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Chair
Legal, Constitutional and Administrative Review
Committee
Parliament House, George Street
BRISBANE QLD 4000

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LEGAL, CONSTITUTIONAL AND
ADMINISTRATIVE REVIEW
COMMITTEE

Dear Dr Clark

A PREAMBLE FOR THE QUEENSLAND CONSTITUTION

Thank you for inviting me to make a submission on the recommendations regarding a preamble for the Queensland Constitution made by the Queensland Constitutional Review Commission (QCRC) in its February 2000 Report on the possible reform of and changes to the Acts and laws that relate to the Queensland Constitution.

I am pleased to submit for the consideration of your committee the following comments prepared in the light of the Issues Paper of June 2004 titled "A Preamble For the Queensland Constitution ?" The comments reiterate and expand upon observations made by me at the roundtable forum held under the auspices of your committee at Parliament House on 17 August 2004.

I now turn to address the issues.

DESIRABILITY OF A PREAMBLE

Issue 1

On balance, I agree that the Queensland Constitution should have a short preamble. But the need for a preamble is hardly urgent and consideration of the matter at this time is premature.

The issue of a preamble is a symbolic one, not having any real significance for matters of substantive constitutional reform. I submit that your committee should first consider what substantive constitutional reforms remain to be addressed in the aftermath of its recent reform initiatives and the successful consolidation of the Queensland Constitution. It is even possible that the text of a preamble might need to reflect or acknowledge the results of any substantive reforms undertaken in the immediate future.

There is no evidence of any present public enthusiasm for a preamble and it is unlikely that much could be engendered at this time. Interest would develop when the issue of an Australian Republic is again put to the people. The consideration of a preamble should be postponed until then.

Before the issue of an Australian Republic is again put to the people, any text for a preamble can only be an interim one. When Australia ultimately becomes a republic, an existing preamble in the Queensland Constitution would need to be revised to acknowledge the new constitutional order. In my comments on Issue 23, I argue that work should not proceed on an interim preamble.

Though there is no constitutional imperative requiring it, any text for a final version of a preamble should be submitted for approval by the people at referendum. Refer to the arguments in this regard in my comments on Issue 22. A referendum for a preamble is unlikely to be held before the issue of a republic is again put to the people, in view of the government's present intention to hold a referendum on matters of constitutional entrenchment only when there is a referendum for a republic.

THE QCRC'S DRAFT PREAMBLE

Issue 2

The QCRC'S draft preamble is not suitable for adoption in its present form, even as an interim measure. The text does not seem to have garnered much support or interest since its publication in the year 2000 and would now require a carefully considered review. Further revision of the text would of course be required on Australia becoming a republic.

THE NATURE OF A PREAMBLE

Issue 3

A preamble to the Queensland Constitution should serve the purpose of providing a brief introduction to the text, alluding to the origins of the constitution and the fundamental assumptions that underlie it.

Any aspirational statements in the preamble should be succinct and desirably find at least some support, implicit or explicit, in the provisions of the Constitution. Broad aspirational statements of values need to be closely scrutinised, as they can be controversial and contested. There is no point in developing an elaborate and high-flown preamble which fails to win public acceptance. Statements in the preamble should not be cast in the language of rights and freedoms unless such rights and freedoms are guaranteed in the Constitution. It would be bogus for the preamble to promise more than the Constitution will deliver. The preamble should not be regarded as some sort of substitute for a bill of rights, for by its very nature it would be a very inadequate substitute. If the Constitution is serious about the protection of rights and freedoms it should contain entrenched guarantees in the nature of bill of rights provisions.

Issue 4

Ideally the preamble should be written in language which is clear and simple. But the language would need to be in the appropriate legal form for a constitution.

Issue 5

The preamble should be short and to the point, with no lengthy recitals or enumerations.

Issue 6

There should not be any statement in the Queensland Constitution to the effect that the preamble cannot be used to interpret other provisions of the Constitution. Such a statement would suggest to the ordinary citizen that the preamble is empty rhetoric and not to be taken seriously. The dangers of words in a preamble being used by the judiciary to effect vigorous constitutional change are overstated. A preamble

would only have a marginal effect on constitutional interpretation, where it might be used to resolve ambiguities in provisions. There would need to be specific provisions in the Constitution which could provide some basis for interpretative innovation inspired by the preamble, and it is hard to find such provisions when the Constitution does not contain a bill of rights. If there is real commitment to principles stated in a preamble, any minor or incidental effect on constitutional interpretation should be of no concern. In any event, since the Queensland Constitution is a largely flexible instrument, with very few entrenched provisions operating upon it, Parliament could overturn a judicial decision founded on the preamble if it thought fit.

POSSIBLE ELEMENTS TO BE INCLUDED IN A PREAMBLE

Issue 7

It is appropriate that a preamble refer to the history and origins of the Constitution. But such reference should be brief. There is no need to subject a reader to a detailed and technical excursus into the realms of constitutional history.

Issue 8

A preamble should refer to the sovereignty of the people. But any formulation developed now would likely have to be revised if Australia adopted a republican form of government.

Issue 9

Since there is already a reference to God in the preamble to the Commonwealth Constitution, there may not be a need to include such a reference in the Queensland Constitution. If a mention of God is considered desirable, the form of words used in the preamble to the Commonwealth Constitution could be adopted.

Issue 10

In my opinion the preamble should recognise the position of Aboriginal and Torres Strait Islander people as the original occupants and custodians of the land. This would be to state the background circumstances to the establishment of Queensland's constitutional arrangements. And it would contribute to the process of reconciliation with indigenous peoples. A useful formulation is offered in paragraph 5 of the QCRC'S draft preamble.

Issue 11

Any recognition of cultural diversity in the preamble should not attempt to elaborate much on the idea or to spell it out in terms of rights. The approach adopted in the preamble for the final draft Northern Territory Constitution prepared in 1996 should not be followed.

Issue 12

The rule of law is a fundamental principle underlying the Constitution. It should be accorded recognition as such in the preamble. No attempt should be made to define it or elaborate its meaning. Any recognition of the rule of law in the preamble would have limited interpretative effect. If judges wish to rely on rule of law assumptions in their legal reasoning, they do not require a preamble in order to do so.

Issue 13

A preamble should recognise the principle of equality under the law rather than a more generalised notion of "equality". Equality under the law can be viewed as related to or an aspect of the rule of law.

Issue 14

Gender equality could be viewed as subsumed under the principle of equality under the law. If it is thought necessary to explicitly mention gender equality, the wording "the equality of men and women" would be suitable. The QCRC'S draft preamble shows the way to recognise gender equality in short form, though associated with other matters.

Issue 15

Because the Queensland Constitution establishes the framework for the system of government of the State, it is fitting that a preamble make an introductory reference to it as the paramount law of Queensland. Though the Queensland Constitution is flexible in nature, its subject matter makes it more than just an ordinary Act of Parliament. A preambular recognition of the Queensland Constitution as paramount law would not in itself provide a sufficient legal basis for the entrenchment of any constitutional provisions. Such a recognition would, however, be misleading unless accompanied with the qualification that the Queensland Constitution is subject to the Commonwealth Constitution and the Australia Acts 1986 (UK and Cth). This qualification would set the Queensland Constitution in its proper place within the Australian constitutional order as a whole.

Issue 16

The preamble should make some reference to the basic system of government established by the Constitution. At the least the democratic nature of the system should be acknowledged. It would also be appropriate to mention Parliament in view of the understanding that it represents the will of the people through popular election. The preamble could refer to the system of government as one of "Parliamentary democracy".

Issue 17

Only if the preamble were to contain a range of aspirational statements would it be appropriate to have a reference to the environment.

Issue 18

Regardless of whether or not the preamble were to have a strong aspirational aspect, the possible other elements listed in the Issues Paper should not be embodied in the preamble. These elements would be unsuited to the Queensland Constitution as they are mostly at a remove from constitutional principle and do not have much readily agreed meaning or content in practice. A few of them would probably be controversial, eg mateship and the English language, and others would be more appropriate for the Commonwealth Constitution eg references to the world community and citizenship.

DEVELOPING THE TEXT OF A PREAMBLE

Issues 19-21

Any final text for a preamble would require wide public consultation in its development. As it is my opinion that a final text should be submitted for approval at referendum, effective public consultation would be a *sine qua non* for a successful referendum outcome.

In regard to the strategies which might be used to develop a preamble, I offer the following brief observations:

- A state-wide competition could have a promotional or educative impact but would be of limited utility in drafting a preamble. Any idea of a “winning preamble” would be inappropriate and could give rise to an expectation that it should be adopted.
- Lawyers will have to be involved in the drafting of a final text for submission to the people at referendum.
- The experience of the failed attempt for a new preamble for the Commonwealth Constitution in 1999 shows that a poet or other professional writer should NOT be commissioned to undertake the drafting task.
- A parliamentary or committee process should examine the issues concerning a preamble and receive public submissions.

ADOPTING A PREAMBLE

Issue 22

Any final text for a preamble should be submitted to the people at referendum, even though there is no constitutional requirement for this to happen. It would be verging on the bizarre to formulate nowadays any final preamble text which purports to emanate from “We, the People...” without obtaining the direct ratification from the people at referendum. The referendum process imposes a salutary discipline on the drafters of the preamble to search for a consensus in regard to aspirational statements and to rein in enthusiasms which will not command broad support. If the preamble were to fail at referendum, that would prove that it was out of step with the wishes and aspirations of the people.

Issue 23

There is no need for an interim preamble to the Queensland Constitution to be inserted by way of an Act of Parliament prior to a final version being confirmed by way of referendum.

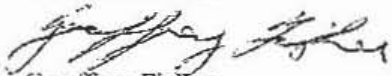
Much work would be required even for an interim preamble, as the QCRC draft would require careful scrutiny and revision, and public opinion would expect a wide process of community consultation. But there is no guarantee that an interim preamble would settle anything. When the time came to submit a final version to referendum, it is likely that the whole debate as to the form and content of the preamble would be reopened. The Issues Paper itself maintains that at such a time a comprehensive public education strategy would be needed. This would be particularly so if the referendum occurred at a time when the matter of an Australian republic was being resolved. The duplication of effort and resources involved in working initially for an interim preamble and later for a final version should be avoided. The exertion of formulating or redrafting a preamble for the Queensland Constitution is not something that should be undertaken every few years.

Issue 24

For the reasons outlined in my response to Issue 1 above, the appropriate time to consider a referendum on the issue of a preamble for the Queensland Constitution is when a referendum is held in regard to a change to a republic.

The views expressed in this submission are my own and of course do not represent any views of my employer, the Queensland University of Technology. I hope that what I have written will be of some assistance to your committee in its deliberations.

Yours sincerely,

A handwritten signature in cursive script, appearing to read 'Geoffrey Fisher', written in black ink.

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