as it is not, it does serve the useful purpose of highlighting where such other measures are to be found and of reproducing their provisions by way of attachments. Nonetheless, there would be an incongruity in inserting a preamble into the *Constitution of Queensland Act* 2001 and not into those other measures. If, for example, that preamble were to take the form of some sort of aspirational statement or recitation of fundamental values or beliefs, would the absence of such a statement from the other measures mean, by way of contrast, that they could be construed without regard to those aspirations, values or beliefs?

This potential for incongruity noted, the balance of this submission addresses whether a preamble should be inserted into the *Constitution of*

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[2] s 94 and Schedule 2 to the Constitution of Queensland Act 2001.

Queensland Act 2001. For that purpose, that Act will be termed "the Queensland Constitution".

The Association does not support the insertion of a preamble into the Queensland Constitution whether that be in the form recommended by the Queensland Constitutional Review Commission or otherwise.

An enduringly relevant description of the proper function of a preamble is to be found in Quick and Garran's seminal work *"The Annotated Constitution of the Australian Commonwealth"*:

> "The proper function of a preamble is to explain and recite certain facts which are necessary to be explained and recited, before the enactments contained in an Act of Parliament can be understood. A preamble may be used for other reasons: to limit the scope of certain expressions or to explain facts or introduce definitions. (Lord Thring, Practical Legislation, p.36). The preamble has been said to be a good means to find out the intention of a statute, and, as it were, a key to the understanding of it. It usually states, or professes to state, the general object and meaning of the Legislature solving an ambiguity or fixing the connotation of works which may possibly have more than one meaning, or determining the scope or limiting the effect of the Act, whenever the enacting parts are, in any of these respects, open to doubt. But the preamble cannot either restrict or extend the legislative words, when the language is plan and not open to doubt, either as to its meaning or its scope. (Maxwell on the Interpretation of Statues [1873], pp 35-45).
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> In the case of Overseers of West Ham v Iles (1883), 8 App. Cas. p388, Lord Blackburn said: "My Lords, in this case the whole question turns upon the construction of sect. 19 of 59 Geo. III c 12. I quite agree with the argument which has been addressed to your Lordships, that in construing an act of Parliament, where the intention of the Legislature is declared by the preamble, we are to give effect to that preamble to this extent, namely, that it shows us what the Legislature are intending; and if the words of enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case we prefer that meaning to one showing an intention of the Legislature which would not answer the purposes of the preamble, or which would go beyond them. To that extent only is the preamble material."

Although the enacting words of a statute are not necessarily to be limited or controlled by the words of the preamble, but in many instances go beyond it, yet, on a sound construction of every Act of Parliament, the words in the enacting part must be confined to that which is the plain object, and general intention of the Legislature in passing the Act; and the preamble affords a good clue to discover what that object was. (Per Lord Tenterden, CJ in Halton v Cove, 1 B and Ad 538; Salkeld v Johnson 2 Exch 283; per Kelly, CB, in Winn v Mossman, L R Ex 300; cited, Broom's Legal Maxims, 5th ed p 572) "The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound the words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which according to Chief Justice Dyer (Plowd 369) is a key to open the minds of the makers of the Act and the mischiefs which they intended to redress". (Per Tindal, CJ delivering the opinion of the Judges in the Sussex Peerage Case, 11 Cl and Fin 143; per Buller, J, in R v Robinson, 2 East PC 1113; cited R v Johnson, 29 St Tr 303; Broom's Legal Maxims, 5th ed 573.

It is a general rule, in the construction of statutes, that the preamble may extend, but cannot restrain, the effect of an enacting clause. (Kearns v Cordwainers' Co, 28 LJ CP 286; DECL xiii, p 1882).

We ought not to restrict a section in an Act of Parliament by the preamble or general purview of the Act where the section is not inconsistent with the spirit of the Act. (Sutton v Sutton, 22 Ch D 521, Id)

The preamble of an Act of Parliament is proper to explain the general body of it. (Copeman v Gallant, 1 P Wms 317, Id)

If the enacting part of a statute will bear only one interpretation, the preamble shall not confine it; but if it is doubtful, the preamble may be applied to throw light upon it. (Mason v Armitage, 13 Ves 36. Id)

In construing an Act of Parliament, thought it may assist ambiguous words, cannot control a clear and express enactment. (Lees v Summersgill, 17 Ves 508. Id).

But it may serve to give a definite and qualified meaning to indefinite and general terms). Emanuel v Constable, 3 Russ. 436, overruling Lees v Summersgill, Id)

> In construing Acts, the court must take into consideration not only the language of the preamble, or any particular clause, but of the whole Act; and if, in some of the enacting clauses, expressions are to be bound of more extensive import than in others, or than in the preamble, the Court will give effect to those more extensive expressions, if, upon a view of the whole Act, it appears to have been the intention of the Legislature that they should have effect. (Doe d Bywater v Brandling, 6 LJ (os) KB 162 Id)
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> The effect of the preamble of a repealed Act was considered in Harding v Williams, 1880, 14 Ch Div 197. The effect of a preamble to a particular section of an Act was considered in ex parte Gorely, re Barker, 34 LJ (B) 1."[3]

Viewed in this light, the proposed preamble serves none of these purposes effectively. The long title of the Queensland Constitution is exactly descriptive of what the statute is – "An Act to consolidate particular laws relating to the Constitution of the State of Queensland". Those laws reflect our heritage and it is beyond argument that the Queensland Constitution would be interpreted in light of that heritage and against the background of a presumption that no alteration to fundamental common law doctrines (which include native title), liberties and privileges was intended. Given this, the proposed preamble offers no improvement to the existing law in terms of interpretation. It looks rather like an ill-disguised "bill of rights" tacked onto a consolidating statute. Whether Queensland should have that sort of measure is a matter in itself warranting discrete consideration. Like such a measure, the proposed preamble is capable of generating endless debate about its need, its omissions and whether an absence of express recognition denies or diminishes the worth of rights and liberties presently taken for granted. Such a debate has the capacity to distract and divert attention from more pressing law reforms.

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[3] Quick and Garran "The Annotated Constitution of the Australian Commonwealth", 1901 Edition reprinted by Legal Books, Sydney, 1976, pp 284-285.

The proposed preamble does not serve the traditional end of a preamble in explaining why the legislation was considered desirable. A preamble itself was not considered necessary at the time when the Queensland Constitution was enacted. This preamble, if enacted, would always be nothing more than an afterthought that may serve only to unsettle, in ways not readily predictable, the interpretation of the provisions in the Queensland Constitution. It could never be, as in other constitutional instruments, a lofty statement of the ideals that had inspired a people to choose to be governed under the terms of that instrument. Queensland owes its separate existence initially to a decision by British colonial officials about the need for a separate, local administrative unit in the northern part of the then colony of New South Wales and latterly to a decision by a majority of those then entitled to vote to form the Commonwealth of Australia.[4] In the absence of some profound constitutional change, supplementation of the latter language by way of the insertion of a preamble into the Queensland Constitution is neither necessary nor desirable.

The Association thanks your committee for the opportunity to make a submission on this subject and would be pleased to provide whatever assistance the committee in its deliberations on this and any other matter thinks appropriate.

Yours sincerely

GLENN MARTIN SC
President

[4] Adapting the language of the preamble to the Commonwealth of Australia Constitution Act 1900 (UK).