



No 104

The University of Sydney

RECEIVED
27 AUG 2004
LEGAL, CONSTITUTIONAL AND
ADMINISTRATIVE REVIEW
COMMITTEE

Faculty of Law



George Winterton
Professor of Constitutional Law

Direct Line: +61 2 9351 0441

173 - 175 Phillip Street
Sydney NSW 2000
Australia
DX 983, Sydney
Facsimile: + 61 2 9351 0200
Email: georgew@law.usyd.edu.au

27 August 2004

Dr Lesley Clark MP
Chair, Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Dr Clark,

A Preamble for the Queensland Constitution?

Thank you for your letter of 17 June inviting a submission to the above inquiry.

Some years ago I published an article which your Committee may find useful on the question whether the Preamble to the Commonwealth Constitution should be amended. It also proposed alterations to the current Preamble, and included various national Preambles and draft Australian Preambles: "A New Constitutional Preamble" (1997) 8 *Public Law Review* 186. I note especially the section "Principles for framing the preamble" (pp. 188-89).

Unlike many national constitutions, such as those of the United States, Ireland, India and South Africa, the Commonwealth Constitution contains few (but nevertheless some) rights provisions, and deals mainly with the structure, machinery and powers of government. Consequently, it is expressed rather prosaically, and has a Preamble which essentially explains tersely how the Constitution came to be enacted, making no allusion to social or political values, with the exception of an invocation of "the blessing of Almighty God". Australian State constitutions focus almost exclusively on the machinery of government.

National constitutions serve an important symbolic function as the legal embodiment of national values and aspirations which is not entirely paralleled by State or Provincial constitutions, and their respective Preambles may reflect this difference. Indeed the present Australian constitutions do, in that the State Constitutions lack any equivalent even to the meagre Commonwealth Preamble.

Since our federal system was modelled on that of the United States, it may be useful to see what their State constitutions provide. Most American State Constitutions include a Preamble, several of which (e.g., those of Colorado, Illinois, Maine and Wisconsin) are modelled on the national Preamble, although some are longer than the latter. Massachusetts includes a veritable essay on government in its Preamble, and that of Illinois is prolix, but most State Preambles are quite concise. Texas has one of the shortest:

"Humbly invoking the blessings of Almighty God, the people of the State of Texas, do ordain and establish this Constitution".

Most United States State Preambles are somewhat longer than this, referring to freedom (e.g., California, Michigan and New York), to liberty (e.g., Arizona, Minnesota, Pennsylvania and Rhode Island) or, occasionally, to both (Connecticut). An elegant balance echoing the national Preamble is struck by Ohio:

We, the people of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.

Even more concise is New York's:

We The People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution.

Virtually all State Preambles (*unlike* the national Preamble) include reference to "God" (e.g., Connecticut and Minnesota), "Almighty God" (e.g., California, Georgia, Illinois, Michigan, New York, Ohio, Pennsylvania, Rhode Island, Texas and Wisconsin) or, occasionally, a synonym such as "the Sovereign (or Supreme) Ruler of the Universe" (Colorado, Maine and Washington) or "the great Legislator of the universe" (Massachusetts). Maine's Preamble, which mentions both "God" and "the Sovereign Ruler of the Universe", reads like a prayer. A rare secular State Preamble is Oregon's:

We the people of the State of Oregon to the end that Justice be established, order maintained, and liberty perpetuated, do ordain this Constitution.

For reasons noted in the article referred to above (pp. 187-89), I believe that both the Commonwealth and State constitutions should include Preambles which recite the circumstances leading to the foundation of the polity and enactment of the Constitution, and to core civic values which enjoy virtually universal support. Nothing which is socially divisive should be included, nor anything likely to affect the outcome of issues which can arise in the courts. Consequently, they should be secular and not refer to God (however, since it would be socially divisive to remove the existing reference to "Almighty God" from the Commonwealth Preamble, that allusion should be retained), nor to specific rights or freedoms, dispossession of Indigenous people, or recognition of Indigenous law or custom or the customs of other ethnic minorities.

What should be included is:

- Reference to the prior custodianship of the land by Indigenous people.
- A brief précis of the foundation of Queensland and its subsequent status as an original State of the Commonwealth of Australia.
- A brief précis of the circumstances leading to adoption of the Constitution.
- Reference to core governmental principles and civic values: democratic, representative and responsible government; respect for the rule of law and for the equal dignity and worth of every person; the equality of all citizens before the law; and respect for the natural environment.
- If the Constitution is to be adopted pursuant to a referendum, the Constitution should include a clause such as "We, the people of Queensland, do hereby enact and give to ourselves this Constitution".

enacting clause is not strictly part of the Preamble, but usually immediately follows it.

A draft Preamble embodying these suggestions appears in the above article (p. 189).

In light of the above, I can respond briefly to the issues raised in the Committee's *Issues Paper* of June 2004, dealing mainly with matters not discussed above.

1. Yes. Just as a book or article is enhanced by an introduction setting the context of the material discussed, so a constitution should include a Preamble which explains concisely the circumstances leading to its adoption and the core governmental features of the society which it governs.
2. Not entirely. The QCRC's Preamble has many good features, but I suggest that two provisions should be deleted.
 - (a) There is no need to refer to the United Kingdom; hence the first two sentences should be deleted.
 - (b) It would be preferable merely to affirm "the equality of all persons under the law" and to delete the various grounds of discrimination which reads like a catalogue of political correctness and inevitably offends some by excluding other grounds (such as sexual orientation).
6. No – provided that the Preamble adopted is relatively modest, along the lines advocated above or by the QCRC. As was noted in the debates regarding the 1999 Preamble proposal (which included such a clause), it appears somewhat contradictory to acknowledge core and virtually universally acknowledged governmental principles and civic values in the Preamble while forbidding courts to refer to it in interpreting the Constitution and legislation. However, if a lengthy Preamble virtually amounting to a mini Bill of Rights were adopted, a provision forbidding judicial use of it in interpretation would be appropriate. This is a further argument for a modest Preamble.
7. Yes; a brief précis.
8. Yes, in the clause affirming Queensland's core governmental principles and civic values, along the lines recommended in the QCRC's draft Preamble. The Constitution should include a "We, the People" enactment clause only if the Constitution is to be adopted in a referendum.
9. No, it should be secular.
10. Yes, in the relatively modest way suggested above and in the QCRC's draft Preamble.
11. Probably not. There is no inherent detriment in mentioning cultural diversity and the value of a harmonious and tolerant society, but a Preamble loses its impact if it is too prolix. Moreover, once reference is made to societal aspects beyond the absolutely basic civic values, where does one stop if offence to proponents of other commendable social values is to be avoided? A provision which recites the equality of all persons under the law and the equal dignity and worth of every person acknowledges the value of tolerance of multiculturalism, thereby rendering separate mention of the latter unnecessary.
12. Yes, as suggested above or in the QCRC's draft Preamble.
13. Yes, as suggested above.
14. No, for the reasons noted in [2 (b)] above.

- 15.No, since under the doctrine of *McCawley v R* [1920] AC 691 State constitutions do not have the status of "paramount law", except for provisions entrenched by "manner and form" requirements. Since there is some uncertainty as to whether only entrenchment pursuant to the *Australia Acts 1986* (Cth and UK) s. 6 is legally effective (see *Attorney General for Western Australia v Marquet* (2003) 202 ALR 233) the Preamble should avoid this contentious issue. It would demean the Preamble if it were held to be incorrect or inaccurate.
- 16.Yes, as suggested above.
- 17.Yes. The QCRC's provision is satisfactory, but could be improved upon.
- 18.No.
- 19.This parliamentary committee would seem the most appropriate mechanism for framing a Preamble.
- 20-21. Submissions should be invited from the public in a separate inquiry to frame the Preamble. Taking these into account, the Legal, Constitutional and Administrative Review Committee should then frame the Preamble.
22. Whatever mechanism is used to adopt a new Queensland Constitution should apply to the Preamble.
23. Yes.
24. There should not be a separate referendum on the Preamble. See [22] above.

Yours sincerely,
George Winterton