



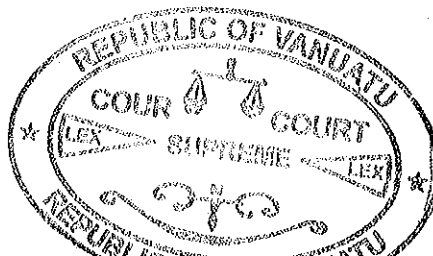
### III - SECTIONS OF BILL CONSIDERED INCONSISTENT WITH A PROVISION OF CONSTITUTION

The Referral by the President concerns the following specific provisions of the Bill, namely:-

- (a) Sections 4(1)(a)
- (b) Section 13(d)
- (c) Section 15(1)(c)
- (d) Section 32
- (e) Section 7

They are set out below for ease of reference:

- (a) Section 4(1)(a)
  - "4 *Meaning of domestic violence*
  - (1) *A person commits an act of domestic violence if he or she intentionally does any of the following acts against a member of his or her family.*
    - (a) *assaults the family member (whether or not there is evidence of a physical injury;*
    - (b) *..."*
  
- (b) Section 13(d)
  - "13 *Conditions relating to individual protection and harmonious family relationships.*
  - A Court may include all or any of the following condition in a protection order:*
    - (a) *....*
    - (b) *...*
    - (c) *...*
    - (d) *prohibiting the Defendant or complainant from being in or near specific premises, including premises where the other lives, works or frequents, even though he or she has a legal or equitable interest in the premises;*



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(e) ...”

(c) Section 15(1)(c)

*“15 Conditions relating to property*

*(1) A Court may include all or any of the following conditions in a protection order:*

*(a) ...*

*(b) ...*

*(c) granting the complainant exclusive occupancy to a residence or specified part of a residence whether or not the residence is solely owned or leased by the Defendant...”*

(d) Section 32

*“32 Evidence*

*In proceedings under this Act (other than proceedings for an offence) a Court, or authorised person may receive any evidence that the Court or authorised person thinks fit, whether the evidence is otherwise admissible in a Court or not.”*

(e) Section 7

*“7 Declaration of authorised persons*

*(1) The President acting on the advice of the Judicial Service Commission is, by declaration in writing, to appoint authorised persons.”*

#### **IV - ISSUES AND QUESTIONS FOR DETERMINATION BY COURT**

Both Counsel assist the Court with agreed statement of issues. The followings are the three main issues fragmented into specific questions to be determined by the Court:

##### **A - ISSUE 1:**

**EXTENT AND MEANING TO BE GIVEN TO PREAMBLE AND INCONSISTENCY WITH THE PREAMBLE:**



## **RELATED QUESTIONS**

1. Is the Preamble a part of the Constitution?
2. Is the Preamble “a provision of the Constitution” within the meaning of the Article 16(4) of the Constitution?
3. If so, is Section 4(1)(a) of the Bill inconsistent with the Preamble of the Constitution?

### **B – ISSUE 2:**

#### **INCONSISTENCY WITH ARTICLES 5(1) (2) AND 47(1) (2) OF THE CONSTITUTION**

##### **RELATED QUESTIONS**

4. Is Section 4(1)(a) of the Bill inconsistent with Article 5(1)(f) of the Constitution?
5. Are Sections 13(d) and 15(1)(c) of the Bill inconsistent with:
  - (a) Article (5(1)(d)? and
  - (b) Article 5(1)(j) of the Constitution?
6. Is Section 32 of the Bill inconsistent with Article 5(1) and 5(2) of the Constitution?
7. Are Sections 7 and 32 of the Bill inconsistent with Article 47(1) (2) of the Constitution?

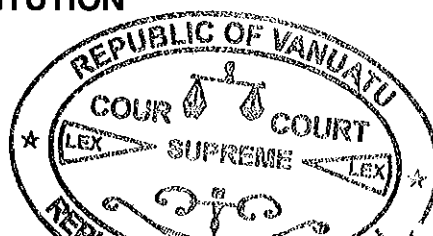
### **C - ISSUE 3:**


#### **SEVERABILITY**

##### **RELATED QUESTIONS**

8. Whether, if any provisions of the Bill are struck down, those parts are severable.

### **V - INTERPRETATION OF THE CONSTITUTION**



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I set out below the guideline I follow in interpreting the Constitution in respect to the issues raised in the present case:

First:

*"In the course of interpreting the constitutionality of a proposed Act of Parliament (a Bill), there is no question of entering into an inquiry as to whether or not the proposed Act is in fact "for the peace, order and good Government of Vanuatu". That must be a question in the sole discretion of Parliament. The sole question for determination of the Court is, does the Proposed Act (Bill) or any parts thereof offend the Constitution, and if so, in respect of which Article of the Constitution and to what extent."* [See *In re the Constitution, Timakata v. Attorney-General* (1992) VUSC9; 1980 – 1994) Van LR691; see also *In re the President's Referral, President of the Republic of Vanuatu v. Speaker of Parliament* (2000) VUSC 43; Civil Case No.51 of 2000.

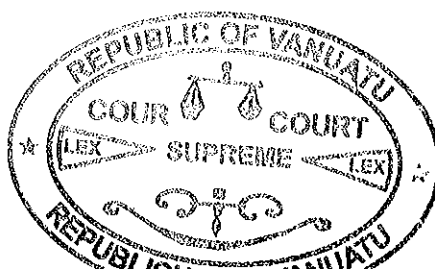
Second:

The interpretation of the Constitution is sui genesis. The Constitution is the law behind the law and is still evolving. It has to be interpreted and applied in a dynamic, organic or progressive manner [*Virelala v. Ombudsman* (1997) VUSC 35]. In *Republic of Vanuatu v. Bohn*, [2008] VUAC6 the Court stated:

*"Where there is an authoritative decision of this Court which is decisive on a point, there is no need to go beyond the Vanuatu Court of Appeal decision on that point. The only time that persuasive authorities from other countries could be relevant is when counsel are trying to argue that the Vanuatu, precedent should be departed from."*

Third:

It is to be noted that one of the important issues raised in this case deals with the used of Preamble as the sole basis for stating a legal principle as against a proposed Act of Parliament. It is a new issue in this jurisdiction. There is no decision of the Court of Appeal on that point. I will accept and adopt as my own



persuasive authorities from other jurisdictions dealing with similar Constitutional question.

## VI - BURDEN ON UNCONSTITUTIONALITY OF A BILL

It is a presumption that a proposed law (a Bill) is presumed to be constitutional. The burden of persuading the Supreme Court of the unconstitutionality of the proposed law is on the Referral Authority by virtue of the exercise of the Referral power under Article 16(4) of the Constitution to rebut that presumption. [See *President of the Republic of Vanuatu v. Attorney-General of Vanuatu*, CC 169 of 1997, Judgment of Supreme Court dated 5 June 1998].

## VII - SUBMISSIONS AND CONSIDERATIONS

I now propose to deal with each issue raised one after the other.

### ISSUE 1:

#### EXTENT AND MEANING TO BE GIVEN TO PREAMBLE AND INCONSISTENCY WITH THE PREAMBLE

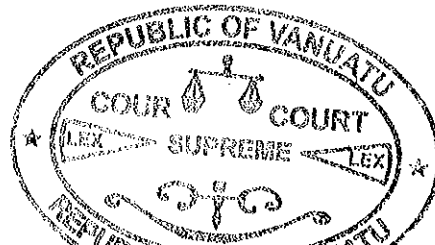
The President considers that Section 4(1)(a) of the Bill for Family Protection Act No.28 of 2008 is inconsistent with the Preamble of the Constitution.

S. 4(1)(a) provides:

#### **"4. Meaning of domestic violence**

- (1) *A person commits an act of domestic violence if he or she intentionally does any of the following acts against a member of his or her family:*
  - (a) *assaults the family member (whether or not there is evidence of a physical injury;*
  - (b) *..."*

It is considered that the definition of the "assault" ["meaning of domestic violence"] in the Bill outlined above is inconsistent with the statement in the Preamble on



“christian principles” which teach and allow reasonable assault by a parent on his or her child as a form of correction.

It is agreed by both Counsel that in order to determine that issue, the Court must first determine whether or not the Preamble of the Constitution is “a provision of the Constitution” within the meaning of Article 16(4) of the Constitution.

Mr Bill Bani, Counsel for the President submits that the Preamble of the Constitution is “a provision of the Constitution” for the following reasons:

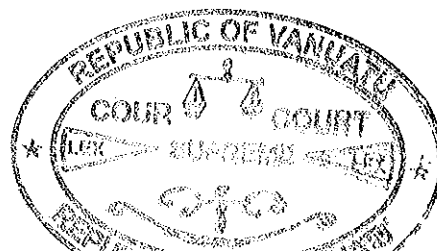
First, the Constitution contains a transitional provision under Chapter 15. Chapter 15 does not say that the Preamble is for a transitional period or for a temporary period only. He argued that there is no provision of the Constitution which says the Preamble is not a provision of the Constitution.

Second, Mr Bani refers the Court to the pre-constitutional discussions on the draft of the Preamble by the Constitutional Framers and invite the Court to consider and rely on them.

Third, Mr Bani compares the Preamble with Articles 7 and 8 of the Constitution. Article 7 provides for fundamental duties every person has to himself and to his descendants and to others under Part II of the Constitution. However, Mr Bani pointed out that the fundamental duties are non-judicable pursuant to Article 8 of the Constitution. There is no such a similar provision like Article 8 in respect to the Preamble.

Fourth, Article 85 which deals with procedure to amending the Constitution, under Chapter 14, does not make any difference to an enacting provision as opposed to the Preamble.

Fifth, Mr Bani refers the Court to the judgment of the Court of Appeal of Solomon Islands in the case of **Minister for Provincial Government v. Guadalcanal Province Assembly** (1997) SB CA 1; CA – CAC 003 of 1997 (11 July 1997).



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At page 5 of the judgment of Kapi P (Ag) said:

*"There is authority which supports the proposition that it is permissible to have recourse to the terms of a preamble as an aid to constructing the enacting provisions of a statute. However, this is only permissible where there is obscure or indefinite enacting provisions (see **AG v. Prince Ernest Augustus of Hannover** (1975 AC 438).*

...

*It is permissible to have recourse to a preamble as an ambiguity in the enacting provisions. These authorities, however, go beyond the common law in that a preamble may be used as an aid to construction even where the enacting provisions are not so ambiguous (see **Kauesa v. Minister of Home Affairs** (1994) LRC 263 at 297 – 298)."*

His Lordship then refers to the text of the Irish Constitution by J.M. Kelly (Third Edition) and states:

*"I do not have easy access to the Irish reports but a reading of the material provided illustrate that the preamble is part of the Constitution and often stipulates the spirit of the constitution which may help to determine the meaning or effect to be given to particular provisions of the Constitution."*

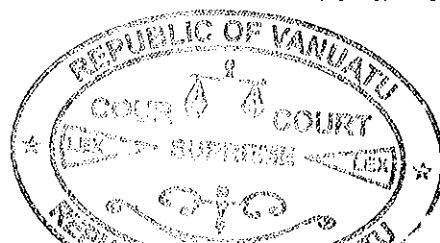
Williams JA said at page 11:

*"The whole document must be read together, subject of course to the general principle that a specific provision would prevail over a general intent derived from the use of the words of wide import."*

Goldsbrough JA also expressed the same view at page 15 of his judgment:

*"Resort has often been made to the words of a preamble in a statute when deciding on provisions which themselves have been found to be ambiguous, and there is ample authority for this."*

In essence, Counsel for the President submits that the Judgment of the Solomon Islands Court of Appeal referred to above is a good persuasive authority for the proposition that a Preamble of the Constitution can be used as an aid to



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interpreting an enacting provision of the Constitution. As such, the Preamble is a provision of the Constitution in a general sense but is otherwise not an enacting provision of the Constitution such as Articles 1 through to 95.

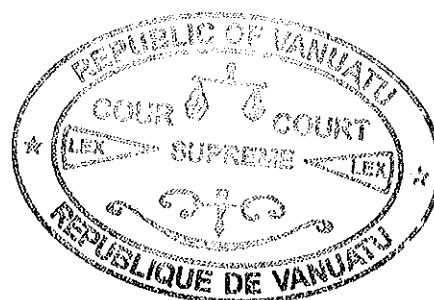
Further, Mr Bani submits that the Preamble is not a provision of the Constitution in relation to Article 16(4). However, the Preamble can be used by the Referral Authority if it is couched with an enacting provision of the Constitution but not by itself as a legal principle.

Mr Dudley Aru, Counsel for the Respondent, submits and accepts that the Preamble is a part of the Constitution. The following suggest that the Preamble is part of the Constitution:

- The simple fact of its inclusion in the text.
- Analogy with the role of a preamble to ordinary legislation.
- Constitutional precedent in other jurisdictions.

Mr Aru submits that the preamble is not a “provision of the Constitution” within the meaning of Article 16(4). The following are in support of the Respondent’s submission on this point:

1. There are few available aids to the interpretation of Article 16(4) and its relationship to the preamble:
  - There are no relevant definitions.
  - Other provisions do not assist.
  - Pre-constitutional discussions to which the Referral Authority makes reference in its submissions are of limited assistance.
2. Dicta from several decisions of the Supreme Court suggest a narrow reading of Article 16(4) which impliedly includes the preamble from the meaning of a “provision”:
  - (a) In re the President’s Referral, ***President of the Republic of Vanuatu v. Speaker of Parliament*** [2000] VUSC 43; Civil Case 51 of 2000.



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*"It is fundamentally important to understand that the duty of the Court is to control the constitutional validity of a bill or a provision of a bill in the light of an express provision of the Constitution and not otherwise."*

(b) **Virelala v. Ombudsman** [1997] VUSC 35; Civil Case 4 of 1997

*"I must say that there is a role for implication in constitutional interpretation. But, this role is a limited one, and the only implications, which could be made were those that must be necessarily implied from the actual terms of the instrument [Constitution]."*

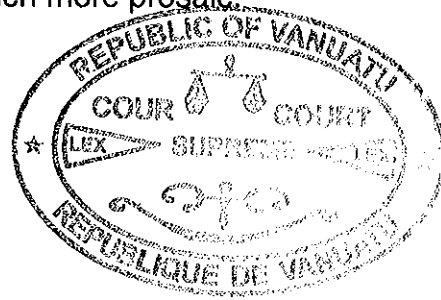
*Therefore, in my judgment, I am of the opinion that the Court is not free to limit the language of a legislative power contained in the Constitution or the Court is not free to invent implied prohibitions upon the exercise of legislative power."*

(c) In re the Constitution, **Timakata v. Attorney-General** [1992] VUSC 9; [1908 -1994] Van LR 691

*"In the course of interpreting the constitutionality of these present Bills, there is no question of entering into an inquiry as to whether or not the proposed Acts are in fact "for the peace order and good government of Vanuatu," that must be a question in the sole discretion of Parliament. The sole question for determination of the Court is does the proposed Act (the Bills) or any parts thereof offend the Constitution, and if so, in respect of which Article and to what extent."*

3. Some inferences are invited by the general structure and design of the Constitution. These features may be noted:

- The preamble is kept separate from the body of the Constitution.
- The preamble is not assigned an article number.
- The preamble is expressed in general, poetic and aspirational language whereas the balance of the text is much more prosaic.



- No other part of the Constitution makes reference to any part of the preamble.
- No part of the preamble is amplified elsewhere in the Constitution.

The inferences suggested by these features include:

- The preamble is symbolic rather than functional.
- The various statements in the preamble were designed to capture the spirit of newly-established independence and the founders ethos.
- The preamble has no more than an interpretive role.
- Whatever its precise operation, the preamble is distinct from the regular machinery of the Constitution and should not be ascribed the same effect as an operative provision.

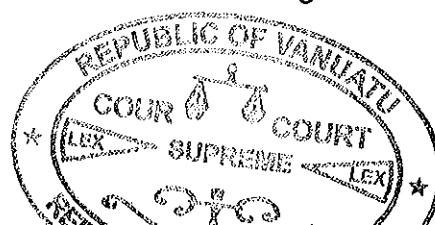
4. Other jurisdictions have developed a similar limited role for the constitutional preamble:

- **United States of America**

The preamble has been held not to be a source of power but rather to be evidence of the origin, scope and purpose of the Constitution. The way in which the preamble can assist in the process of interpretation was described by Joseph Story in the Commentaries: “For example, the preamble declares one subject to be, ‘to provide for the common defence.’ No one can doubt that this does not enlarge the powers of the Congress to pass any measures which they deem useful for the common defence. But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one could promote and the other defeat the common defence, ought not the former, upon the soundest principles of interpretation, to be adopted?”

- **Canada**

The preamble has frequently been described as a “helpful interpretive device” together with warnings that it “cannot be used to derogate from rights otherwise guaranteed” and that it has “no enacting force”. The British



Columbia Court of Appeal has referred to the preamble as a “dead letter” into which the Court had “no authority to breath life.”

- **Australia**

In their commentary on the newly enacted Constitution, Quick and Garran asserted that parts of the preamble may serve to aid in the interpretation of words or phrases which might arise in the context of unexpected issues or newly emerging opinions. Early judicial impressions of the role and effect of the preamble were conservative – the reference tot the “indissoluble Federal Commonwealth” was described as merely a “pious aspiration for unity”. Subsequent consideration of the Preamble in the High Court has not been so dismissive. The role ascribed to the Preamble has, however, been limited to that of an interpretive guide. In one case, three judges of the High Court considered that the Preamble was a legitimate source from which to infer limitations on the legislative power of the Parliament. Subsequent decisions disallowed this approach.

- **England**

England does not have a Constitution as such, but there are a number of instruments which are treated as having equivalent character and which pertain to sovereign powers. One such act is the Parliament Act 1911 whose preamble was recently considered by the House of Lords, finding that it is useful to determine the overall object of the Act, but holding that interpretive arguments based on the preamble could not prevail over the clear language of the statute.

- **France**

The position in France is quite anomalous and should be understood in relation to the various upheavals which have produced French constitutional instruments. The preamble to the 1958 Constitution refers to the (very long) preamble to the 1946 Constitution. It is here that the bulk of the fundamental freedoms (usually found in the operative parts of other constitutions) are contained. They found their way into the preamble in 1946 after an attempt to re-draft the Declaration of the Rights of Man 1789



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had failed in referendum. Commentators have drawn attention to the problems associated with reading the preamble as a set of specific rights due to the language used, the absence of specifics, the clash of principles between instruments, and also the circumstance that the original intent was to deny the preamble any legal consequences. Nevertheless, since the 1958 Constitution, the Conseil Constitutionnel has treated the preamble of 1946 as binding. It is suggested that these decisions must be seen in the context of politico-legal necessity.

- **India**

Judicial consideration of the role of the preamble has been clear: It cannot be the source of any substantive power which the body of the Constitution alone can confer on the Government, expressly or by implication.

- **Solomon Islands**

The preamble to the Constitution of the Solomon Islands is much more detailed than in Vanuatu and is expressed in more specific language. In the leading case, the Court of Appeal reversed a decision of the Supreme Court where the primary judge found implied and express provisions to be located in the preamble. The Court of Appeal, relying on foreign precedent and general principles of statutory interpretation concluded that the preamble did not contain legal principles and was of interpretive value only.

The introductory part of the Constitution of Vanuatu is set out below:

*"WE the people of Vanuatu,  
PROUND of our struggle for freedom,  
DETERMINED to safeguard the achievements of this struggle,  
CHERISHING our ethnic, linguistic and cultural diversity,  
MINDFUL at the same time of our common destiny,  
HEREBY proclaim the establishment of the united and free Republic of Vanuatu  
founded on traditional Melanesian values, faith in God, and Christian principles,  
AND for this purpose give ourselves this Constitution".*



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It is to be noted that the introductory part of the Constitution has no title. For ease of reference, it is called "Preamble".

It is very short. It is made up of seven (7) statements recognising that the people of Vanuatu is the enacting authority of the Constitution. The introductory statements express the underlying spirit of the Constitution and set out in general terms the principles, philosophies and aspirations of the newly-established nation which the Constitution is founded upon.

The first issue this Court needs to determine is the extent to which the Court may have regard and give meaning to the Preamble of the Constitution.

I will determine the issue by answering each question as raised.

**QUESTION 1:**

**1. Is the Preamble a part of the Constitution?**

I answer that question in the affirmative (yes). Both Counsel accept that the Preamble of the Constitution is a part of the Constitution. It is included in the text of the Constitution as part and parcel of the Constitution.

**QUESTION 2:**

**2. Is the Preamble "a provision of the Constitution" within the meaning of Article 16(4) of the Constitution?**

"The Preamble of the Constitution express some underlying principles, philosophies and aspirations which forms the basis of the new nation (Per Kapi (Ag) P in *Minister of Provincial Government v. Guadalcanal Provincial Assembly* (1997) SBCA1 (at p.5) which I accept and adopt as my own.

Counsel for the Referral Authority submits that the Preamble is a provision of the Constitution in a general sense but concedes in his submissions that the Preamble of the Constitution is not "a provision of the Constitution" within the



meaning of Article 16(4) of the Constitution. He also concedes that the Preamble is not an enacting provision of the Constitution like the enacting provisions contained in Articles 1 to 95 of the Constitution.

He further concedes in his submissions that the Referral Authority cannot use the Preamble by itself as a legal principle on the basis of the persuasive Judgment of the Court of Appeal of Solomon Islands in the *Guadalcanal case* referred to earlier.

I note and accept the following features in the submissions of the Respondent:

- The Preamble is kept separate from the body of the Constitution.
- The Preamble is not assigned an article number.
- The Preamble is expressed in general, poetic and aspirational language whereas the balance of the text of the Constitution (from Article 1 to 95) is more prosaic.
- No other part of the Constitution makes reference to any part of the Preamble.
- No part of the Preamble is amplified elsewhere in the Constitution.

I accept that the above features suggest the following:

- The Preamble is symbolic rather than functional.
- The various statements in the Preamble were designed to capture the spirit of newly-established independence and the founders ethos.
- The Preamble has no more than an interpretative role.
- Whatever its precise operation, the Preamble is distinct from the regular machinery of the Constitution and should not be ascribed the same effect as an operative provision.

I accept and share the views that the recourse may be had to the terms of the Preamble to interpret other provisions of the Constitution which are found to be ambiguous. However, when there is no ambiguity it is not necessary to have recourse to the terms of the Preamble for assistance. The Judgment of the Court



of Appeal of Solomon Islands in re **The Minister for Provincial Government v. Guadalcanal Province Assembly** CAC No.3 of 197, 11 July 1997 is a good persuasive authority for that proposition:

Kapi P (Ag) at page 9 stated:

*"In respect of use of a preamble to a constitution, several jurisdictions have dealt with the issue. It is permissible to have recourse to a preamble as an aid to construction of the provisions of a constitution as in common law, where there is an ambiguity in the enacting provisions. These authorities, however, go beyond the common law in that a preamble may be used as an aid to construction even where the enacting provisions are not so ambiguous (see **Kauesa v. Minister of Home Affairs** [1994] LRC 263 at 297-298)."*

His Lordship then refers to the text *The Irish Constitution* by J.M. Kelly (Third Edition) and states:

*"I do not have easy access to the Irish reports but a reading of the material provided illustrate that the preamble is part of the Constitution and often stipulates the spirit of the constitution which may help to determine the meaning or effect to be given to particular provisions of the Constitution."*

Williams JA at page 11, stated:

*"Where a specific enactment of the Constitution conflicts with a statement in the preamble then, of course the specific enactment must prevail; but subject thereto the preamble provides substantive guidelines to be followed when considering the meaning and effect of the Constitution."*

Goldsbrough JA also expressed the same view at page 15 of his judgment:

*"Resort has often been made to the words of a preamble in a stature when deciding on provisions which themselves have been found to be ambiguous, and there is ample authority for this."*

All three learned Justices of Appeal agreed that where there is no ambiguity it is not necessary to have recourse to the terms of the preamble for assistance. Kapi P put it in this way:



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*"I consider that the Preamble of the Constitution of Solomon Island is not different to the nature of preamble in other constitutions. The preamble is a general statement of jurisprudential philosophy or underlying principles or beliefs by the people as the basis of the new nation. To this extent it is permissible as has been illustrated by decisions from other jurisdictions for courts to have regard to preambles in construing provisions of constitution. However, in my opinion, these general statements must not be read as constituting legal principles on their own."*

Williams JA said at page 11:

*"The whole document must be read together, subject of course to the general principle that a specific provision would prevail over a general intent derived from the use of the words of wide import."*

And Goldsbrough at p.15:

*"I am not aware of any authority which permits resort to be made to a preamble however, where no ambiguity is found. As Innes CJ said in Law Union and Rock Insurance Co. Ltd v. Carmichael's Executor 1917 AD 593 at 597:*

*'A preamble has been described by an old English Judge as 'a key to open the minds of the makers of the Act and the mischief which they intended to redress'. But the key cannot be used if the meaning of the enacting clause is clear and plain. In cases however where the wording is ambiguous, and in cases where the Court is satisfied that the Legislature used, then it is proper to have recourse to the preamble.'*

*The 'agreement and pledge' found at the beginning of the Constitution, which as I said earlier is only referred to here for the sake of convenience as a preamble, as much as part of the Constitution as other provisions. But from its words one can see that it does not set out to make specific provisions. Where such specific provisions do appear later in the Constitution these later provisions will stand alone except where their meaning cannot be ascertained without reference to other material."*



In the light of the foregoing submissions and concessions, and on the basis of the persuasive Judgment of the Court of Appeal of Solomon Islands in the Guadalcanal Case referred to above, I am of the opinion that the Preamble is not an enacting provision of the Constitution and it is not a provision of the Constitution” within the meaning of Article 16(4) of the Constitution. Thus, the Referral Authority cannot use a statement in the Preamble as the constitutional basis for his Reference consideration under Article 16(4) of the Constitution.

**QUESTION 3:**

**3. Is Section 4(1)(a) of the Bill inconsistent with the Preamble of the Constitution?**

I answer that question in the negative (no). The Referral Authority cannot recourse to the Preamble by its own as a legal principle in the constitutional reference under Article 16(4) of the Constitution as it is intended in the present case.

I now deal with the second issue on inconsistency with the Article 5(1)(d), (f) and (j) and (2) and 47(1) (2) of the Constitution. I shall answer particular questions one after the other.

**QUESTION 4:**

**4. Is Section 4(1)(a) of the Bill inconsistent with Article 5(1)(f) of the Constitution?**

Counsel for the Referral Authority says that the Court can check the constitutional validity of s.4(1)(a) with other enacting provision of the Constitution and in this instant case Article 5(1)(f). Article 5(1) (f) guarantees fundamental freedom of conscience and worship.

Mr Bani submits that “christian principles” are joint in with freedom of conscience and worship because they are individualistic right. Mr Bani, relies on the following cases from Canada, Samoa and Solomon Islands to support his submissions: [**Young v. Young**, (1993) 4 – S.C.R.3 & **R. v. Big M Drug Mart Ltd.**, [1985]1 – S.C.R.295, which are followed and applied by the High Court of Solomon Islands



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in re **Lobo v. Limnilove** (2202) SBHC 110 and the Supreme Court of Samoa in re **Sefo v. Attorney-General** (2000) WSSC 18].

The cases referred to above show that freedom of religion include right to manifest religious belief by worship and practice or by teaching and dissemination of the religious belief.

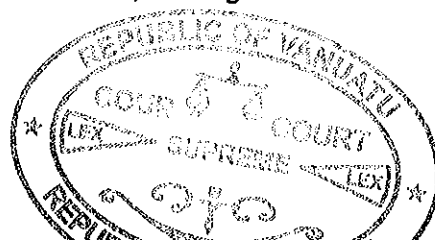
Mr Bani further submits on the basis of the above persuasive authorities that the right to teach and practice the religious belief includes the right for parental discipline. Mr Bani, therefore, submits that Section 4(1)(a) of the Bill is inconsistent with Article 5(1)(f) of the Constitution and the christian principles contained in the Preamble.

It must be understood that it is Article 5(1)(f) of the Constitution that I would be asked to interpret in order to check the constitutional validity of Section 4(1)(a) of the Bill in question. Article 5(1)(f) must be ambiguous in order for me to have recourse to the Preamble as an aid to interpreting Article 5(1)(f) of the Constitution.

In the present case, the ambiguity of Article 5(1)(f) of the Constitution has not been raised in the Further Amended Referral filed 2 August 2008 and so both Counsel did not submit on its ambiguity warranting for a recourse to the statement of christian principles contained in the Preamble. I note with interest the following statement from the Judgment of the Supreme Court of the Canada in **R. v. Big M Drug Mart Ltd.**, [1985] 1SCR 295:

**“Freedom of Religion**

*A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s.15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious*



*beliefs openly and without fear and hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.*

*Freedom can primarily be characterised by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."*

There is no difficulty for me to accept and I do accept that freedom of conscience and worship includes right to manifest religious belief by worship and practice or by teaching, and dissemination and that the right to teach and practice the religious belief includes the right for parental discipline.

Section 3 of the Bill for the Family Protection Act defines a family member as follows:

**"3. Meaning of family member**

*Each of the following is a member of a person's family:*

- (a) the spouse of the person;*
- (b) a child of the person and/or the person's spouse;*
- (c) a parent of the person or the person's spouse;*
- (d) a brother or sister of the person or the person's spouse;*
- (e) any other person who is treated by the person as a family member."*



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The question then, is, is section 4(1)(a) of the Bill intended to prohibit the exercise of genuine parental discipline?

I think not. As submitted by Counsel for the Respondent which I accept, there is nothing in the Bill which prohibits the exercise of genuine parental discipline. The term “assault” is not defined in the Bill nor is it defined in Section 107 of the Penal Code Act [CAP.135]. In both, the meaning of “assault” is supplied by the common law. The common law recognises the exception of lawful chastisement where a parent delivers reasonable corporal punishment to a child. Such punishment does not amount to an assault at common law and so would not amount to an assault under the Penal Code or the proposed Family Protection Act No.28 of 2008. Section 4(1)(a) of the Bill is not inconsistent with Article 5(1)(f) of the Constitution.

**QUESTION 5:**

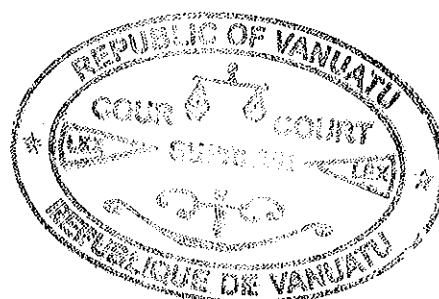
- 5. Are Sections 13(d) and 15(1)(c) of the Bill inconsistent with –**
- (a) Article 5(1)(d)? and**
  - (b) Article 5(1)(j) of the Constitution?**

Mr Bani submits that Section 13(d) of the Bill is inconsistent with Article 5(1)(d) and Article 5(1)(j) of the Constitution. It is further submitted that it does not matter that the deprivation is of temporary nature. It must be made pursuant to the Constitution and the law.

Section 13(d) and 15(1)(c) provide that a protection order may prohibit a person from being in or near specified premises or grant exclusive occupancy, including a place of work or residence and regardless of the person’s legal or equitable interest in the property.

Counsel for the Respondent submits that Sections 13(d) and 15(1)(c) are not inconsistent with Article 5(1)(d) and (j) for the following reasons:

- A protection order does not create or destroy interests in land or other property.



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- A protection order does not prevent an owner of property from disposing of, or encumbering, the interest in property.
- The court, in making a protection order, must take into account matters of ownership and interest.
- A protection order may be varied or discharged at any time.
- A protection order would not prevent a person against whom it is made from subsequently recovering an occupation rent or from seeking any other equitable remedy from another person for whom it is made.
- Protection orders are of temporary and preservative nature (see s.37).
- There is nothing in the Bill which is different in substance from the court's ability to make preservative orders (e.g. freezing order) in the context of commercial cases or the ability to lodge a caution over a land lease.

Even if there is some prima facie inconsistency with Article 5(1)(j), the preamble to the enumerated fundamental rights in Article 5(1) provides that they are "*subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health.*" It is clear from the considerations which attend the making of a protection order (ss.11(2), (3), 12(2), 13, 15) that the Bill invokes some or all of the considerations highlighted above.

In my considered opinion, I agree and accept the submissions advanced on behalf of the Respondent. Sections 13(d) and 15(1)(c) of the Bill are not inconsistent with Article 5(1)(d) and (j) of the Constitution.

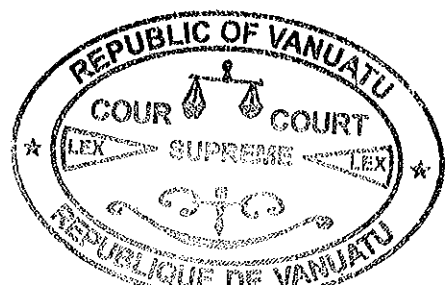
**QUESTION 6:**

**6. Is Section 32 of the Bill inconsistent with Articles 5(1)(d) and 5(2) of the Constitution?**

Section 32 of the Bill deals with evidence. It provides:

"32 *Evidence*

*In proceedings under this Act (other than proceedings for an offence) a Court, or authorised person may receive any evidence that the Court or authorised person thinks fit, whether the evidence is otherwise admissible in a Court or not."*



Mr Bani says that Section 32 of the Bill is inconsistent with Article 5(1)(d) and Article 5(2)(a) of the Constitution. He submitted, in essence that Section 32 constitutes a departure from the rules of natural justice which is guaranteed under Article 5(1)(d) and further that the duty of the Courts is to make decision according to law based on admissible evidence.

Article 5(1)(d) of the Constitution guarantees protection of the law.

Article 5(2)(a) says:

*“(2) Protection of the law shall include the following:*

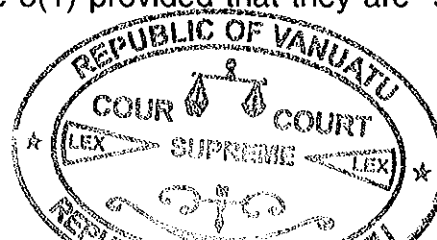
*(a) everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial court and be afforded a lawyer if it is a serious offence.*

*...”*

I have perused the purpose of the Bill for Family Protection Act No.28 of 2008, and considered Section 32 of the Bill and the regime intended to be implemented under the Bill and considered the submissions and arguments in the light of Article 5(1)(d) and 5(2)(a) of the Constitution, in my opinion there is no inconsistency of s.32 of the Bill with Articles 5(1)(d) and Articles (2)(a) of the Constitution. On the contrary, I agree and accept the Respondent's submissions that the considerations of inconsistency is misconceived because:

- The right to protection of the law prevents Parliament from ousting the jurisdiction of the courts and from abrogating the fundamental rules of natural justice whereas s.32 does neither.
- The reception of such evidence in no way implies a departure from the rules of natural justice.
- Section 32 does not operate in respect of proceedings for an offence (ref. Article 5(2)(a)), only in relation to other proceedings.

Even if there is some prima facie inconsistency with Article 5(1)(j), the preamble to the enumerated fundamental rights in Article 5(1) provided that they are “subject



to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health.” It is clear from the considerations which attend the making of a protection order (ss.11(2), (3), 12(2), 13, 15) that the Bill invokes some or all of the considerations highlighted above and that the purpose of the section is to facilitate proof only for preservative measures in cases where, typically, strict proof is notoriously difficult.

**QUESTION 7:**

**7. Whether Sections 7 and 32 of the Bill are inconsistent with Article 47(1)(2) of the Constitution?**

Article 47(1)(2) of the Constitution provides:

**“THE JUDICIARY**

*47.(1) The administration of the justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.*

*(2) Except for the Chief Justice the judiciary shall be appointed by the President of the Republic acting on the advice of the Judicial Service Commission.”*

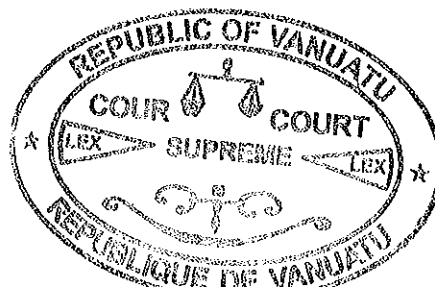
Section 7 of the Bill provides, among other matters, for the appointment of authorised persons.

An authorised person may make temporary protection order in the circumstances specified in the Bill under Division 2 – Temporary Protection Orders.

Authorised person means:

- (a) a magistrate; or
- (b) a justice of an Island Court; or
- (c) a person appointed to be an authorised person under Section 7.

Section 7 of the Bill is set out below:





**“7 Declaration of authorised persons**

**(1) The President acting on the advice of the Judicial Service Commission is, by declaration in writing, to appoint authorised persons.**

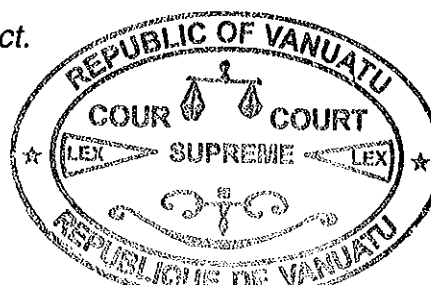
2) The Minister is to recommend to the Judicial Services Commission person for appointment under subsection (1). A person is to be recommended only if:

- (a) the person has undertaken training approved by the Minister for the purposes of this section; and
- (b) the person has a good knowledge of this Act and understands how it works; and
- (c) he understands the social and cultural environment within which domestic violence takes place; and
- (d) the person:
  - (i) is the principal chief of a village; or
  - (ii) is an assistant chief of a village, a church leader, a community leader, a teacher, or a village health worker nominated by the principal chief of the relevant village;
  - (iii) is a member of the Vanuatu Police Force of or above the rank of inspector; or
  - (iv) has applied in writing to the Minister to be recommended for appointment.

(3) The Minister must:

- (a) consult with the President of the National Council of Chiefs and the Director of the Department of Women’s Affairs and the Director General of the Prime Minister’s Department before making a recommendation; and
- (b) ensure so far as practicable that recommendations are made in respect of an equal number of men and women in each local government region of Vanuatu.

(4) A person who is appointed as an authorised person is not to be paid any remuneration or allowances for performing any functions or exercising any powers under this Act.



- (5) *A copy of each declaration must be published in the Gazette as soon as practicable after it is made.*
- (6) *An authorised person may claim from the Director General of the Prime Minister's Department reimbursement of any expenses that the authorised person incurs in performing any functions or exercising any powers under this Act, (reimbursement of telephone calls to the court or transport costs to take a victim to a hospital, for example)."*

Section 32 of the Bill has been set out earlier.

Mr Bani submits that Section 32 of the Bill is inconsistent with Article 47(1) of the Constitution.

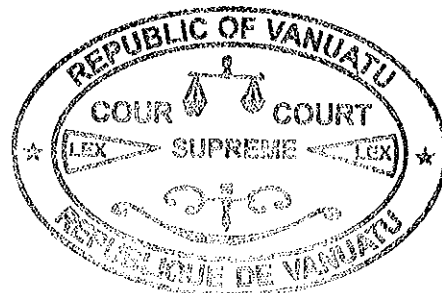
It is my considered opinion that Section 32 of the Bill, is not inconsistent with Article 47(1) of the Constitution. The submission on this point is misconceived. Section 32 of the Bill does not confer any function, let alone judicial function, on any person.

Counsel for the Referral Authority submits that Section 7(1) of the Bill is inconsistent with Article 47(1) and (2) of the Constitution for two (2) reasons:

First, the nature of the powers of the authorised person is of judicial nature. Those powers can only be exercised by Judicial Officers appointed under Article 47. Parliament cannot extend the judicial power to a lay person.

Second, it is said that Parliament cannot extend the power of the President to appoint an authorised person under Section 7 as such a power is not included within the description of the President's role in the Constitution.

On the first limb of the contention, Section 7 of the Bill provides for the declaration of authorised persons. Other authorised persons include magistrates and Island Court justices and are not appointed in this way. Such persons as are appointed under s.7 have limited powers under Part 3, Division 2 to make temporary protection orders.



Such persons as are appointed under s.7 are not members of the judiciary and do not possess the indicia of being part of the national judicial system, in particular:

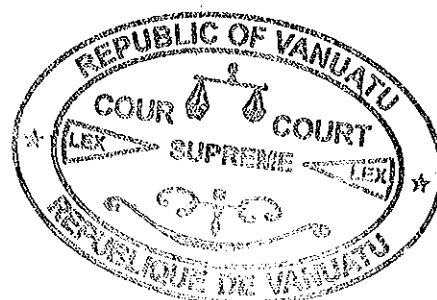
- No formal or legal training or qualifications are required.
- An authorised person is not entitled to make decisions which are determinative of rights or obligations.
- An authorised person is not entitled to determine any question of law.
- The role of the authorised person is merely to discharge the limited statutory function of deciding whether to issue a temporary protection order and the terms thereof.

It is my considered opinion that when Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act or proposed Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined. Section 7 and the related proposed regime in the Bill illustrate this point.

Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide question of law as well as questions of fact or of administrative policy; but this requires clear words because the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so.

But there is no similar presumption that where a decision-making power is conferred by a law or proposed law, Parliament did not intend to confer upon it power to decide questions of law as well as questions of fact.

In any event, the fact that a body or authority is exercising a judicial function, and does so in the public interest, does not mean that it is part of the judicial system of the State. In the present case, it is not intended that an authorised person is going to exercise a judicial function nor that he or she is part or a member of the Judiciary under Article 47(1) (2) of the Constitution.



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I am of the opinion that there is no inconsistency in respect of the submissions advanced on behalf of the Referral Authority on the first limb of submissions.

As to the second limb of the submissions, it is my opinion that it is misconceived because there is nothing in the Constitution which prevents Parliament investing the President with additional powers.

The last issue is about the severability question.

**QUESTION 8:**

**8. WHETHER, IF ANY PROVISIONS OF THE BILL ARE STRUCK DOWN, THOSE PARTS ARE SEVERABLE**

There is no need to answer the severability question in the present Constitutional Reference as such a question does not arise in the present case.

**VIII - ANSWERS TO QUESTIONS**

I answer to the questions as follows:

**QUESTION 1:**

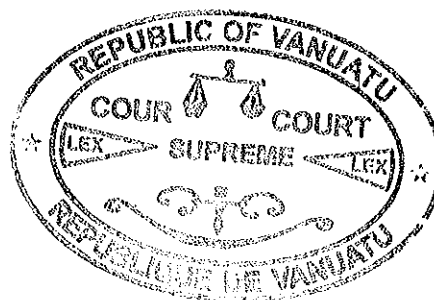
Is the Preamble a part of the Constitution?

Answer to Q.1: Yes. Recourse can be had to the Preamble to interpret an enacting provision of the Constitution when it is ambiguous. But when an enacting provision of the Constitution is clear, there is no need to have recourse to the Preamble as an aid to interpreting an enacting provision of the Constitution.

**QUESTION 2:**

Is the Preamble "a provision of the Constitution" within the meaning of the Article 16(4) of the Constitution?

Answer to Q.2: No.



**QUESTION 3:**

Is Section 4(1)(a) of the Bill inconsistent with the Preamble of the Constitution?

Answer to Q.3: No.

**QUESTION 4:**

Is Section 4(1)(a) of the Bill inconsistent with Article 5(1)(f) of the Constitution?

Answer to Q.4: No.

**QUESTION 5:**

Is Section 4(1)(a) of the Bill inconsistent with-

- (a) Article 5(1)(d)? and
- (b) Article 5(1)(j) of the Constitution?

Answers to Q.5:

- (a) No; and
- (b) No.

**QUESTION 6:**

Is Section 32 of the Bill inconsistent with Articles 5(1)(d) and 5(2) of the Constitution?

Answer to Q.6: No.

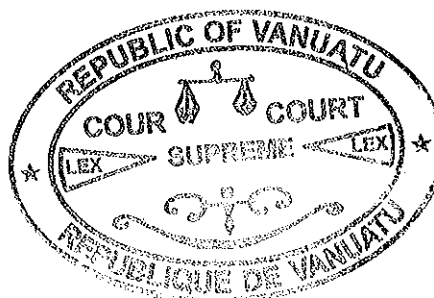
**QUESTION 7:**

Whether Sections 7 and 32 of the Bill are inconsistent with Article 47(1) (2) of the Constitution?

Answer to Q.7: No.

**QUESTION 8:**

Whether, if any provisions of the Bill are struck down, those parts are severable.



Answer to Q.8: Not required to provide an answer as the severability question does not eventuate in this Reference.

## IX - OPINION

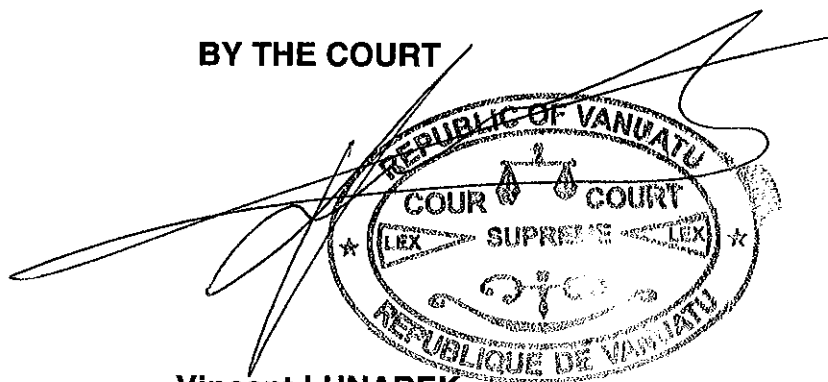
Upon the powers conferred on the Supreme Court under Article 16(4) of the Constitution, I am of the opinion that Sections 4(1)(a), 7(1), 13(d), 15(1)(c) and 32 of the Bill for the Family Protection Act No.28 of 2008 under challenge, are consistent with the provisions of the Constitution.

I, therefore, invite the President to sign the Bill for the Family Protection Act No.28 of 2008.

There is no Order as to costs.

**DATED at Port-Vila this 22<sup>nd</sup> day of November 2008**

**BY THE COURT**



**Vincent LUNABEK  
Chief Justice**