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Joint Select Committee on the Republic Referendum,
Parliament of Australia
Canberra
(by email)

Submission on the Constitution Alteration (Establishment of Republic) Bill

Honourable Members and Senators,

Given the peculiar compromises that emerged from the Constitutional Convention ("ConCon"), I must say that I think the Prime Minister's drafting team has done a pretty good job in drafting the amendments. However, I want to make some suggestions in respect of five matters:
Selection of the President,
Dismissal of the President,
Executive power and the choice of Ministers,
The preamble and enacting words, and
Spent and transitional provisions of the Constitution.

I note Mr Evans's remarks, in the submission that is already posted on your Web site, that the Committee is not bound by the resolutions of the ConCon. While I endorse these remarks, as a strict matter of law and Parliamentary principle, I accept that the Prime Minister gave an undertaking that the resolutions would be turned into the words of a Constitution Alteration Bill as closely as practicable. Therefore my suggestions here are intended to be compatible with the general spirit of the ConCon's resolutions, even where I disagree with them. However, where the resolutions have inner contradictions or will lead to absurdity, I have suggested something that departs from them while, I hope, maintaining their general thrust.

Selection of the President

I am concerned that there is nothing in the proposed text that mandates that a president *must* be chosen at any time. One monarchist of my acquaintance is making much of this in public debates, pointing to precedents from places like Italy and Slovakia where the office was simply left vacant for some years or months, and suggesting that the same could happen here. While I believe that is unlikely, it certainly is possible. A Prime Minister, finding that the Acting President is sympathetic to his/her political views, could delay the formation of a nominating committee or the presentation of a nomination to Parliament – or an Opposition Leader could refuse to second any candidate proposed by the Prime Minister, either because they were all unsatisfactory or simply to make political mischief.

Many of the draft republican Constitutions circulated before the ConCon put some time limits on the election of a President. Mr Turnbull's and ex-Senator Teague's drafts provided that Parliament must meet within 90 days of a vacancy occurring. Once Parliament had met to

elect a President, Mr Teague's and Professor Winterton's drafts put limits (5 and 10 days, respectively) on the time for which Parliament could adjourn if a President had not been chosen.

The ConCon, it seems to me, did not reject these ideas; it simply did not advert to them. I submit that in these circumstances the views of those who had done serious drafting work before the ConCon should not be ignored, and that some peremptory language about the selection of a President should be added to the Bill. In fact I suggest that the wording should be rather more peremptory, along the following lines:

- A nominations committee should be established at least 3 months before the expiry of a President's term, or within one month after vacation of the Presidency otherwise than by expiry of term;
- The joint sitting should be held at least one month before the expiry of a President's term, or within 3 months after vacation of the Presidency otherwise than by expiry; and
- Once the joint sitting has commenced, the Houses must sit jointly for some period on every consecutive week day until a President has been chosen, and leave of absence can not be given to any member or Senator except on compelling medical or compassionate grounds.

I hasten to add that the intention of this recommendation is *not* to create the inconvenience of continuous sittings for members and Senators. I suggest that if such provisions are included in the Constitution, the government and opposition will *always* find a candidate acceptable to both of them in the first day or two. In the absence of some such provision to act *in terrorem*, the temptation to stall just *might* exist.

Dismissal of the President

This is an area where, like many other people, I find the ConCon's recommendation strange – Professor Winterton refers to "Constitutional Chicken" while I think of it more in terms of High Noon, with the PM and President facing each other with their hands an inch from their guns – but if it can be implemented in a way that is not *too* absurd then I suppose that the general spirit of the ConCon's resolutions should be observed.

There was however (with respect to the delegates) an inbuilt contradiction in their resolution on this matter. On the one hand, the resolution says the President "is removed" immediately the PM issues a notice in writing (without, incidentally, defining "issued") and declares that a lack of "ratification" by the House of Representatives does not restore the President to office – but on the other hand it *does* use the word "ratification" which suggests that the dismissal notice is not fully effective until the later vote by the House. The drafting team appears to have recognised this contradiction, and has replaced it by replacing "ratification" with "approval".

I suggest instead that the concept of ratification should be made dominant – that the PM merely have the power to *suspend* the President, subject to the requirement that s/he must submit a motion for *dismissal* within 30 days (or within 30 days of the first sitting of a new House if a dissolution/expiration of the House has occurred just before or after the suspension). I would really prefer a more thorough-going change such as that suggested by Mr Evans, but if Parliament does not want to move *too* far away from the resolutions I suggest that this proposal is the one that remains closest in spirit to the resolution on dismissal while maintaining some vestige of *sense* in the Constitution. Of course, a requirement that the PM must *publish* the notice of dismissal needs to be added too.

Executive power and the choice of Ministers

I have felt, ever since the first "minimally" amended drafts were circulated, that there is something inherently absurd in setting up a republic with what is clearly intended to be a *non*-executive President while maintaining a section in the Constitution that pretends to vest executive power in this non-executive person! I have maintained for some time that to make minimal amendments to our Constitutional *system* we need somewhat more than minimal amendments to the Constitutional *text*. [See my Web page – still sitting on the Web unamended since the election for the ConCon! – at http://www.suncoast.com.au/real-republic/.]

I do take some (minimal) comfort from the draft section 59 which, while maintaining in the first paragraph the pretence of vesting power in the President, makes it clear in the third paragraph that the President must generally act on the advice of the Executive Council, the PM or another Minister – but I suggest that another step in codification of the conventions should be added. While it may be difficult to codify *all* of the conventions of responsible government, at least the main convention – which expresses the central *meaning* of responsible government – is easy enough to put into words. This is - that in appointing or dismissing Ministers from time to time the President must appoint a group of people who, collectively, have proved to have, or seem on the available evidence most likely to have, the confidence of a majority of the House of Representatives. I submit that words to that effect could be added to section 64, and that the second paragraph of the proposed new section 59 should also be changed to make it clear that the only persons who are entitled to attend meetings of the Executive Council are the current Ministers. [As I point out under the final heading, the Constitution should be a document which explains to an ordinary reader how the system of government works. It is all very well to openly refer to constitutional conventions without defining them, as the third paragraph of proposed section 59 does – that at least draws the attention of the reader to the fact that there *are* some conventions lurking somewhere. However, the second paragraph, without further amendment, would seem to say one thing while convention flatly contradicts it. This is *not* transparent Constitution-drafting.]

The preamble and enacting words

The ConCon recommended a new "preamble", which was to include "introductory language" in the form "We the people of Australia…" and "concluding language" to the effect that [we the people] "…asserting our sovereignty, commit ourselves to this Constitution". It is surprising that in a Convention which included so many lawyers none of them pointed out that such words are not regarded as part of a "preamble" but are *words of enactment* (or *enacting words*, or an *enactment clause*). [In fact earlier in the Convention (Friday 6th Feb), subgroup (i) of the preamble Working Group had understood the terminology quite well. It recommended that the preamble conclude with an *enactment clause*, discussed in more detail below.]

It has become sadly clear that Parliament is unlikely to agree on the details of every clause of a preamble in time for one to be submitted to a referendum in November, but I submit that some new words of enactment are essential. We would constitute the most absurd republic in the world if we changed to a republican form of government simply by amendment of a constitution which still, in form, depends on its enactment "by the Queen's most Excellent Majesty, by and with the advice and consent of" the two Houses of the United Kingdom Parliament! Honourable members and Senators, with respect, you really *must* persuade both Houses to agree at least on a new form of enacting words to be inserted within the

Constitution-proper in front of section 1, and to include it in the main Constitution Alteration Bill.

As to the form these words should take, I submit that you can take more guidance from the sub-group of the Convention mentioned above than from the final resolutions. The sub-group knew what they were talking about, as proved by their getting the terminology right. They recommended an enactment clause which would recognise the sovereignty of the Australian people, and submitted a draft in which the words were "We, the people of Australia, do hereby enact and give to ourselves this Constitution". The Resolutions Group watered down both the terminology (to "concluding words") and the draft words (to "we.. commit ourselves") before the resolution was put for final adoption by the full Convention. With respect to the learned lawyers and parliamentarians in the Resolutions Group, if we are to institute a republic, we the people should be doing rather more than *committing ourselves* to an amended Constitution. We will in effect be re-enacting it and we should make it clear that it *is* the Constitution *because* of the re-enactment. I would even suggest something rather stronger than the words proposed by sub-group (i), but very much in the spirit of their resolution. I suggest that we should add, before section 1 –

> We, the People of Australia, declare that this Constitution, originally enacted by the Parliament of the United Kingdom of Great Britain and Ireland, now continues to have effect as the supreme law of the Commonwealth of Australia solely because of its adoption by ourselves, the People of Australia.

There will be time enough later for a full debate on some "preambulatory" words to be added eventually, but we will look a very funny republic if we do not add something along those lines from the instant that we become a republic.

Spent and transitional provisions of the Constitution.

I also draw to the Committee's attention the fact that the ConCon recommended that "Spent and transitory provisions should be removed". [I suppose by "transitory" the delegates meant what are usually called "transitional" provisions – some of them retained effect rather too long to be called "transitory".] Various statements from the government have indicated that this is all too much bother, so I suppose we must all accept that it is not going to be done in the current Alteration Bill. However, since the Committee consists of members and Senators who, I hope I can assume, will continue to have an interest in constitutional matters, let me put a couple of matters before you for future consideration.

First, although I have heard eminent lawyers express the view that a mere tidying up of the Constitution doesn't matter because, after all, the law will still be the same, let me urge upon the Committee that it *does* matter, because the cluttering-up of the Constitution with spent provisions greatly detracts from the ability of ordinary citizens to read it. I suggest that Committee members try the following experiment – imagine you are 17-year-olds, about to acquire the right to vote, and that you think it might be a good idea to read our basic Rule Book about our government. You are interested, then, not in the history of how the Federation was "got going" in 1901, but how it goes now. Start reading the Constitution from the front. I think many 17-year-olds, even literate and politically-aware ones, would give up before the end of the "covering clauses" because *they* have nothing to do with our government today. Then, if you do persist and wade through the Constitution proper, there are so many sections that have expired or which make some provision "until the Parliament otherwise provides" that the current Rule Book is almost buried in them. The actual language is quite clear – they were good practitioners of Plain English, the old Founding Fathers – but the words which are current are half-buried in words whose effect expired in 1901, 1906 or 1911.

I urge that committee members keep pressing the need for a tidying-up of the Constitutional text.

Secondly, I draw the attention of the Committee to an aspect of the transitional sections not addressed in previous Constitutional-reform exercises. The Constitutional Commission of the 1980s studied the whole sections, sub-sections or paragraphs that have expired, and made recommendations for repeal in its report. However, as mentioned in the previous paragraph, there are also the sections that make some provision "until the Parliament otherwise provides". Consider section 31, for example. Its marginal note says "Application of State laws", but the actual topic is the election of members of the House of Representatives. Its actual meaning *in 1901* was that the first election would be run, in each State, under that State's electoral laws. Its actual meaning *now* is simply that the Commonwealth Parliament can pass electoral laws, but that is hardly obvious. There are 20 other sections like that. It is no wonder that citizens don't know much about our Constitution and the workings of government under the Constitution. As noted above, I mention these matters purely for future action, but I hope that Committee members will file them away in their memories. Once we have a republican constitution, we should take further steps to develop a *readable* republican constitution! [And if the No vote wins in November, the inevitable continuing debate will be improved if we have a readable constitutional-monarchist constitution.]

I will be happy to discuss these and related matters further, should the Committee require.

Sincerely,

(Mr, or even Citizen!) John R Pyke