

The Secretary  
Joint Select Committee on the Republic Referendum  
Parliament house  
Canberra ACT 1600

Dear Ms Surtees,

I have the honour to present to following written submission to the Joint Select Committee, and look forward to meeting its members during their sittings in Adelaide next week.

I should explain that the South Australian Constitutional Advisory Council's office closed in April 1997, after the completion and presentation of the reports the State Governor in Council had commissioned us to produce. This delayed my receipt of your letter. I can now be contacted at Flinders University (Tel. 08 8201 2375, Fax. 08 8201 3350) or at home (Tel. 08 8364 0042).

### **Constitution Alteration (Establishment of Republic) Bill**

Overall, this document seems to serve its purpose well, but I submit the following suggestions:

*(page references are to the printed version numbered  
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P. 4, LL 6-7      After "President" insert: "or appointed to be Acting President". It is **highly desirable** that the qualifications for both positions be the same.

P. 5, LL. 18 and 23      In each case delete the words: "Until the Parliament otherwise provides". The reasons why they should go are:

First, the 98-year-old convention that in the event of the death, absence or incapacity of our present *de facto* head of state (the Governor-General) the longest serving State Governor available should serve as the Administrator of the Government of the Commonwealth has been **of immense value** in helping to keep the office of *de facto* head of state **above politics**. It is most desirable that any revised Constitution of the Commonwealth should enshrine and preserve that tradition on a permanent basis, and that the Federal Parliament should not be empowered to alter it **without consulting the people**. As there are six State Governors, there can be no possible doubt that one of them would always be available. Making the choice by seniority precludes a Prime Minister from picking and choosing on political grounds. This will be of even greater importance in the future, in that if a Prime Minister were to dismiss a President, he **must not** have the

power to select who will serve as head of state until a new President is chosen and appointed. The Constitution should continue to provide an order of succession as it does now, depriving future Prime Ministers of any power to meddle in the matter.

Second, it may be noted that some of the gravest present problems with the operation of the Constitution of the Commonwealth have arisen where its provisions included those words "until the Parliament otherwise provides". Witness the Federal Parliament's total emasculation of section 87, whose termination has done so much to impair the quality of government at the State level.

P. 5, LL. 30-33, These paragraphs, together with the passage reading ", or a person P 6, LL. 1-6, 12-16 exercising powers or functions as the President's deputy," **should be deleted in their entirety**. They correspond and to the old Section 126, authorizing the appointment of Deputies to the Governor-General. It was originally expected that a Governor-General might have a Deputy resident in each State – in those days before, not only air travel, but even before all state Capitals were linked by rail to the Federal capital – because there was a belief amongst colonial statesmen (including the then South Australian Premier, Charles Cameron Kingston, one of the principal architects of the Constitution of the Commonwealth) that the office of state governor would wither away and even be abolished. However, in the first few years of Federation, it was decided not only that such a development would be quite hostile to the continuance of responsible parliamentary government at the State level, but also that State Governors should continue to hold investiture ceremonies and so on, and that their positions should not unnecessarily be downgraded. Because section 126 has never been implemented, it is one of those provisions of the Constitution which has become **otiose**. Therefore it should have no counterpart in the revised Constitution of the Commonwealth.

P. 8, Line 12 The old section 4 of the Constitution **should have its counterpart** in any revised Constitution. As Lumb and Ryan explained (*The Constitution of the Commonwealth of Australia Annotated*, 1974, p. 34) section 4 has the effect of fettering the power of the government of the day to select a member of the Federal judiciary, or an officer of the Federal Government, to serve as Administrator of the Government of the Commonwealth. Both those prohibitions **are important** and ought to be preserved. Most people holding higher judicial appointments are reluctant to

serve as *de facto* head of state nowadays. Many would even refuse to do so, and rightly so, because they would not wish to find themselves being asked, subsequently, to consider the validity of legislative or executive measures to which they had been a party. Further, it is vital to maintain some provision that no person currently employed as a public servant or other officer of the Commonwealth could act as Administrator, because, being beholden to the government of the day must have the potential to preclude such a person from acting with that impartiality and independence which is fundamental to the proper performance of the duties of a head of state.

P. 16, LL. 7-9      I fully concur with the opinion, which I believe has now been expressed by all State Governments, that it is quite inappropriate and unacceptable to seek to amend section 7 of the *Australia Act 1986* in this way. The request and consent mechanism provided for in section 15 (i) of the *Australia Act* should be employed.

### **Presidential Nomination Committee Bill**

This serves its purpose well, save for the following:

P. 6, line 2      For "lottery", substitute "lot". "Lottery" is ridiculous because (except where it is used figuratively, which is utterly inappropriate in a statute or a Constitution) it means the distribution of prizes following a sale of tickets!

I am glad to have had the opportunity of forwarding these comments.

Yours sincerely,

Associate Professor Peter A Howell