AIATSIS
Australian Institute of Aboriginal and Torres Strait Islander Studies

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Worldwide knowledge and understanding of Australian Indigenous cultures, past and present

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

3 September 2004

Re: Submission to 'A Preamble for the Queensland Constitution?'

The Australian Institute of Aboriginal and Torres Strait Islander Studies is pleased to provide the attached submission to 'A Preamble for the Queensland Constitution?'.

A preamble to the Constitution can have an important symbolic affect and it is significant that Aboriginal and Torres Strait Islander people should be recognised in such a document. The submission focuses on both the symbolic importance as well as the content and extent of the recognition.

For further inquiries on the submission please contact Dr Lisa Strelein, Manager, Native Title Research Unit, on 02 6246 1155 or at lisa.strelein@aiatsis.gov.au.

Yours sincerely

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Submission to the Legislative Assembly of Queensland Legal, Constitutional and Administrative Review Committee Inquiry -

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'A Preamble for the Queensland Constitution?'

AIATSIS

Australian Institute of Aboriginal and Torres Strait Islander Studies

Issue 1 – Should the Queensland Constitution adopt a preamble?

AIATSIS expresses its in principle support for the idea of a preamble to the Queensland Constitution which includes recognition of Aboriginal and Torres Strait Islander people. Preambles have significant symbolic power and symbolism reflects as well as defines what is important to us as a society. By suggesting what is important, symbols influence people's sense of involvement in the society in which they live.[1] However, there are questions that need to be addressed before a preamble is supported in practice.

The Queensland Constitutional Review Commission (QCRC) recommends that the preamble should 'affirm certain widely-held values' but these values are neither affirmed nor protected by the substantive provisions of the Queensland Constitution itself. Preambles can be powerful in capturing the sense of a nation or a people but the preamble must be in harmony with the Constitution itself. AIATSIS recommends that the Queensland government follow through with recognition of the rights that are concurrent with these values.

AIATSIS recommends putting to the Queensland voters the protection of basic rights, in line with these widely held values, in the Constitution. Consultation with the community to determine whether support exists for such a proposal could occur at the same time as consultation on the preamble. If supported, the changes could be made similarly to the insertion of a preamble (as suggested on pp. 17-18 of the Issues Paper) – first through legislative amendment and then through a referendum.

Rights included in such a piece of legislation could be framed in a general way that offers protection to everyone, including Indigenous people.

For instance, section 8(2) of the *Human Rights Act 2004* (ACT) provides that everyone has right to enjoy their human rights without distinction or discrimination of any kind. Examples of discrimination include discrimination because of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.

Section 8(3) of the *Human Rights Act 2004* (ACT) also provides that everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

An Indigenous specific right to land could also be legislated. This right originates from Indigenous peoples' unique status as original inhabitants of Australia and the spiritual, social, cultural and economic relationship Indigenous people have with their traditional land and waters. Indigenous rights to land have become increasingly vulnerable following the *Native Title Amendment Act 1998* (Cth) which, among other things, privileges non-Indigenous property rights and interests over native title rights and interests.

Although very few rights are specifically protected by the Constitution, a lack of rights protection in Australia has disproportionately affected Indigenous people. Larissa Behrendt points out that the decision of the High Court in *Kruger v Cth* (1997) rejected the argument that the removal

[1] Lisa Strelein, 'Symbolism and function: From native title to Aboriginal and Torres Strait Islander self-government', in M Langton, M Tehan, L Palmer and K Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press 2004, p202.

policies of the Commonwealth had breached the Indigenous claimants' rights to freedom of movement and religion.[2]

The ACT *Human Rights Act 2004* contains a provision in its preamble which specifically acknowledges the importance of human rights to Indigenous people:

> "Although human rights belong to all individuals, they have special significance for Indigenous people—the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance."

AIATSIS recommends consulting and legislating on at least these three rights:

a. Freedom from discrimination on the basis of race, nationality, ethnicity, etc;
b. Equality before the law; and
c. Protection of Indigenous specific rights to land.

Recommendation 1 – The Queensland Constitution should adopt a preamble.

Recommendation 2 – The Queensland government should protect the rights and freedoms that are concomitant to the values asserted in the preamble through legislative amendment and then Constitutional change. At the very least this includes freedom from discrimination on the basis of race, equality before the law, and, protection of Indigenous specific rights to land.

Issue 2 – Should the Queensland Constitutional Review Commission's draft preamble be adopted in Queensland?

Not without amendment. Recognition of Aboriginal and Torres Strait Islander people should not be limited to a historical reference but should include a recognition of current status and relationship to country.

Recommendation 3 – The Queensland Constitutional Review Commission's draft preamble should be amended before adoption.

Issue 3 – What purpose should a preamble to the Queensland Constitution serve?

Aboriginal and Torres Strait Islander people have a distinct relationship with the law and legal processes in Australia, in part a result of their exclusion, discrimination and disadvantage at the hands of the law. One of the purposes of the preamble should be to symbolically include Aboriginal and Torres Strait Islander people in the legal domain of the state.

This is, as the proposed preamble implies, an important step in the reconciliation process. However, in order to do this properly, the reference to Aboriginal and Torres Strait Islander people must be more extensive than it currently is. This point will be discussed further in relation to Issue 5 and Issue 10.

[2] Larissa Behrendt, 'National salvation lies in a bill of rights', *Sydney Morning Herald*, June 21 2002.

Issue 5 – How extensive should the preamble be?

The QCRC's Issues Paper provides some interesting arguments in relation to Issue 5. Providing an argument in favour of a pared-down preamble, it quotes Professor Craven, who has argued for 'a proposal that represents an absolutely minimal approach to the preamble' which basically acknowledged the position of Indigenous people but contained 'no abstract statements of value which … have the potential to be very dangerous.'[3]

Anticipating opposition to this approach, Professor Craven has suggested elsewhere, "of course, some will argue that it is not enough. Why is it not more poetic? Why are there not references to a range of wider values, such as the protection of human rights, diversity and protection of the environment?"[4] In response, Craven suggests there are two reasons: first, it is difficult to know how vague language might be interpreted in the future, and secondly, 'many people…will be only too delighted to pay a just debt to Indigenous people be recognising them in the Constitution. But they will be completely opposed to a preamble which contains a whole range of imprecise values."[5]

Craven's two main problems with a more extensive acknowledgment of Indigenous people appear to be that first, the language will be too poetic or vague and second, the meaning of rights or values are too imprecise.

These problems can be dealt with relatively easily. First, a more extensive acknowledgement of Indigenous people does not have to be worded in a way that is elaborate or poetic. The same effect can be achieved with more direct and concise language. Second, the preamble can further acknowledge Indigenous people without reference to a 'whole range of imprecise values'. Recognition of Indigenous peoples' prior occupation of Australia, the continuing relationship with their traditional country, and so on[6] can expressed with precision.

The QCRC Issues Paper also refers to John Pyke's suggestion that "if a preamble makes too many claims for *specific* interests and values then *other* Australians will not feel able to support it."[7] (emphasis added) While this point has some validity, its implications are concerning. By only asserting the values of the majority we privilege their values and risk alienating and ignoring the rights and interests of minorities.

Furthermore, if John Pyke was referring to a political or cultural reality that a more extensive reference to Indigenous people would not be supported by a majority of Queensland voters, failure to even attempt change adopts an excessively defeatist attitude. The Queensland government is already committed to widespread community consultation and this is an opportunity to discuss with voters why further acknowledgment of Aboriginal and Torres Strait

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[3] Professor Craven, Commonwealth Constitutional Convention, n 10, vol 3 at 425, referenced in Legal, Constitutional and Administrative Review Committee, 'A preamble for the Queensland Constitution?' Issues paper, June 2004, p 8.

[4] Professor Craven, 'Placing Indigenous People Where They Should Be', *Walking Together*, Nov 1998, Newsletter of Reconciliation Australia, available at:
<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/wtsp_nov98/pages/WTnov30.htm>

[5] See note 3 above.

[6] Please see comments regarding issue 10 for further discussion of what should be recognised.

[7] J Pyke, 'A serious version by John Pyke, with commentary – Why our Constitution needs a preamble – and something more' at www.home.aone.net.au/byzantium/preambles/jp.html referenced in Legal, Constitutional and Administrative Review Committee, 'A preamble for the Queensland Constitution?' Issues paper, June 2004, p 7.

Islander people should be pursued. Deliberative polls, like those held for the Commonwealth Constitutional Convention on a republic and for the ACT Bill of Rights, demonstrate that people who understand an issue are more likely to embrace a change to achieve it.[8]

Recommendation 4 - The preamble should contain more extensive recognition in relation to Aboriginal and Torres Strait Islander people.

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

It is unlikely this Issue will specifically affect Aboriginal and Torres Strait Islander people as there are currently no provisions in the Queensland Constitution that might require interpretation by this provision of the preamble. This raises further issues that were addressed in more detail under Issue 1.

However, if the recommendations of this submission are adopted, and substantive freedoms and protections are included in the Constitution, then a preamble that has no bearing on the interpretation of other provisions of the Constitution appears to be empty recognition of the values espoused in the proposed preamble. McKenna, Simpson and Williams note with reference to the proposed Commonwealth preamble that 'to assert those values, whilst simultaneously denying that they have any legal significance, appears at best a confusing contradiction and at worst an undermining of those values."[9]

Furthermore, the perceived danger of allowing the preamble a role in the interpretation of Constitutional provisions is over emphasised. McKenna, Simpson and Williams point out 'to date, minimal use has been made of the current [Commonwealth] Preamble by Australian judges. It has been used sparingly to support conclusions grounded in other considerations, and has never been determinative of the outcome in a case."[10] It seems logical that one of the benefits of a preamble (particularly one that is agreed upon at referendum) is that provisions of the Constitution will be interpreted in accordance with the values set out in the preamble. The idea that this might give judges a wider range of law making power seems to take a narrow view judicial decision making. At best, judges currently make decisions with reference to what they understand or perceive the values of society to be. At worst, their decision is based on their own values, which they project onto the wider public. Judges become more, not less, accountable in their decision making as a result of a preamble that can be used to interpret provisions of the Constitution.

Finally, arguments surrounding this issue have so far tended to focus on the accountability of the judiciary in their decision-making. However, Parliament and the Executive should also be held accountable to the values articulated in the preamble and Constitution.

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[8] See 'Deliberative Polling' at www.ida.org.au. Issues Deliberation Australia conducted deliberation polls for both the ACT Bill of Rights and the Republic. Deliberative polling is also discussed in relation to Issue 20.

[9] Mark McKenna, Amelia Simpson and George Williams 2001, 'First words: The Preamble to the Australian Constitution', *UNSW Law Journal* 28, para. 76.

[10] Mark McKenna, Amelia Simpson and George Williams 2001, 'First words: The Preamble to the Australian Constitution', *UNSW Law Journal* 28, para 49.

Recommendation 5 – The Queensland Constitution should **not** specifically state that the preamble cannot be used to interpret other provisions of the Constitution. Rather, it should specifically state that the preamble should be used to interpret other provisions of the Constitution.

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

QCRC's reference to Aboriginal and Torres Strait Islander people in the proposed preamble to the Queensland Constitution states:

> *"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"*

The QCRC's preamble currently recognises the 'contribution' of Aboriginal and Torres Strait Islander peoples as the 'original occupants and custodians of this land'. This is a considerably limited recognition that does not give a 'sense of what sort of society we want to be' as it is refers only to the past without any direction or reference as to the contemporary status of Indigenous people in Australia.[11]

Victoria is currently amending their Constitution to 'recognise Victoria's Aboriginal people and their contribution to the State of Victoria'.[12] The amendment will include recognition that the Aboriginal people

- were the first custodians of the land within Victoria;
- have a unique status as descendents of the original inhabitants;
- have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and
- have made a unique and irreplaceable contribution to the identity and well-being of Victoria.

In doing so, Victoria will become the first State in Australia to formally recognise Aboriginal and Torres Strait Islander peoples in their Constitution.

Queensland should view Victoria's preamble as a benchmark from which to work and include at least the same level of recognition in the Queensland preamble.

The current reference to Aboriginal and Torres Strait Islander people starts with the words '[i]n a spirit of reconciliation'. AIATSIS recognises that this statement is probably intended to be a reference to achieving reconciliation but it effectively acts as a qualification on the rest of the sentence, as if acknowledging Aboriginal and Torres Strait Islander peoples as the original occupants and custodians of the land requires justification. Thus, the phrase 'in the spirit of reconciliation' tends to limit the following recognition.

AIATSIS recommends including a recognition of Aboriginal and Torres Strait Islander peoples' continuing rights by virtue of their status as Australia's Indigenous peoples.

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[11] Legal, Constitutional and Administrative Review Committee, 'A Preamble for the Queensland Constitution?' Issues Paper, Legislative Assembly of Queensland, June 2004, p 2.

[12] Victorian Parliament, *Constitution (Recognition of Aboriginal People) Bill 2004*, Explanatory Memorandum, p 1. Available from http://www.dvc.vic.gov.au/aav/news_events/constitution/exp-memorandum.pdf

Suggested reference to Aboriginal and Torres Strait Islander people in the preamble to the Queensland Constitution:

> *We recognise the contribution of both Aboriginal and Torres Strait Islander peoples as the original occupants and custodians of this land and further recognise their continuing rights held by virtue of their status as Australia's Indigenous peoples.*
>
> *Aboriginal and Torres Strait Islander people have a spiritual, social, cultural and economic relationship with their traditional lands and waters and have made a unique and irreplaceable contribution to the identity of Queensland.*
>
> *We are committed to ensuring Aboriginal and Torres Strait Islander people attain an equal standard of living on all social and economic indicators such as health, education, employment, and wealth.*

As a final point, it is worth reiterating that although the symbolic value of a preamble should not be underestimated, it is still important to give effect to that symbolism. AIATSIS recommends that the Queensland government commits itself to attaching real rights to these values either in the Constitution or in a separate legislative Act, for all people, but particularly for Indigenous people.

Recommendation 6 – The preamble should recognise Aboriginal and Torres Strait Islander people.

Recommendation 7 – The preamble remove the words 'in the spirit of reconciliation'.

Recommendation 8 – The preamble should adopt the proposed reference to Indigenous people (extracted above).

Issue 20 – How should the community be consulted in this process?
Issue 21 – Who should be consulted?

Proper consultation is also a means to garner community support. It gives legitimacy to the preamble. If the preamble is representative of the community's wishes, it increases the likelihood of it passing at referendum. As noted in the QCRC Issues Paper, one of the central problems with the proposed preamble to the Commonwealth Constitution was the complete lack of any consultation process. [13]

Aboriginal and Torres Strait Islander communities in Queensland should be consulted to establish whether they are happy with this wording, whether the preamble goes far enough, and if not, what they would like to see instead. Consultation with Indigenous communities should not be conducted with the intention of 'selling' this particular preamble but rather to establish what Aboriginal and Torres Strait Islander people of Queensland want to see in the preamble and how they want themselves reflected.

Fact sheets should be made and distributed, detailing clearly and plainly what the Queensland government is intending to do. Community consultation meetings should be held, and advertised

[13] Legal, Constitutional and Administrative Review Committee, 'A Preamble for the Queensland Constitution?' Issues Paper, June 2004, p 17

with at least a months notice through Indigenous networks (such as online email forums), Indigenous organisations, Indigenous publications (such as the Koori Mail) as well as local and regional newspapers. Indigenous people should be given both the opportunity and appropriate time to discuss the proposed preamble and suggest changes to the wording.

Above all, consultation should be genuine and not a token gesture.

As indicated under Issue 5, deliberative polling is a unique and effective public consultation process. IDA (Issues Deliberation Australia), who conducted the deliberative polls for the Republic referendum and the ACT Bill of Rights, suggest that conventional polls represent the public's surface impression of an issue, usually based on media clips and headlines. A deliberative poll seeks to examine what the public would think if given an opportunity to be informed and to deliberate with their peers on topics of social and public policy.[14] IDA notes that after each deliberative poll, "there were dramatic, statistically significant changes in views", and that these opinions "represent the conclusions the public would reach under ideal circumstances, that is, when it has an opportunity to become more informed and engaged by the issues and to work through the pros and cons of a variety of options."[15]

Recommendation 9 – The Queensland Indigenous Community should be consulted in this process. Consultation should occur with Indigenous representatives and with the Indigenous community generally, and allow sufficient time for discussion and response.

Recommendation 10 - A deliberative poll be conducted for the preamble to the Queensland Constitution.

[14] 'Deliberative polling', IDA General Activities, www.ida.org.au
[15] See note 12 above.