Genevieve Molineux

From: John Pyke
Sent: Sunday, 17 May 2009 9:46 AM
To: LCARC
Subject: Preamble and oaths/affirmations

Attachments: Preamble submission 2009.doc

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Dear Stephen (and other LCARC staff). I attach my submission. Following your phone call I have expanded a little on the effect of a preamble in interpreting an Act. I would be happy to talk to the Committee if we could find a mutually convenient time, but please tell them that if we did meet I couldn't really expand much further on what I have said there.

Best regards

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May 2009

Chair and Members
Legal Constitutional and Administrative Review Committee
Parliament House
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Re your Issues Paper of this month – Preamble and Oaths or Affirmations

Honourable members,

I offer some general thoughts first before addressing your issues 1, 2 and 3.

General Thoughts on a Preamble to a Statutory 'Constitution', and its Use in Interpretation

I must say any excitement I feel about the idea of the Parliament putting a preamble in front of the *Constitution of Queensland 2001* ('the Constitution') is extremely muted. As I make clear in a couple of places below, I suggest that what is in the *sections* of the Constitution is more important and interesting than what is in a preamble.

The Constitution, as you are all aware, is an ordinary Act of the Parliament and can be amended or over-ridden by any later Act, whether that later Act is enacted with actual intent to change the fundamental rules or in utter inadvertence to the fact that it is inconsistent with the Constitution. In other words, it is a 'Clayton's' Constitution, a 'Constitution' in inverted commas. If the reference on this matter could be read as implying any intent to lift the Constitution to a higher status, there may be a point to including a preamble, for a preamble at the head of a *real* Constitution that has been ratified by the people and has supreme-law status can have a point. It can spell out some of the fundamental values that the people agree on, or the reason for enacting the new constitution (see the US preamble), and act as an inspiration for future generations. However, I doubt that giving the Constitution a higher-law status was the intention of the mover of the resolution (the Premier), and things like high-minded statements of fundamental principles, regret for past wrongs, or hopes for the progress of the State in the future have far less significance when stuck in front of a 'Clayton's' Constitution – they are just something said by politicians at a certain date in a particular Parliament, that can be expressly un-said or simply ignored by later politicians. A preamble to any constitution is mostly dealing with symbolism, but there is *a point* to symbolism in a real binding Constitution; a preamble to a Clayton's constitution is quite *empty* symbolism.

I also suggest that, whatever value a preamble may have had if it had been included at the time of enactment of the 2001 Constitution, it is an odd thing to tack a preamble, as an 'afterthought', on to an Act that has been enacted some time before – a later Parliament can certainly amend an Act

but it seems very strange for a later Parliament to retrospectively add some claims about the enacting Parliament's fundamental motives, aims and values, back when it was enacting the law.

My lack of enthusiasm is compounded by the fact that the Premier's motion giving you the current reference included the instruction that you should ensure 'that the text to the preamble does not purport to include information to be used as an aid to statutory information'. I am not sure whether you are being asked to include a specific clause saying that the preamble is not to be used in interpretation, or just to draft the preamble in such a vague and waffly way that there is nothing in it that could be used as an interpretational aid. Certainly, you should *not* recommend the inclusion of an express bar to the use of the preamble in interpretation. This would make the preamble, and the Parliament that enacted it, a laughing stock. In the language of the former Prime Minister, you would be making some sort of statement of principles or values but at the same time making it clear that they were 'non-core' values. If the Parliament is to make a statement of principles in the thing we call our Constitution, they should be principles that it is prepared to be *bound* by, to whatever extent constitutional doctrines allow.

However, that – the extent to which constitutional doctrines allow it – is the escape hatch. Even if you do not include a 'not to be used in interpretation' clause in the preamble, I can assure you, and the Premier, that anything in a preamble to a Clayton's constitution, whether drafted clearly or vaguely, is unlikely to have much effect on the interpretation of statutes of the State. As to interpreting the *Constitution of Queensland* itself, a preamble could have *some* small effect in unlikely cases. If another section were held to be ambiguous, it would have to be interpreted against the context of the whole of the rest of the Act, and (as emphasised in the *Prince Ernest Augustus case*, below) the preamble is part of that context. So *if* the preamble clearly supported one side of the argument about the ambiguity it may be conclusive. However, 'the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms' (*Powell v Kempton Park Racecourse Co Ltd* [1897] 2 QB 242 at 299). So even in *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436 – the case generally cited as the leading authority on the use of a preamble – a supposed limitation in the preamble to the *Act of Settlement 1701* (only a *supposed* limitation, because here it was *the preamble itself* that was ambiguous) was *not* used to limit the meaning of some fairly clear words in what we would now call a section of the Act, even though the words had the quite extraordinary effect of making the German Prince a British citizen.

As to interpreting any Act other than the *Constitution*, a preamble to the *Constitution* will have even less effect – something in one Act does not affect the interpretation of another one unless the two Acts were passed as part of the same 'scheme' or are otherwise clearly intended to be read together. I know of no Act on the Queensland statute book that says it is to be read with, or subject to, the *Constitution of Queenland 2001*. (The *Parliament of Queensland Act 2001* does explain, in s 5, that the *Constitution* also makes provisions about the Parliament, but there is no indication that the *Parliament Act* is in any way 'governed by' the *Constitution*.) So I think you can assure the Parliament and the Premier that, whatever you choose to put in a draft preamble, it will have very little real effect on the law of Queensland. That makes me wonder if it is worth doing at all, but the reference to your committee, on the motion of the Premier, seems to amount to an instruction to draw up a preamble, no matter how pointless the exercise may be.

So assuming that you accept that you have to draft *something*, rather than reporting (as your predecessor committee did in LCARC Report No 46) that the whole exercise is meaningless, then mentions of the following things, drawn from the QCRC draft preamble, would seem appropriate:

- Acknowledgment of the fact that, as part of the Commonwealth, we (Parliament and people) are bound by the Commonwealth Constitution,
- Acknowledgment of the prior occupation of the land by Indigenous people, and their continuing contribution to the life and culture of Queensland,
- Respect for the principles of democratic government and the rule of law, and
- Equality under the law.

Some of the other suggestions by the QCRC should, however, be forgotten. It suggested that we should declare that 'we respect the land and the environment we all share'. While our economy depends on digging coal from the ground, ***and selling it to people who burn it***, and while we still clear forests and scrub to build houses and graze cattle, I suggest that inclusion of such a phrase would brand Queenslanders as hypocrites! Aspirational statements are one thing, but stating aspirations that we have no intention of living up to would just make us all – parliamentarians and voters alike – look ridiculous. We should only insert something like that into the Constitution when we have collectively decided that our laws and actions should be *limited* by this claimed 'respect' for the environment,

As to the way that the preamble should commence, I note that not only the QCRC draft but a couple of the others noted in your Issues Paper contain statements made in the name of 'We, the people of Queensland'. Unless you propose to have the preamble endorsed by a referendum this would be an utter misstatement of the facts – the Parliament *represents* the people of Queensland but it cannot realistically utter pronouncements in their name. The most you can say is 'The Parliament of Queensland, representing the people of Queensland, declares' or some such phrase – and as I've said above if it doesn't bind future Parliaments it is nothing but a nice but ineffective bit of symbolism anyway.

I suggest that a more concrete issue than the lack of a preamble is the lack of anything in the long or short title or objects section that explains to an intelligent 10-year-old what the Constitution ***is and does***. I submit that the objects section should say 'This Act continues the principal institutions of government of the State of Queensland in existence and grants or describes their powers and in some cases limits them', and the long title could say something similar. I suggest that form of words (rather than 'defines and limits their powers', which I would prefer) because I know there is a general desire in Ministerial and Crown Law circles to avoid any suggestion that the State Constitution embodies a strict separation of powers, and I think the suggested form of words states the present situation without suggesting any intent to authorise the inference of limits other than those clearly expressed in, eg, ss 65 and 66.

I also suggest that there should be a *section*, rather than a phrase in a preamble, that acknowledges that the Constitution (and therefore the institutions mentioned in it, though that need not be stated) is subject to the Commonwealth Constitution. This is a constitutional fact, because of s 106 of the Commonwealth Constitution, whether or not the State Constitution says it, so you might as well say it. At the moment, it does not even mention that Queensland is part

of Australia - a foreigner could stumble across the Constitution on the web and read it and imagine that this place 'Queensland' was a nation-State somewhere in the world. This is bizarre! New South Wales acknowledged the supremacy of the Commonwealth Constitution in s 2 of its *Constitution Act* in 1902, but Queensland has tried to maintain the pretence that it is a 'sovereign State'. It is ***not***, so, again, you might as well say it.

As to your listed Issues:

Issue 1. Recognition of Indigenous, or Aboriginal and Torres Strait Islander, People

If you are to recommend any topics for a preamble, this certainly should be among them.

However, I suggest the issue of land rights, in particular, is so important that it should be specified in *a section* of the Constitution, not just in a mere preamble. In the exercise that led to the consolidation of most of the old *Constitution Act 1867* into the new Constitution, EARC and the successive Parliamentary Committees got hung up on sections 30 and 40 of the old Act. Despite almost every constitutional lawyer in the State advising that they could be repealed safely, there was some worry, emanating from somewhere in government, that if they were repealed there could be adverse consequences for the certainty of land titles. So they are still there, and they include offensive and erroneous statements that the power of the Parliament is subject to a couple of old Imperial Acts! And s 69 of the Constitution of 2001, instead of stating the modern law as to the source of land titles, merely refers to the old sections. It is high time this anachronistic Constitutional nonsense was tidied up. I suggest the repeal of the two old sections and the replacement of s 69 by something close to the following:

> **69. Lands**
> The Parliament recognises that the lands once occupied by the Indigenous people of Queensland were claimed by the Crown of the United Kingdom of Great Britain in a process which was in accordance with the practice of other European powers at the time, but which would now be regarded as an unlawful invasion, and that the continued holding by Indigenous people of native title over their land has only been fully recognised since the decision in *Mabo v Queensland* (1992) 175 CLR 1. In consequence of this, it is declared that:-
>
> > (a) all titles to land derived from a grant, sale or lease by the government (whether referred to at the time of grant, sale or lease as the Crown, the Governor in Council, or the State), where the grant, sale or lease were valid according to the law at the relevant time, are valid titles;
> >
> > (b) all land with which a group of Indigenous people has maintained a continuous connection since the British Crown claimed possession of the land is held by that group under native title to the extent that the native title has not been extinguished by a valid grant, sale or lease by the government; and
> >
> > (c) all land not subject to any other valid title is vested in the government of Queensland as trustees for the people of Queensland, to be managed or disposed of in the public interest and subject to the relevant law.

This is in fact saying nothing new; it is a concise summary of the status of our law of land titles, as affected by *Mabo* and the *Native Title Acts*. The introductory paragraph is a factual statement that admits that settlement was, from the Indigenous point of view, an invasion, but that it is far too late to declare settlement and its consequences illegal. Since land title has been so central to the modern struggle for recognition of Indigenous rights, this is as good a place as any to make the concession that, while it is far too late for non-Indigenous Queenslanders to get back on the sailing boats and go 'home', it would nowadays be seen as a breach of international law to settle a country on the pretext that there is nobody there. Para (a) should satisfy the worries of any nervous Nellies who fear that repeal of the old constitutional sections will somehow make post-colonisation titles vanish. (I *think* that was the fear in the earlier reviews of the Constitution.) Para (b) is a neat summary of the *Mabo* ruling. Para (c) is about what used to be called Crown land and is now called unallocated state land in the *Land Act 1994*. The bits about the government holding 'as trustees' and 'public interest' are statements of political morality rather than law; the law comes in the last phrase, and of course the 'relevant law' *is* the *Land Act 1994*.

In some ways this could be subject to the same criticism that I have made above about a preamble – that, being in a Clayton's constitution, it has no more permanent effect than any section of any other Act – but I submit that, since the Constitution already contains a Chapter and a section headed 'Lands' it might as well state the modern law, and might as well be used to give 'constitutional' recognition to native title – even if 'constitutional' means rather less in State law than it does in the context of the Commonwealth Constitution.

Issue 2. An Aspirational Statement?

With the greatest respect to the Premier, who moved the motion, and the other members, who passed it without debate, I find the idea of expressing some 'vision for the state's future' in the Constitution quite ludicrous, *if* by that the resolution means that we should consider things beyond the usual constitutional principles such as government according to democratic principles, the rule of law and equality before the law. As noted above, if you think we should have a preamble at all, those things certainly should be mentioned. Beyond that, I really don't understand what the Premier was thinking of when she moved for 'an aspirational statement on the commemoration of the 150th anniversary'. 'We hope the next 150 years will be even better' or something like that? The place for that is in speeches at commemorative functions. The Constitution is the instrument that sets up our organs of government (see the suggestion above about the object section), not a PR release for the Premier's Department. *Constitutional principles* belong in it; general back-slapping or day-dreaming do not. And since the Constitution is a document that is intended to have a long-term effect, it would seem very odd in some years' time for people to be reading a statement that says 'on the occasion of the 150th anniversary of the State, blah, blah, blah...'.

Issue 3. Modernisation of Oaths or Affirmations

I have made my views on this clear to an earlier manifestation of this committee. Though we may become a republic within the next 5-10 years, we remain, for the time being, a constitutional monarchy, and I answer the question fully accepting that fact. Even so, I see no point in people

having to promise 'to be faithful and bear true allegiance to her Majesty' – as if they are aliens being naturalized under the old form of naturalisation oath – whenever they are sworn in as an MP, a Minister, the Governor or a Judge. If the oaths other than the Governor's included a promise to *serve* Her Majesty faithfully, there would be some point, seen against the rather fictitious assumption that MPs, public servants and Judges are working On Her Majesty's Service – a fiction that we have generally dropped in Australia anyway. But there is no point in a mere promise of allegiance – if the people taking the oath or affirmation are Australian citizens, they are *already* under an obligation to be loyal to Australian institutions, which include the Queen as our *de jure* Head of State. If they are monarchists, they probably feel a literal *allegiance* to HM, and may be insulted by having to promise it again; if republican they no doubt interpret 'allegiance to the Queen' as a metaphor for being loyal to our constitutional institutions in general, and wonder why they have to promise *that* again.

The only time anyone needs to promise allegiance, to the Queen or to Australia, is when an alien is naturalized as an Australian – and these days, under the *Australian Citizenship Act*, they no longer promise allegiance to the Queen, but 'loyalty to Australia and its people'. Once we are Australians, by birth or naturalization, that allegiance or loyalty should be taken for granted; we should not have to keep *re*-promising it, as if there is some fear that the people might have elected a potential traitor to high office or the government might have selected one as Judge or Governor.

What someone *should* swear or promise on taking up a constitutional office is *to do the job* with honesty and diligence (which is why a promise *to serve* Her Majesty well and faithfully would make more sense). Oddly, that was not even included in earlier versions of the oaths or affirmations, but it was added to most of those under review, as an additional promise after the unnecessary reaffirmation of allegiance, in the previous review. (In the case of members of the Executive Council, it is now the *only* promise, as the re-promise of allegiance has already been dropped.) In the case of the Governor or acting Governor, it is, however, quite proper that the second promise still refers to serving HM in the office of Governor, because the Governor is still formally acting as HM's representative. Perhaps we should add 'and the people of Queensland' as well to the Governor's oath, but it is not yet time to remove the promise of service to the Queen.

So my submission as to what you need to do is simple – chop the 'I will be faithful and bear true allegiance..' paragraph out of each of the oaths or affirmations that retain it. I reiterate, if it is not clear from the above, that this is not some republican attempt to somehow remove the Queen from the Constitution in a sneaky way. It is just that allegiance to the Queen or the nation is something to which we are already subject; *re*-promising it is simply not necessary, and is a distraction from the much more *relevant* promise *to do the job* well and faithfully, when a citizen enters upon a constitutional office.

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