hc/let/12456

18 June 1999

Ms Claressa Surtees
Secretary
Joint Select Committee on the Republic Referendum
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Ms Surtees

The committee has invited submissions for its inquiry into the Constitution Alteration (Establishment of Republic) 1999 and the Presidential Nominations Committee Bill 1999.

The resolutions of both Houses require the committee to examine the provisions of the bills. This term of reference does not restrict the committee in its consideration of the bills, and empowers the committee to consider whether the proposed changes to the Constitution and the associated legislation are desirable. There is nothing in the resolutions which requires the committee to refrain from a consideration of the soundness of the "model" proposed at the 1998 Constitutional Convention or to confine itself to a consideration of whether the bills give effect to that "model". Such a restriction on the committee would prevent a proper examination of the "model". I make these observations because the advertisement inviting submissions is suggestive of such a confined inquiry. There was no such proper examination at the Convention.

Attached are the following documents which I ask the committee to accept as part of this submission to the committee:

- Comments on the bills. These comments were provided to various senators and have since been widely circulated. They briefly draw attention to the principal defects of the bills.

- A paper entitled *A Non-republican Republic: the Convention's Compromise Model*, delivered at a symposium on an Australian republic at the University of Queensland Law School on 11 June 1998, which analyses the defective foundations of the Convention "model".

Leaving aside other defects of the Convention, of its "model" and of the bills, there are two extremely serious problems with the scheme proposed by the legislation:

- the bizarre and dangerous provision whereby the head of state could be dismissed by the Prime Minister simply by the latter signing an unpublished document

- the provision whereby the head of state would not have a fixed term but could remain in office indefinitely at the discretion of the Prime Minister.

These aspects of the Convention "model" in fact have no model. They are not to be found in any other constitution in the world, the reason being that no other country has been so misguided as to adopt such obviously unbalanced arrangements.

Both of these aspects of the "model" would undermine the existing system of cabinet government which it was the stated aim of the "model" not to change. That system, as described in the authorities and precedents, referred to in the attached paper, presupposes the possibility of independent action on the part of the head of state and sufficient independence of position to undertake that action.

The Convention "model" and the scheme proposed by the bills would confer a dangerous concentration of power on one office-holder. This would not be a republic, but a thinly disguised monarchy little ameliorated by the dependence of the monarch, the Prime Minister, on the achievement of a mere plurality, and sometimes not even a plurality, of votes at House of Representatives elections.

If it is insisted that an appointed President must be the option submitted to a referendum, in spite of abundant evidence of great public resistance to that option, the following minimal amendments are necessary to overcome the principal defects of the scheme reflected in the bills:

- the head of state should be dismissible only for stated cause, by provisions like those applying to judges in section 72 of the Constitution

- the dismissal should be only by the appointing authority, the Houses of the Parliament (to provide for periods when the Houses are not sitting, at most there should be suspension by an independent parliamentary commission until the Houses are able to meet to consider whether removal should occur)

- there should be a requirement for a president to be appointed before the end of a fixed presidential term, so that no president would continue in office beyond that term without parliamentary approval

- the nomination process should not be under the total control of the Prime Minister and the nominating body should not have a built-in prime ministerial majority, as in the proposed legislation

- the nomination process should not be secret.

It would be preferable, however, for the Convention "model" and the legislation to be abandoned entirely and an indicative referendum held to ascertain first, whether the electorate wishes to make a change to a republic, and secondly whether an elected or an appointed head of state is preferred by the electorate, followed by the submission of the preferred option as constitutional amendments to a referendum.

I would be pleased to elaborate on these points should the committee so require.

Yours sincerely

(Harry Evans)

hc/misc/12280
10 June 1999

COMMENTS ON

CONSTITUTION ALTERATION (ESTABLISHMENT OF REPUBLIC) 1999

(1) The long title (at the very beginning of the bill) is what the electors are asked to approve when they vote (the question put to them is: Do you approve this proposed alteration?). The long title is misleading in that it mentions that the President would be chosen by a two-thirds majority of the members of the Commonwealth Parliament, but does not mention that the President would be liable to be dismissed by the Prime Minister at any time and could be kept in office indefinitely at the Prime Minister's discretion (see (4) below).

(2) The unspecified reserve powers of the Governor-General (s59, p. 3), hitherto matters only of convention, would be fixed in the Constitution, unalterable except by a further referendum, and presumably justiciable. In the event of any dispute, the High Court could be called upon to engage in an exploration of British history to determine what the reserve powers were in 1901 and prior to the alteration of the Constitution, only to find that there was no agreement as to what the reserve powers were. The consolation is that a President dismissible by the Prime Minister is unlikely ever to exercise the reserve powers, however justified their exercise might be. The provision for the reserve powers to "evolve" (schedule 3, s8, p. 16) would only confuse the issue.

(3) If the Prime Minister's motion for the appointment of a President were not approved, no President would be appointed (s60, pp 3-4). It could well suit a Prime Minister to leave the office vacant, or to threaten to do so to ensure agreement to the nomination.

(4) The President would not have a fixed term, but an indefinite term ending only on death, resignation or dismissal by the Prime Minister (s61, p. 4). A Prime Minister could keep a compliant President in office indefinitely, and ensure that compliance by offers of continuation of the presidential term.

(5) No grounds are specified for the Prime Minister to remove a President (s62, p. 5). A Prime Minister, in dismissing a President who had offended the prime ministerial ego, could claim that there were undisclosable grounds of a scandalous nature for the removal, and neither the dismissed President nor the public would be able to test such a claim.

(6) There is no requirement for the Prime Minister's notice dismissing a President to be made public at any time (s62, p. 5). There would therefore be no opportunity for the public to attempt to ascertain, for example, whether the Prime Minister had been carrying around with him an undated or backdated dismissal notice.

(7) No provision is made (s62, p. 5) for the situation of the Parliament being prorogued at a time when a dismissal of a President occurs. A Prime Minister could prorogue the Parliament for several months, dismiss the President and then claim that there was no obligation to consult the House because it could not meet. There should be provision for both Houses to be recalled in case of a dismissal. If there were a dissolution before or in conjunction with a dismissal, the Prime Minister would be a dictator during the election period.

(8) There would be no consequences arising from a lack of House of Representatives approval of a dismissal of a President (s62, p. 5). In the unlikely event that the House, controlled by the Prime Minister, disapproved of the Prime Minister's action, nothing would follow, thereby demonstrating the impotence of the House and the total power of the Prime Minister.

(9) The Prime Minister could dismiss all of the persons specified as acting Presidents by serial dismissal notices (s63, pp 5-6). Any acting President unacceptable to the Prime Minister could be passed over by a dismissal notice.

(10) The Prime Minister would be the sole judge of any incapacity on the part of a President (s63, p. 5), and so could suspend a President at will.

(11) A Prime Minister could keep a President who offended the prime ministerial ego out of the way (for example, by overseas trips) and ensure a more compliant holder of the presidential office by exercising the power to appoint deputies (s63, pp 5-6).

(12) The royal prerogative would be fixed in the Constitution and could be altered only by legislation requiring the Prime Minister's approval (s70A, p. 6). Monarchical powers, in reality held by the Prime Minister, would be perpetuated, not altered.

PRESIDENTIAL NOMINATIONS COMMITTEE BILL

(13) The Prime Minister would have exclusive control over appointments to the Nominations Committee (cl 8-12, pp 5-6); the only limitation would be that party and state parliamentary appointees would have to be the nominees of the party or parliament

concerned. The Prime Minister would “have the numbers” on the committee, even without his own party supporters, by appointing the non-politician members who would make up half the membership, and by appointing the Convenor, who would have a casting vote (cl 6, 11, 12, pp 3, 6).

(14) The Prime Minister would determine the terms and conditions of members of the Nominations Committee, other than those determined by the Remuneration Tribunal or by regulation (cl 14, p. 7). By not making any regulations, the Prime Minister would have virtually complete control over the terms and conditions.

(15) The Prime Minister could dispose of any unfavourable members of the Nominations Committee by arranging for them to be nominated as president (cl 15, p. 7).

(16) The Prime Minister could allow the Nominations Committee to function with up to 16 vacancies (cl 17, p. 8). By manipulating vacancies, the Prime Minister could doubly ensure that he “has the numbers” on the committee.

(17) The nomination process would be entirely secret (part 5, pp 11-12). The public would have no way of judging whether the Prime Minister has picked the best nominee or, indeed, whether the Prime Minister’s choice was nominated at all. There would seem to be no good reason why the names of all nominees should not be made public.

UNIVERSITY OF QUEENSLAND
LAW SCHOOL

Symposium on an Australian Republic
11 June 1998

A Non-republican Republic: the Convention's Compromise Model

Harry Evans
Clerk of the Senate

hc/pap/11854
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A NON-REPUBLICAN REPUBLIC: THE CONVENTION'S COMPROMISE MODEL

Holding a seminar on an Australian republic so soon after the Constitutional Convention might be regarded in some quarters as an act of very bad taste, somewhat like discussing the pleasures of travel by transatlantic liner in the second half of April, 1912. It appears that many republicans now would rather not talk about the subject. Ironically the monarchists, who originally did not want to talk about it, are now relatively forthcoming. They have designed a cartoon, printed on pamphlets and T-shirts, depicting the republic, as envisaged by the majority of the convention, as a bizarre animal, composed of parts of different beasts and persons. This will be a very telling image in the propaganda battle which may ensue, as it draws upon a perception that the convention laboured to produce something ridiculous.

Discussion of the subject must also be painful to anyone with a sense of history. The contrast between the 1890s and the 1990s is stark. In 1897-98 Australians were able to constitute a popularly elected convention which devised a plan of government overwhelmingly accepted by the electorates in referendums and able to work with little modification for a century. In 1997-98 we had a half-appointed convention, with the Orwellian title of "People's Convention", which produced a scheme almost universally regarded as unsatisfactory and unworkable and which nobody appears anxious to recommend.

These observations may be regarded as very unfair to the republicans. As is well known, they were constrained by the prime minister to agree to one model on the basis that the electorate would be compelled to choose between the existing head of state and that one model. This forced a coalition of factions with a narrow majority in the convention to agree to a compromise amongst themselves in order to have their majority prevail. It was a classic piece of modern, factionalised party politics, which here, as in government generally in recent times, produced a less than optimum result.

It is obvious that a more rational procedure, and one more likely to achieve a coherent result, would be to ask the electorate, in an indicative referendum, first whether they wish to change the head of state, and, if there were to be a change, which of a number of possible models they prefer. The elected representatives of the people, in reality the political elites, would then be confined to putting the preferred change signalled by the electorate into a set of constitutional amendments which could be put to a subsequent referendum. This would avoid the factions of the elites and the factionalised numbers-politics which is now the only way in which the elites know how to make decisions. This rational method, of course, was not

favoured by the prime minister because it appeared likely to produce a coherent republican result, and therefore it was cleverly foreclosed.

It is also unfair to the republicans to dwell too much on the proceedings of the convention because it was a partly-appointed body designed to avoid a representative result. A fully-elected convention would have given the republicans much more room to manoeuvre and perhaps enabled them to produce a better plan.

Nonetheless the republicans, particularly the establishment republicans of the ARM, bear a great deal of responsibility for the outcome of the convention because of the way in which they practised faction politics and, more significantly, because of a failure of thought.

The convention chimaera

Before considering why the convention produced what it did, the nature of its production and its immediate origins should be examined.

The model endorsed by a majority of the convention, which is to be pitted against the existing constitutional arrangements, involves the replacement of the Queen and the Governor-General by a head of state possessing the same powers as the Governor-General under the current Constitution, appointed for a fixed term by a joint sitting of the two Houses of the Parliament on the nomination of the prime minister. Before an appointment is made, there is to be a complex public consultation process involving the submission of names of candidates and vetting by some kind of committee. Having been appointed by this procedure, the president is to be removed from office by the prime minister by an instrument in writing. A removal is to be considered by the House of Representatives within 30 days as a matter of confidence in the prime minister, but the House is to have no power to restore the person removed.[i]

It is not difficult to discern the origins of the various elements of this scheme. Appointment by a joint sitting of the two Houses reflects the official republican position, the minimalist model, as expounded by Professor George Winterton, the Republic Advisory Committee, the Keating government which appointed that committee, and the ARM.[ii] The public consultation process is an attempt to pacify those who criticise this method of appointment as undemocratic and who want greater popular participation, some by direct election of a president. The provision for removal by the prime minister is intended as a sop to those who fear that even an appointed president would have too much independence and would bring about too radical a change in the system of government; it is also an attempt to quieten those

monarchists who claim merely to be defending the existing system rather than the monarchy as such.

The convention's model is thus a concoction of various schemes put forward by various factions of republicans and soft monarchists during what has been called the debate on a republic.

As will be seen, the convention's model is deserving of that rather overworked adjective, unworkable. But it also represents a failure to apply to the existing arrangements a little republican thought.

Westminster fixations

A constant refrain of the official republicans in what has passed for a debate is that a republic can be achieved without a change to the system of government, and this is presented as a virtue of such a change. We must not change the system of government, therefore we must have the minimalist model, it is said. There are two obvious retorts to this: first, what is the purpose of changing to a republic if it means no change, and is not this a contradiction in itself; and secondly, why should the existing system not be changed? Preserving the system of government is frequently represented as preserving something called the "Westminster system", and the use of this anaesthetising term adds to the contradiction.

The first step in analysing this "minimalist" delusion is to point out that Australia does not have a Westminster system, has never had a Westminster system and was never intended to have a Westminster system. If "Westminster system" means the British model of parliamentary government, it was radically modified by the framers of the Constitution by the incorporation of elements entirely alien to it: the direct participation of the electors in establishing the Constitution; the prescription of powers in that written constitution; the establishment of a constitutional court to interpret and enforce that constitution; the division of powers between the central and state governments; the delegation of legislative power to two elected houses of parliament of virtually equal competence, each representing the electors voting in different electorates and reflecting the geographically pluralistic character of the country. These elements, generically called federalist, made our system, as designed, very unBritish, as was pointed out at the time.[iii] All of these elements still operate and make the Australian system of government very different from that prevailing in the United Kingdom and countries such as New Zealand which have closely followed the British model.

The term "Westminster system" may refer simply to government by ministers sitting in parliament, the arrangement often called responsible government or cabinet government. But

even if one ignores the federalist elements of the Constitution as simply inconvenient excrescences on its essential ingredient, government by the party which holds a majority in the House of Representatives, a view which the political establishment generally seems to favour, Australia's governance is still very different from that of the United Kingdom. One significant and relevant difference is that of the position of the head of state. There is an immense difference between a monarch irremovable against his or her will except by revolution and a de facto head of state appointed de facto by the prime minister of the day and, according to the generally-accepted theory, removable at will by the prime minister of the day. There is also a significant difference between this situation and that prevailing in 1901, when the de facto head of state was appointed by, and represented, the British government, so talk of maintaining the existing system can only mean maintaining the system of subsequent origin.

Leaving aside the largely meaningless and misleading term "Westminster system", it is clear that any change in the way in which the head of state is appointed necessarily involves a change of the existing system of government because the head of state would be different. As the most cursory glance into the literature on what is more accurately called cabinet government confirms, the head of state has a crucial role in facilitating the workings of that system.[iv] By inserting into its model removal by the prime minister alone the convention would change the head of state to an even greater degree than the orthodox minimalist model of appointment and removal by parliament, and thereby change cabinet government itself.

The head of state and cabinet government

In the light of the rigid adherence of the official republicans to what they call the current "Westminster" system of government, it is a great irony that the proposal emerging from the convention would seriously weaken that system.

The operation of this system depends upon a measure of independence in the head of state, and by significantly weakening the position of the head of state, the convention model undermines the system.

Undoubtedly the most remarkable outcome of the convention was its adoption of the McGarvie doctrine that the prime minister must be able to dismiss a president. As has been observed, this was not part of the pre-convention orthodox "minimalist" model, which proposed that a president be appointed *and* removed by the two Houses of the Parliament. The former governor of Victoria, Mr Richard McGarvie, proclaimed that it is essential to the workings of parliamentary democracy that the prime minister be able to dismiss a president.[v] It was not explained how, if that were so, democracy functions in the United Kingdom itself,

where the prime minister cannot dismiss the monarch, or, indeed, how it operated in Australia in the years before it was believed that the monarch would be bound by prime ministerial advice to dismiss a governor-general.

To reiterate the salient elements of the proposal adopted by the convention, a president, who is to possess *all* the powers of a governor-general, would be removed by the prime minister simply signing a document. The House of Representatives would have an opportunity within 30 days to repudiate the dismissal of the president, but would not be able to restore the person removed to office.

Even in the confines of the existing arrangements, there are a great many problems with this proposal. We may put to one side those which might be regarded as too technical for big-picture constitution-making, such as how the House of Representatives is to review the prime minister's action if it has been dissolved or if the Parliament has been prorogued. The most significant question is: after a dismissal of a president by the prime minister, who is to exercise the president's powers until the very complicated process of appointing a successor is completed? Are those powers then to be held by the prime minister, or is some other person to become acting president? If there is to be an acting president, presumably the McGarvie doctrine requires that that person too should be removable by the prime minister. In that case, the presidential powers would de facto be in the prime minister's control, unless there is to be a long list of independent persons constitutionally designated as successive acting presidents.

It may be contended that this is no different from the current situation, because de facto the prime minister can dismiss a governor-general. That is a defect which, it might be thought, constitutional reformers would want to rectify. Be that as it may, the current situation at least imposes potential difficulty or delay by the need to approach the Queen to dismiss her representative. If the prime ministerial power works in a mysterious way to guarantee parliamentary democracy, as the McGarvie doctrine holds, this must surely be partly because it is unspecified, a matter of lore not law. The bizarre situation of two office-holders, each of whom can dismiss the other, might be accepted on that basis. The proposal adopted by the convention would formalise and prescribe it. That would make it more likely that the prime minister's power of dismissal would be exercised: a power explicitly given to an already powerful office-holder is not likely to be left in disuse for long.

In the workings of cabinet government the head of state is supposed to be a sort of constitutional umpire. The scheme for appointment of a president by the Parliament was open to the objection that it amounted to having the umpire appointed by the players. The scheme adopted by the convention would allow the captain of the team which is ahead on the

scoreboard to change the umpire in the middle of the game. And a captain who thinks that he is about to be sent off would have a great incentive to strike first.

That this is inconsistent with the system of cabinet government, otherwise revered by the convention, may best be illustrated by an example. The role of the head of state as umpire is well demonstrated by the situation in Tasmania in 1989. In the general election of that year, no party received a majority in the House of Assembly, but the Labor Party and the Greens between them had a majority of votes and a majority of seats. The Liberal Premier, Robin Gray, wanted a fresh election. The Labor Opposition Leader, Michael Field, wanted to form a government with the support of the Greens. The Governor, Sir Phillip Bennett, refused the Premier's request for another dissolution, and, having satisfied himself that the Labor Party and the Greens could form a coalition, by requiring them to put their agreement in writing, required Mr Gray's resignation and commissioned Mr Field to form a government.[vi] These events provide an exemplar of how cabinet government is supposed to operate, and how the monarch or her representative is supposed to help it operate, according to the authoritative expositions.

If the convention's proposal had been in force in Tasmania at that time, Mr Gray could easily have avoided the outcome which he so vigorously resisted. He could have dismissed the Governor, on the plausible ground on which he asked for a new election, namely, that democracy had been violated by the Labor Party and the Greens not disclosing before the election that they would enter into a coalition. Then, having directly or indirectly obtained a governor willing to accept his view of the situation, and thereby having gained control of the governor's powers, he could have dissolved the Assembly and waged an election campaign designed to frighten enough electors into changing their votes by the threat of continued turmoil. It is not suggested that Mr Gray was actually so unscrupulous as to pursue this course, but it is well within the bounds of general likelihood, and the proposal of the convention would invite the less scrupulous to go down such paths. Probably they would not have to do so to achieve their ends: it is unlikely that a governor removable by a premier at the stroke of a pen would in the first place display the fortitude of Sir Phillip Bennett.

Lest it be argued that we should not assume aberrant behaviour on the part of office-holders, it need only be pointed out that the option of an elected president was ruled out at the convention largely on the basis of fears of aberrant behaviour on the part of such an office-holder. It has not been explained why an elected president should not be trusted with powers which can safely be given to an appointee and added to the existing powers of a prime minister.

The theory and practice of cabinet government involves many other circumstances in which the head of state is expected to act independently to preserve the system. A prime minister who advises a dissolution when his party is about to remove him should be refused, a prime minister who refuses to resign or advise a dissolution after a successful motion of no confidence should be dismissed, and so on. The system is underpinned by a head of state with some security of tenure. The McGarvie doctrine removes what is left of the underpinning.

Lack of republican thought

The convention produced a paradoxical result ultimately because of the failure of the official republican movement to engage in republican thought. It did not advert to the principles of republican government and apply them to the practical problem of establishing a republican head of state in Australia.

The theory and practice of republican government has had two essential elements: the vesting of sovereignty or ultimate power in the people collectively and, to ensure that that sovereignty is not shifted or usurped, provisions such that office-holders exercising power as the delegates or trustees of the people do not possess such a concentration of unchecked power that they become, like monarchs, the sole repositories of the powers of the state. In other words, what are usually called checks and balances are of the essence of republican government in theory and practice. So far as the theory is concerned, that can be traced in republican thought from Cicero through the American federalists to the current epoch.[vii] As for the practice, republics which allow their office-holders to assume the powers of monarchs not only cease to be republics by definition but also in their fundamental rationale and modus operandi, and we recognise them as dictatorships.

Cabinet government is monarchical not only in the sense that it requires an independent head of state to operate properly, but also in that it builds on the concentration of power in the monarchy. According to its original and greatest exponent, it rests upon the fusion of legislative and executive power through the cabinet.[viii] Since it evolved in the middle of the 19th century it has become more monarchical, in that power has become more concentrated. The monarch's prerogative powers and the legislative powers have shifted from the House of Commons to the ministry, then to the cabinet and finally to the prime minister, who has become a sort of elected dictator, the true monarch.[ix]

This is completely true only of pure "Westminster" countries such as the United Kingdom and New Zealand (the latter before the change of the electoral system). Australia has had a partly republican regime since the Constitution was drawn up in the 1890s. The most essential features of that Constitution are the vesting of de facto sovereignty in the electorate

through constitutional referendums and the divisions of power between Commonwealth and states, between legislature and judiciary and between the two houses of the legislature. To establish a genuine republic we should build on those republican foundations.

The official republican movement was determined not to allow our republican heritage to influence a change in the head of state. The electors were to be kept away from the process, except for window-dressing. The near-dictatorial status of prime ministers was not to be disturbed. The proposal of the convention would make the Australian system more monarchical by increasing the concentration of power in the prime minister and by bringing the nominal head of state further under the control of the head of government.

Now many of the official republicans seem to accept that the convention model may well fail at a referendum. They now murmur about success in the referendum after next.[x] This return to the drawing board would not have been necessary had they remembered the electorate and adverted to republican principles in the first place.

The states

The position of the states and their constitutions in a transition to a republic is generally regarded simply as a problem by the orthodox republicans. This attitude to the states as a problem is partly derived from their general hostility to federalism as to all other constitutional arrangements for division and limitation of power.

There is, however, a real problem with the states. If they are to maintain cabinet government, and to preserve the independence of their constitutions in accordance with the principles of federalism, they require their own heads of state to replace the state governors. Any arrangement other than the appointment of the replacements by parliament raises the problem of additional expense. Premiers have discovered the electoral appeal of arguments based on economy, as is illustrated by the downgrading of the New South Wales governor's position and the moves to reduce the size of the parliament in Tasmania.

State parliaments have more serious problems than their expense. There is the stranglehold of the premiers over lower houses where governments possess secure party majorities, which makes executive domination even stronger than at the federal level. More importantly, the state parliaments are simply too small to operate effectively a system of cabinet government. When ministers and other office-holders are appointed from the majority party there are few backbenchers remaining and most of them look forward to appointment to some office or another in the gift of the executive. To the extent that the prime minister and cabinet are held accountable by the British House of Commons, this is partly because there are large numbers

of backbenchers who have no hope of ministerial appointment and who therefore have less incentive to be entirely servile to the leaders of their own party. This is another area in which the Australian system departs from the British model. The expense which would be involved prevents the expansion of the Australian parliaments in the hope that the British pattern would thereby be duplicated, apart from the lack of any certainty of success of such an experiment.

With a little republican thought, the transition to a republic provides an opportunity for pursuing solutions to these problems, with economy. The offices of the state governors and premiers could be combined and subjected to direct election in conjunction with lower house elections. The new chief executive, removable by the legislature only by special majority on impeachment-type grounds, would conduct the executive government and serve for the same fixed term as the lower house. This measure of separation of the executive and the legislature could also encourage lower houses to perform their legislative functions instead of acting merely as rubber stamps and low-quality debating panels.

A state, perhaps a less populous state such as Tasmania, could adopt such a system as an experiment, thereby demonstrating one of the advantages of federalism, states acting as social and political laboratories.[xi]

A republican republic

There are two steps which should be taken to build on Australia's republican foundations and establish a genuine republic. The first is to give the electorate a say in the type of head of state to replace the Queen and Governor-General. The best way of doing this would be by an indicative referendum of the type which has been mentioned. The second step is to accept that one possible choice by the electorate, an elected head of state, is a legitimate and acceptable choice, and could be made the basis of a coherent constitutional change. This could be crafted to confer an appropriate degree of independence on a president so that the holder of the office could properly perform either the role meant to be performed by the head of state in a system of cabinet government or a different constructive role chosen by the electors.

Harry Evans

NOTES

[i] Taken from the communique issued by the convention, 13 February 1998.

[ii] G. Winterton, *Monarchy to Republic: Australian Republican Government,* 1986; The Report of the Republic Advisory Committee 1993; statement by the Prime Minister on the report, 7 June 1995.

[iii] Sir Richard Baker, Australian Federal Convention, *Debates,* 17 September 1897, p 789.

[iv] The principal expositions are printed together in *Evatt and Forsey on the Reserve Powers,* Legal Books, 1990; E. Forsey & G. Eglington, *The Question of Confidence in Responsible Government,* 1985; D.A. Low, ed., *Constitutional Heads and Political Crises: Commonwealth Episodes, 1945-85,* 1988.

[v] His most extreme statement of this is in his contribution to *The Weekend Australian* supplement on the constitutional convention, "Blueprints for the future", 31 January 1988.

[vi] Mr Gray, as some reports had it, may have resigned voluntarily and advised that Mr Field be called, but it was clear that he did not have a choice.

[vii] Cicero, *De Re Publica, De Legibus,* c.54-46 B.C.; Hamilton, Madison and Jay, *The Federalist,* 1788; and, to come to Australia, B. Galligan, *A Federal Republic: Australia's Constitutional system of government,* 1995.

[viii] Bagehot, *The English Constitution,* 1867, ch. 1.

[ix] As Lord Hailsham famously declared: *Elective Dictatorship,* BBC lecture, 1976. Prime ministerial power has not declined since then.

[x] Looking to the referendum after next started immediately after the convention: "Real republic awaits another day", *The West Australian,* 14 February 1998, p 12; "A republic, of some sort, will be achieved", *The Courier Mail,* 16 February 1998, p. 12; "Republic 'would fail' at first referendum" [Sir Anthony Mason] *The Age,* 2 March 1998, p A2.

[xi] A similar scheme was suggested by Martyn Webb: Professors Patrick O'Brien and Martyn Webb, eds, *The Executive State: WA Inc and the Constitution,* Constitutional Press, Perth, WA, 1991, at pp. 327-8; see also H. Evans, 'The Australian Head of State: Putting Republicanism into the Republic', *Papers on Parliament,* No. 28, November 1996.