

No 130

**SUBMISSION TO THE Legal Constitutional and Administrative Review  
Committee**

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**A PREAMBLE FOR THE QUEENSLAND CONSTITUTION?**

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Questions in Response to the Issues Paper June 2004

LEGAL, CONSTITUTIONAL AND  
ADMINISTRATIVE REVIEW  
COMMITTEE

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Issue 1. Should the Qld Constitution contain a preamble?

\*Yes because it is widely recognized that the federal Constitution should contain a preamble, however including preambles in State constitutions will provide an impetus for the ultimate inclusion of a preamble in the federal Constitution. For so long as we retain the States, then their Constitutions matter. In our view the preamble could presage human rights legislation in this State, given that 'laws relating to human rights are clearly within the legislative competence of the States.'<sup>1</sup>

Issue 2. Should the Qld Constitutional Review Commission's draft preamble be adopted in Qld?

\*We are not certain this is the best model and think other ideas should be canvassed.

Issue 3. What purposes should a preamble to the Qld Constitution serve?

\*We believe one purpose is to at least raise awareness of the sorts of constitutional rights and protections that other countries such as Canada protect through Bills of Rights. As Professor George Williams has pointed out, in Australia we lack a 'domestic reference point for upholding human rights'<sup>2</sup> and there no treaty to safeguard indigenous rights. In our view, this makes constitutional pronouncements that have human rights dimensions of considerable significance, as they raise awareness of human rights issues even if they have no legal effect.

<sup>1</sup> Nick O'Neill, Simon Rice, Roger Douglas, *Retreat from Injustice* (The Federation Press, 2004), p. 38

<sup>2</sup> George Williams, 'National security, terrorism and Bills of Rights' (2003) 9(1) *Australian Journal of Human Rights* 263-271 at 265

Issue 4. What type of language should the preamble use?

\*If at all possible the language should be very clear and yet have something of an inspirational feel to it. We understand that a preamble by the former Senator Gareth Evans was very well constructed and was an excellent model for your consideration – it combined literary excellence with a succinct extract of the salient points. There are presumably USA and Canadian models we could look to for examples.

Issue 5. How extensive should the preamble be?

Issue 6. Should the Qld Constitution specifically state that the preamble cannot be used to interpret other provisions of the Constitution?

Issue 7. Should there be a reference to the origins or history of the Constitution in the preamble?

\*We agree with Mr John Pyke who has proposed valuable wording in answer to this question (... and whereas Australia has evolved since that time into a fully independent nation under a sovereign people. ...'

Issue 8. Should the preamble refer to the sovereignty of the people, and if so, how?

Issue 9. Should the preamble refer to God, and, if so, how?

No!! We are secular and the Constitution expresses that so no State should take it upon itself to intrude religion into a constitution as it is no longer appropriate.

Issue 10. Should the preamble recognize Aboriginal and Torres Strait Islander people and if so, how?

\*Despite the constitutional neglect of the indigenous inhabitants, by the time of the 1999 constitutional referendum (on the subject of a republic) there was widespread support for an acknowledgment of Aboriginal Australians that 'went beyond historical

fact.<sup>3</sup> So this inclusion would appear to mirror community sentiments although we perhaps need to be aware that support for this was lower in WA and Qld.

However, this inclusion would also take a step towards acknowledging the Report of the Council for Aboriginal Reconciliation (1991 – 1994) which explored options for documents to uphold the notion of a 'treaty' as a non-statutory measure of indigenous rights protection.<sup>4</sup> Constitutional changes were recommended to include, "constitutional recognition of a Bill of Rights with specific reference to indigenous peoples' rights", and "constitutional entrenchment of a justiciable right of indigenous self-government in relation to specified areas ..." which includes recognition of customary law.<sup>5</sup>

It is worth noting in this context that, drawing on the support for acknowledgment in a Preamble, and upon the concept of reconciliation, some State governments have recently taken steps to 'constitutionalise' indigenous people.<sup>6</sup> However such recognition does not confer any legal rights.<sup>7</sup> It would doubtless be more acceptable to make such an inclusion in Qld, as in Victoria, if it was non-justiciable, although in another view this is a token gesture.

Issue 11. Should the preamble recognize cultural diversity and if so, how?

\*See Question 14

Issue 12. Should the preamble recognize the rule of law and if so, how?

\*Yes. We suggest that the recognition of the principle of the rule of law is essential for the protection of the Australian system of government. As Zines argues, the constitutional acknowledgement of the rule of law reflects a commitment to the protection of fundamental freedoms and liberties.<sup>8</sup> Accordingly, provision should be made for the "supremacy of the Constitution and the rule of law." However, reference to the rule of law alone may not be sufficiently comprehensive in the coverage of the essential features of the Australian system of government. We believe that mention should also be made of the constitutional principle of the separation of powers. This would both turn the clock back on the avowed ignorance of that doctrine on the part of a former Premier of Queensland and would reflect at the Queensland State level this observation of the authors of *Retreat from Injustice*:

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<sup>3</sup> McKenna, et. al., p. 402

<sup>4</sup> Report of the Council for Aboriginal Reconciliation (1994), The Institute: Canberra, p 158 – 159.

<sup>5</sup> *Ibid.* p 159 – 160.

<sup>6</sup> See for example, 'Victoria move on reconciliation' *Sydney Morning Herald*, 17 August 2004, p. 5

<sup>7</sup> *Ibid.*

<sup>8</sup> Zines, L. "The Present State of Constitutional Interpretation" in A. Stone and G. Williams (eds.) *The Australian Federal Judicial System*. Melbourne: Melbourne University Press, 2000.

'The High Court of Australia is very protective of the doctrine of separation of powers, which is now unarguably entrenched in the Australian Constitution.'<sup>9</sup>

Issue 13. Should the preamble refer to 'equality' and if so, how?

\*An explicit commitment to equality may facilitate a more socially just and equitable vision of society. We suggest that this objective is best promoted by inclusion of the terms "equality, dignity and non-discrimination" in the Preamble. Daintith and Seth point out that use of the generic term "equality" within the constitutional document is insufficient to promote the values of social justice.<sup>10</sup> Hence, in addition to inclusion of the term "equality, dignity and discrimination" we believe that the document should make an explicit reference to the "principles of social justice."

Issue 14. Should the preamble refer to gender equality and if so, how?

\*As Margaret Thornton argues, modern constitutions need to be cognizant of the historical advantages and discrimination that women face.<sup>11</sup> We believe, therefore, that there is need for constitutionally strengthening the position of women. Accordingly the preamble should include the words "which ensures gender equality". The inclusion of such a provision should be in addition to the commitment to the more generic commitment to "equality, dignity and non-discrimination."

However there are presumably further issues concerning indigenous women that may differ from those of the mainstream. We think this requires consideration here. We would therefore suggest that you could consider using the words 'which ensures gender equality while also recognising cultural diversity' - or something like that.

Issue 15. Should the preamble recognize the status of the Constitution and if so, how?

\*Yes. We believe that it is important that the Preamble affirm that the legal authority of constitutional government derives from, and that sovereignty resides in, the people. Accordingly, we believe that recognition should be given to the central and fundamental role of the people in conferring authority on constitutional government.

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<sup>9</sup> See footnote 1, at p. 101

<sup>10</sup> Daintith, T. and P. Seth "Privatisation and the Constitution", *Public Law*, 1999, 106.

<sup>11</sup> Margaret Thornton, "Towards Embodied Justice: Wrestling With Legal Ethics in the Age of New Corporatism", *Melbourne University Law Review*, 1999, 23, 749.

Issue 16. Should the preamble recognize the system of government the Constitution establishes and if so, how and to what extent?

\*We believe that reference to the terms “representative government”, “democracy”, and “responsible government” are essential for the protection of our liberal democratic system of governance. Furthermore, as stated previously, mention should be given to the principles of the rule of law and the separation of powers to ensure the comprehensive protection of our system of government.

Issue 17. Should the preamble refer to the environment and if so, how?

\*As Williams argues, a constitution is an aspirational document.<sup>12</sup> It should include the basic values, aspirations and goals of the people. The constitutional protection of the environment has become one of the major challenges of our time.<sup>13</sup> Environmental protection is required in order to ensure reasonable living standards. If the preamble is to embody shared beliefs, goals and values then an explicit commitment to environmental protection is needed. We suggest the inclusion of the principles of “ecological sustainability and bio-diversity” in the document.

Issue 18. Should the preamble contain other elements and if so, what should they be?

Issue 19. How might text be developed around the identified elements of a preamble?

Issue 20. How should the community be consulted in this process?

Issue 21. Who should be consulted?

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<sup>12</sup> Williams, G. *A Bill of Rights for Australia*. Sydney: University of New South Wales Press, 1999.

<sup>13</sup> Bowral, P. “Constitutional Protection of the Environment in a Federal Country: The Canadian Experience,” *International Journal of Environment Technology and Management*, 2003, 3, 295 at 396.

We believe that consultation should be very extensive, possibly extending to school students aged 14 and over. There are many political interest groups in our schools and debating teams who would be interested in this issue. We recognize that many people will not be interested but on the other hand there are many who would be interested should this matter be brought to their attention. We would also strongly suggest that the Indigenous community of Queensland be consulted and that there should be some assurance that LCARC will canvass the views of both Indigenous *men and women* to an equal degree.