Shadow or Illumination? Kingston's Rival Constitution

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In mid-October 1890 the Attorney-General of Tasmania Andrew Inglis Clark returned from a trip to Britain and the United States. His journey had taken place after the decision made by the 13 representatives of the Australasian colonies in Melbourne in February 1890 to hold a convention of delegates to commit to an 'early union' of the colonies and 'to consider and report upon an adequate scheme for a Federal Constitution'.[1] It was a well-timed study tour. By the time of his return, all the colonial legislatures except Western Australia had appointed their seven-member delegations (with New Zealand selecting only three). Clark himself was one of the Tasmanian seven. With his recent on-the-spot examination of relevant jurisdictions overseas, and his well-developed ideas on the shape of such a union, he pre-empted the discussion by immediately sitting down to work on a draft constitution for the federation.

Portrait of Charles Cameron Kingston, photographed by Swiss Studios, Melbourne. Image courtesy of National Library of Australia, PIC/6980

The National Australasian Convention had been called for the beginning of March 1891; Clark completed his draft, had it printed, and circulated it with a covering letter on 12 February. It is certain that Sir Henry Parkes, the host of the Convention, and Edmund Barton received a copy in New South Wales, and it seems that he also sent copies to other premiers, among them South Australia's Premier Thomas Playford. Playford in turn passed it on to his protégé and adviser on constitutional matters, his close political colleague and former Attorney-General Charles Cameron Kingston, for his consideration. By 26 February Kingston had produced his own draft. Clark and Kingston had done a remarkable job in the short time available, although clearly they both had the matter under consideration for some time. This paper examines the origins and nature of the two drafts and seeks to restore the significance of Kingston's draft to the process that led to the Constitution of the Commonwealth of Australia and to assess his drafting contribution against that of Clark in terms of its substance, influence and form.[2]

By 1891, Charles Cameron Kingston had been a member of the South Australian Parliament for nearly ten years. In 1884 at the age of 34 he became Attorney-General in John Colton's government. Out of office the following year, he remained prominent in opposition, and in June 1887 when Thomas Playford succeeded Sir John Downer as Premier, Kingston returned to the portfolio for the ensuing two years. In that year he and Playford met at some length with Henry Parkes in Adelaide and much of Kingston's interest in taking practical steps to federation stemmed from that time. A major topic of this meeting, pressed on Parkes by the South Australians,

1 *Official Record of the Proceedings and Debates of the Australasian Federation Conference,* Government Printer, Melbourne, 1890, p. iii.

2 The major contribution to this study is the work of Alex Castles. See Alex C. Castles, 'Clark, Kingston and the draft Constitution of 1891', in Richard Ely (ed.), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth,* Centre for Tasmanian Historical Studies, University of Tasmania, Hobart, 2001, pp. 261–85.

was the need for a common approach and uniform legislation in the colonies to deal with the issue of 'Asiatic aliens' and 'coloured' immigration. A concern from the days of the Victorian gold rush, exacerbated by the use of Pacific Islanders to develop the Queensland sugar industry, it had become a particular issue for South Australia due to its jurisdiction over the Northern Territory.

The outcome was the Intercolonial Conference on the Chinese Question of 1888, which Parkes agreed to hold in Sydney under his chairmanship. Kingston, as the prime initiator of the conference, played a prominent part. As a radical protectionist he was a strong advocate of restricting 'Asiatic' immigration and what became known as the 'White Australia Policy'. His radical position made no distinction between his attitude on immigration and his role as a strong defender of the free movement and full citizenship rights of Chinese and others who were or had become residents in Australia. These were the principles embodied in the draft bill that a committee comprising Kingston, Alfred Deakin (Victoria) and J.M. Macrossan (Queensland) prepared and saw adopted by the conference. Kingston's policy role and his skill as a draftsman were recognised and positively commented on by his colleagues. The aim was for each colony to pass the bill either of its own volition or under the provisions of the new Federal Council of Australasia Act (see below) which could create common laws among its members. The 'Chinese question' was one of a number of issues, including defence, trade and customs and posts and telegraphs, driving the examination of models of federation which would enable such common supra-colonial issues to be dealt with on a unified and uniform basis and this conference provided a further impetus to the federal movement. Neither Clark of Tasmania nor Sir Samuel Griffith of Queensland was present in 1888, but, of the nine delegates, a number were later to attend the 1890 Melbourne Conference (Parkes of NSW, Duncan Gillies and Deakin of Victoria, Playford of South Australia and Macrossan of Queensland) and the 1891 Convention (Parkes, Gillies and Deakin, Playford and Kingston, Macrossan, and Philip Fysh from Tasmania).

The Australasian Federal Council was established by imperial statute in 1885 to facilitate colonial cooperation and uniform legislation among its member colonies. It was seen by some as an end in itself, but for many federalists, including Kingston, merely as a useful precursor to a full federation. The self-governing colonies of Victoria, Queensland and Tasmania joined, as did the Crown Colonies of Western Australia and Fiji. Others rejected it. New South Wales refused to join, Parkes believing that it was half-baked. New Zealand stood out. In South Australia, despite John Downer's strong advocacy and Kingston's support, the Legislative Council rejected the enabling legislation. Kingston, as Playford's Attorney-General on coming to office in 1887, tried again and eventually managed to secure passage of a bill that would enable South Australian representation from 1889. To get the legislation through, Kingston had undertaken to press for a broader and more representative membership to overcome objections in South Australia to the practice of only two members both drawn from the incumbent government forming the delegation. He also had to agree to a 'sunset clause' in the legislation which allowed membership for a period of two years only, subject to renewal of the Act at the end of the period. Although attempts were made to do this in 1890, the support of the upper house could not be gained, so South Australia had just two years membership. The only Federal Council meeting its delegates attended was in 1889 in Hobart.

Playford and Kingston were the South Australian delegates to the 1889 meeting. Here, to welcome him to the fold, Premier Playford was elected as sessional chairman. Clearly the Council was impeded greatly by the absence of New South Wales and, to a lesser extent, New Zealand. Kingston, based on the argument he had successfully pressed in his own jurisdiction, believed his proposal to increase and broaden the membership would be a means of inducing them to get involved as well. But he

never lost sight of the aim of broader union. He lobbied strongly before the meeting for an expanded membership, and helped prepare resolutions in committee which Deakin supported. Kingston's urgency for the Council to be seen as a vehicle for federation was not fully supported by all the delegates, but was influential. Deakin had the Council carry a significant addendum to the committee's motion: 'That in recommending that the constitution of the Council shall be amended by the increase in the number of its members, *this Council contemplates the early consideration of the question of Australian Parliamentary Federation by the enlarged Council*'.[3] Among those present at that Council meeting were the soon to be very significant Samuel Griffith (Queensland) and Andrew Inglis Clark (Tasmania). With Kingston they were to form the drafting committee at the 1891 Convention.

Playford lost office in June 1889, but returned to government with Kingston's support in August 1890. Playford again offered Kingston a ministry but he refused, claiming he 'did not feel at liberty' to accept the honour.[4] The press commented that 'Mr Kingston's private engagements and other circumstances' prevented his joining the ministry.[5] The reasons for him not doing so are something of a mystery. He did have financial problems, but at no other time in his life do these seem to have affected his willingness to accept public office. It may have been that he was grappling with an illness, as he suffered rheumatism and osteo-arthritis. It was during this period that he began to use a stick to assist his walking. However, Kingston continued to play an active role in the House of Assembly and maintained his support of Playford. His backbench status prevented him from being a delegate to the 1890 Melbourne Conference. This was the only significant federation conference of any kind he missed. He ended the decade as the most consistent individual attender at all the significant meetings: all sessions of the two Federal Conventions, four Premiers' Conferences, and as a member of the London delegation in 1900. On this occasion, despite his 'personal circumstances', he was induced by Playford to make himself available and was elected as one of the five House of Assembly representatives to the 1891 Convention to be held that March.

So it was that in February, when he received a copy of Clark's draft bill, he was able to respond by rapidly drafting a bill himself as a preferred alternative. He must have been toying with ideas prior to receiving Clark's document—his long-term clerk George Sharp's comment made some years later that 'If he prepared one draft of the Commonwealth Constitution he prepared a dozen' may refer at least in part to this period.[6] In any case his final version was drafted in a very short time. Between the date of its reception, sometime after 12 February, and 26 February Kingston produced his own document and under Playford's authorisation had it printed by the Government Printer and put into circulation. To assist his thinking he had also just seen a manual prepared by his political foe Richard Chaffey Baker which had been published in Adelaide that January and made available to all delegates and others involved. This invaluable document compared the constitutions of the United States, Canada, and Switzerland with commentary on federal systems generally.[7]

J.A. La Nauze refers to the Clark and Kingston drafts as 'forbiddingly formal documents' as they were 'nothing less than complete anticipations of the Convention's task, draft constitutions for a federal union'.[8] Their significance was not lessened by the fact that there were 'few original points in either

3 Federal Council of Australasia, *Official Record of Debates*, 4 February 1889, The Council, Hobart, 1889, pp. 109, 111 [emphasis added].
4 *South Australian Register* (Adelaide), 18 August 1890, p. 4.
5 ibid., 6 January 1892, p. 4.
6 *The Mail* (Adelaide), 8 July 1922, p. 13.
7 Richard Chaffey Baker, *A Manual of Reference to Authorities for the Use of the Members of the National Australasian Convention …*, W.K. Thomas, Adelaide, 1891.
8 J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, Vic., 1972, p. 24. Clark and Kingston's drafts are outlined in Appendices 2 and 3 respectively, pp. 292–6.

of them'.[9] This typically acerbic comment simply meant that they both incorporated examples from the British North America Act and the Constitution of the United States sometimes word for word. There is something of a mystery concerning the whereabouts and distribution of Kingston's draft. It was virtually without reference by contemporaries and can only be found bound-in as document number six with no annotations in the collection made by Samuel Griffith. The existence of Kingston's draft code was to be referred to occasionally during forthcoming proceedings, but was thereafter entirely forgotten. Griffith's lack of acknowledgement, John Quick and R.R. Garran's[10] ignorance of its existence, and later historians such as La Nauze's dismissal of its significance have served it ill. On the other hand L.F. Crisp[11] and Alex Castles (whose article has been cited earlier), give it the serious treatment it deserves.

The reason that it deserves serious treatment is that even without knowing how widely circulated it was, Kingston's presence at all critical meetings in the process and his key role as a member of the three-person drafting committee would have ensured that his views were well known and argued. Kingston was no shrinking violet as an advocate. Significantly he and Clark were both included in an informal and private dinner with Parkes on the eve of the Convention, presumably because they had set down their ideas on paper. Clearly it would have been read by Griffith and other members of the core drafting committee in 1891. It would certainly have been advocated by Kingston in the course of the discussions of that drafting committee on the *Lucinda*, chaired by Griffith and comprising Kingston and Barton who had replaced Clark who was ill and only joined the group much later. Others including Sir John Downer were there in the early stages, but the threesome had done most of the work by the time Clark was able to come aboard. Kingston's continuing presence gave him an opportunity to press features of his bill that Clark was denied. Clark later famously claimed that the group had 'tinkered' with his bill, and they 'messed it' but he was unable to restore the situation.[12]

The question remains to what extent was Kingston simply reworking Clark or striking out on his own? La Nauze unkindly describes both drafts as scissors-and-paste work of the two most relevant examples of the Canadian Act and the Constitution of the United States of America. But they both certainly go beyond that. I want to focus on three aspects of the drafts: firstly the content and some of the differences between them; secondly the drafting and drafting principles involved; and thirdly their impact on the final outcome.

In relation to the comparison of the content of the drafts, this has been well analysed by previous scholars including La Nauze, L.F. Crisp and Alex Castles. Clark heavily based his draft on his view of the US Constitution. Kingston was less familiar with that and other examples, but had a more practical and local knowledge of the political issues involved in managing the Westminster system and grafting it onto a federal structure. He was a curious mix of a great national visionary with a radical democratic agenda, coupled with a very strong states'-rights philosophy. He did not wish to inhibit the Commonwealth in the exercise of its authority but he sought to closely define that authority and clearly enunciate its scope. His democratic principles and suspicion of national tyranny attempted to retain accountability to the states and to the general electorate.

9 ibid., p. 24.

10 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth,* Angus and Robertson, Sydney, 1901.

11 L.F. Crisp, *Federation Fathers,* Melbourne University Press, Carlton, Vic., 1990, at pp. 292–6, which includes a useful table of comparison of some of the more significant features of Clark and Kingston's drafts at Table 5.3.

12 *The Mercury* (Hobart), 29 July 1897, supplement, p. 1.

Clark had left open the question of responsible cabinet government and whether executive councillors needed to be members of parliament or not. Kingston very explicitly required that ministers were members. But his states'-rights views emerged in his requirement that every state should be represented in the cabinet by a minister; that senators had to have been members of their colonial parliament; and that the governors of colonies were to be elected by the electors and again to be drawn from persons who had served in local Houses of Parliament (this can be seen as foreshadowing his long campaign against the Colonial Office recommendations of governors external to the jurisdiction they were to serve in). In relation to the future high court (he called it the Federal Supreme Court), he and Clark were at one on the elimination of the right of appeal to the Privy Council from Australia's highest court. (This became one of his ongoing causes for the next decade.) They agreed that the judges should be appointed by the Governor-General in Executive Council, but Kingston would have them chosen only from those who had been or were state Supreme Court judges.

La Nauze lists 'some interesting variations and additions' to Clark's draft, which is not comprehensive but gives a feeling for the differences.[13] Crisp does a similar exercise. For these purposes I would just single out a few.

Under 'powers', a particular cause of Kingston's was laws in relation to 'Trades unions and organisations of employers and employés, and tribunals for the settlement of industrial disputes'.[14] His proposal that the Commonwealth have such a power eventually found its way into the Constitution. The power 'to fix the right of any colonies with reference to the user of the water of any river or stream' was something that Clark, as a Tasmanian, was probably not particularly aware of or excited by but it was one of the federal obsessions of the South Australians in particular as the end-users of the River Murray. Not only did it occupy a lot of subsequent futile debating time, but remains an issue to this day.

Two concepts not in Clark's draft had great significance:

The first, based on Kingston's advanced concept of democracy, influenced by Baker's learned exegesis, is the machinery of the referendum. In what would be seen as an extreme form, Kingston provided that one third of the members of either House, or resolutions from any two state legislatures, or 20,000 voters by petition could all demand a referendum before assent was declared to a federal Act. A majority of votes (but with no majority of states provision), would carry the question. The referendum would also apply to amendment of the Constitution requiring at least two thirds of the Colonial legislatures and a two-thirds majority of voters to confirm it. The latter provision as modified is now the means by which the Constitution can be changed or state boundaries altered.

The second is the means by which money bills could be handled and the issue of resolution of deadlocks between the Senate and the House of Representatives. Kingston came from a jurisdiction where this matter was critical, as no South Australian government, whether conservative, populist, or progressive had been able to break the veto of the Legislative Council or overcome its claim of equal power. Kingston recognised this as a great potential sticking point between the Senate and the House of Representatives, while acknowledging the different composition, role and mandate of the Senate in the federal structure to that of a Legislative Council in a colony. A practical way had been found to deal with this, involving what became known as the 'South Australian compromise'. Kingston incorporated it into his draft. Money bills could only originate in the lower house, and the

13 La Nauze, op. cit., p. 295.
14 ibid.

Senate would be prevented from altering them although it could 'suggest' amendments—but it must either pass or reject. This clause adopted in 1891 and repeated in 1897–98 was critical to the passing of the Constitution. Without it, the night of the 'providential catarrh' in Adelaide[15] would have seen a walkout of the big colonies and federation put on hold for many years.

The second aspect of focus is the form of words: the way in which the measure is drafted. La Nauze refers to Kingston having some 'justified vanity of draftsmanship' and sees him making some changes of names and some pruning of the verbiage and rearrangement of Clark, 'with some interesting additions of Kingston's own'.[16] As mentioned above, Kingston's reputation as a common-sense draftsman was increasing, and his exposure on the intercolonial scene had reinforced this. Plain English and common sense were his rules, and he sought to reduce verbiage wherever possible. In this context one can compare the respective titles: Clark's clunky title was *A Bill for the Federation of the Australasian Colonies of New South Wales, Queensland, Tasmania, Victoria, Western Australia, and the Province of South Australia, and the Government thereof: and for Purposes connected therewith*. Kingston's title was simply *A Bill for an Act for the Union of the Australian Colonies*. Griffith too prided himself on a spare and clear wording and his changes to much of Clark's text demonstrate this. For example, when dealing with transference of authority from state to governors to the Governor-General, Inglis Clark uses 194 words; Griffith took it down to 168, while Kingston's was 112. In dealing with a power, Clark writes 'To regulate commerce and trade with other countries and among the several provinces'; Kingston simply 'Trade and Commerce'.

A later comment made by the historian Sir Ernest Scott, who was a Hansard man in the early years of the Commonwealth Parliament, puts it well, referring to Kingston's:

> command of a crisp precision of phrase and a sure sense of the value of words that could express a meaning in the shortest and most unmistakable terms. Instead of saying that 'any person charged with an offence against the said section in the manner aforesaid and being without reasonable cause or excuse should on conviction before a court of summary jurisdiction be liable to a fine not exceeding £20', Kingston would write at the end of a tersely worded section: 'Penalty £20'—and, oddly enough, neither courts nor persons affected ever had the least doubt as to what he meant.[17]

The Australian Constitution is much more in the language and style of Kingston rather than Clark.

The third aspect is the impact of both men and their draft and ideas. This is very well analysed by Castles in the article cited earlier, who demonstrates the Kingston influence in many sections. While Kingston's draft is forgotten in the historical record, Kingston's contribution proved to be critical at this seminal period in 1890–91 and extended, in a way Clark's did not, through to the end in 1900. A number of Kingston's solutions or provisions have been maintained. While the structure and form can be attributed to Clark, in terms of practical working provisions Kingston's legacy remains including that of dealing with money bills, deadlocks and the referendum. He was eventually successful in relation to the settlement of industrial disputes and unsuccessful in relation to the control of the waters of the river. His more succinct, direct, and practical draft clearly influenced or reinforced those principles in the primary draftsman of the 1891 Constitution Sir Samuel Griffith. It deserves not to be forgotten and to be set in context with A.I. Clark's remarkable contribution.

15 Quick and Garran, op. cit., p. 173. For a dramatic description of this moment of crisis see La Nauze, op. cit., pp. 141–6.
16 La Nauze, op. cit., p. 26.
17 Quote drawn from Crisp, op. cit., pp. 357–8.