

God and Religion in the Australian Constitution

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The [Australian Constitution \(https://www.aph.gov.au/about_parliament/senate/powers_practice_n_procedures/constitution\)](https://www.aph.gov.au/about_parliament/senate/powers_practice_n_procedures/constitution) came into force on 1 January 1901. The Constitution gave effect to an agreement among the people of the six self-governing colonies of the Australian continent to form themselves into a federation.

Recognition of God and Religious Freedom

The preamble to the Constitution states, among other things, that the people agreed to unite in a federal commonwealth “humbly relying on the blessing of Almighty God.” When the Constitution was being drafted, several religious groups and denominations had advocated for the recognition of God in the Constitution [1]. Patrick Glynn, an Irish-Catholic delegate from South Australia, was its most articulate supporter. He put the case for a “simple and unsectarian” acknowledgement of God on the basis that religion is an important source of social cohesion. He said:

The stamp of religion is fixed upon the front of our institutions, its letter is impressed upon the book of our lives, and ... its spirit, weakened though it may be by the opposing forces of the world, still lifts the pulse of the social organism. It is this, not the iron hand of the law, that is the bond of society; it is this that gives unity and tone to the texture of the whole; it is this, that by subduing the domineering impulses and the reckless passions of the heart, turns discord to harmony, and evolves the law of moral progress out of the clashing purposes of life... [2]

Although many of the framers of the Constitution were not as devout as Glynn, a majority eventually supported the recognition of God in the preamble. Some, however, were concerned that this might imply that the Federal Parliament had the authority to enact religious laws. If God were to be recognized in the Constitution, Henry Bournes Higgins argued, “a large number of good people” would need to be reassured that “their rights with respect to religion will not be interfered

with” [3]. This concern about the effect of the preamble was exaggerated, as others pointed out [4], for the preamble could not be interpreted to confer power on the Parliament. However, the possibility that the Parliament’s other legislative powers might authorize laws that could interfere with religious faith and practice was a real one.

While not as secularist as Higgins, Josiah Symon considered it important to “protect every citizen in the absolute and free exercise of his own faith” and “to take care that his religious belief shall in no way be interfered with” [5]. Similarly, Bernhard Wise thought that each person should be free to “follow his own religious observances” and not be permitted to “impose his will on anybody else” [6]. The prevailing concern was thus twofold: that the Commonwealth be prevented from imposing religious observances, and that it be prevented from interfering with the free exercise of religion. After extended debate, a provision was inserted into the Constitution in the following terms, modeled substantially on the religion clauses of the First Amendment to the United States Constitution:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth (section 116).

It has been argued in several cases that laws enacted by the Federal Parliament contravene this provision. However, in none of these cases has a law been found unconstitutional [7]. Notably, the High Court of Australia has held that the prohibition on establishing any religion only prevents the Parliament from making laws which constitute a particular religion or religious body as a state religion or state church [8]. The Court rejected the proposition that section 116 prohibits laws providing non-discriminatory support for religion, such as by funding religious schools, even though decisions of the US Supreme Court have come to this conclusion [9]. Members of the High Court noted that the preamble to the Australian Constitution contains an acknowledgment of “Almighty

God” in the preamble, but declined to draw any legal inferences from this fact [10]. The preamble is not an operative part of the Constitution, but there are cases in which Justices of the High Court have relied on other statements in the preamble to inform their interpretation of the Constitution as a whole [11].

Oaths of Office

There is one other place in the Australian Constitution where God is acknowledged. The Schedule to the Constitution contains the form of an oath or affirmation of allegiance to the Queen that is to be taken by all members of the Federal Parliament [12]. Since the late 1970s, a fairly consistent figure of around 70% of senators and 75% of members of the House of Representatives have chosen to take oaths rather than solemn affirmations [13]. At her coronation, Queen Elizabeth was constitutionally required under the law of the United Kingdom to promise under oath to govern the peoples of the United Kingdom and her overseas possessions in accordance with their respective laws and customs; to cause law and justice, in mercy, to be executed in all her

judgements; and to maintain the laws of God and the true profession of the gospel within the United Kingdom [14]. The Prime Minister and other Ministers of State are likewise required to take oaths or affirmations of office [15]. The oath or affirmation of office for Justices of the High Court requires them to promise they will “bear true allegiance” to the Queen and to “do right to all manner of people according to law” [16].

Sir Gerard Brennan, a former Chief Justice, took the judicial oath of office very seriously [17]. At his swearing-in as Chief Justice [18], he publicly reflected on the judicial oath and its consequences for the performance of his duties as a judge. He insisted that the ceremony was not an “empty ritual” or “formal procedure.” Rather it was, he said, “a public witnessing of the making of two solemn promises for the performance of which the oath-taker will be responsible not only to this Court and this country but also to his Creator.” The oath that Sir Gerard took was two-fold. It required him to swear allegiance to the Queen and to administer justice according to law. According to him, the first of the

two promises was a “commitment of loyalty to Her Majesty the Queen her heirs and successors according to law” [19]. He explained that this involves a commitment to the Head of State “under the Constitution”—a Constitution, he noted, that can be amended by the people. He, therefore, concluded that the oath is ultimately “a promise ... of fidelity and service to the Australian people.” The second undertaking of the oath was to “do right to all manner of people according to law without fear or favor, affection or ill-will.” Chief Justice Brennan explained that this requires impartiality and independence in the administration of justice. “Justice,” he said, “is not done in public rallies. Nor can it be done by opinion polls or in the comment or correspondence columns of the journals.” Rather, the judge must decide the case “in the lonely room of his or her own conscience in accordance with the law” [20].

Conclusion

Like many other national constitutions, the Australian Constitution invokes divine blessing and binds those who hold public office to the performance of their official duties through a mandatory oath or

affirmation. This recognizes that the rule of law depends on those who hold public office duly performing their official duties and that the faithful performance of these responsibilities depends on the character and commitment of those persons. Oaths and affirmations of office reinforce the general duty to obey the law by requiring individual officeholders to promise solemnly that they will personally fulfill their legal obligations with integrity.

The Australian Constitution also prohibits the Commonwealth from making laws establishing any religion or prohibiting the free exercise thereof. This both protects religious expression and prevents any particular religion from being officially established. The invocation of divine blessing in the preamble and the provision for a mandatory oath or affirmation of office suggests that the non-establishment clause cannot mean that religion can play no role in public life, for such a role is plainly enacted by the Constitution itself.

The oath of office is at once both a legal and a religious instrument. It is required by law and supports the lawful exercise of political power, but it

appeals to religious sanction as the guarantor of that law and power. It involves a personal commitment and invokes religious authority, but it does so in order to underwrite the authority of the political order. The oath of office thus suggests that law and religion may be as much intertwined as they are separated in today's politics.

[1] Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891-1906* (Melbourne University Press, 1976) ch 3.

[2] *Official Record of the Debates of the National Australasian Convention, Third Session: Melbourne, 20th January to 17th March, 1898*, 2 vols (Melbourne: Government Printer, 1898) 1732–3.

[3] Ibid 654.

[4] Ibid 660–61, 1736. See also John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 952.

[5] *Official Record of the Debates, Melbourne* (1898) 659.

[6] Ibid 1774.

[7] The leading cases on section 116 are discussed in Nicholas Aroney, Peter Gerangelos, James Stellios and Sarah Murray, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015)343-355. This blog post draws substantially from this book.

[8] *Attorney-General (Vic); Ex rel Black v Commonwealth*(1981) 146 CLR 559, 597, 653, 606-609.

[9] *Attorney-General (Vic); Ex rel Black v Commonwealth*(1981) 146 CLR 559, 601-2, discussing *Everson v Board of Education*330 US 1 (1947) and *Lemon v Kurtzman*403 US 602 (1971).

[10] *Attorney-General (Vic); Ex rel Black v Commonwealth*(1981) 146 CLR 559, 612, 654.

[11] Eg, *Leeth v Commonwealth* (1992) 174 CLR 455, 475, 486.

[12] Australian Constitution, section 42, Schedule.

[13] Deirdre McKeown, *Oaths and affirmations made by the executive and members of federal parliament since 1901* (Department of Parliamentary Services, Parliament of Australia, 2013) 7-8.

[14] Edward Ratcliff, *The Coronation Service of Her Majesty Queen Elizabeth II* (Cambridge University Press, 1953) 3.

[15] McKeown, above note 13, 16-23.

[16] *High Court of Australia Act 1979*(Cth) s 11, Schedule.

[17] Sir Gerard Brennan wrote the entry on the judicial oath in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).

[18] Sir Gerard Brennan, 'Speech on Swearing in as Chief Justice', 21 April 1995, (1995) 183 CLR ix.

[19] Emphasis added.

[20] For more detail, see Nicholas Aroney, “The Rule of Law, Religious Authority, and Oaths of Office” (2018) 6 *Journal of Law, Religion and State* 195. An earlier paper that covers similar ground is available here: <https://www.abc.net.au/religion/faith-in-public-office-the-meaning-persistence-and-importance-of/10097594> (<https://www.abc.net.au/religion/faith-in-public-office-the-meaning-persistence-and-importance-of/10097594>).