The Australian National University

Law Program
Division of Philosophy and Law
The Research School of Social Sciences
Canberra ACT 0200

Telephone: (02) 6279 8140
Facsimile: (02) 6249 4933
Email: george.williams@anu.edu.au

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The Secretary
Joint Select Committee on the Republic Referendum
Parliament House
Canberra ACT 2600

Dear Secretary

Submission to the Joint Select Committee on the Republic Referendum

I enclose a submission concerning the Constitution Alteration (Establishment of Republic) 1999 and the Presidential Nominations Committee Bill 1999.

This submission builds upon earlier comments made to the Referendum Taskforce of the Department of the Prime Minister and Cabinet. It is also based upon "Detours on the Road to a Republic", published in the *Sydney Morning Herald* on 17 June 1999, and "President must be the People's Choice", published in *The Australian* on 16 December 1998 (both attached).

Yours sincerely

George Williams
Barrister
Fellow and Senior Lecturer in Constitutional Law

Inquiry into the Constitution Alteration (Establishment of Republic) 1999 and the Presidential Nominations Committee Bill 1999

Joint Select Committee on the Republic Referendum

Taken together, the Constitution Alteration (Establishment of Republic) 1999 and the Presidential Nominations Committee Bill 1999 would create a workable and effective republican system of government. As presently drafted, there are no overriding constitutional reasons why the Bills should not be passed by the Federal Parliament.

However, there are a number of areas in which the Bills could be redrafted to improve the model and, in doing so, to make it more consistent with the 1998 Convention Communique. I have set these out below.

Constitution Alteration (Establishment of Republic) 1999

Section 60 para 3 – President must not be "a member of a political party"

It is obviously appropriate that the President not be a member of Parliament. It is less clear that the qualifications of the position should include that he or she not be "a member of a political party". This requirement is inconsistent with freedom of association (which may be implied from the Australian Constitution and is recognised by Australia's international obligations – see, for example, Article 22(1) of the International Covenant on Civil and Political Rights 1966).

If the qualification is retained, it should at least be adequately defined. It is possible that the High Court would define "political party" to include organisations other than those recognised by the *Commonwealth Electoral Act* 1918. Hence, the Bill should be amended to state that the President not be "a member of any organisation seeking to promote the election to the Senate or to the House of Representatives of a candidate or candidates endorsed by it". Or, the provision might be amended to read that the President not be "a member of a political party, as defined by *Commonwealth Electoral Act* 1918".

Section 61 para 3 – Multiple terms as President

A person should not be able to serve more than one term as President. Given the largely symbolic and ceremonial nature of the post no one person should occupy it for a decade (or even more). It is important that the opportunity be given for different members of the Australian community to hold the post.

It may also be inconsistent with the stature and nature of the post for the President, once appointed, to again go through the nomination, selection and appointment process.

Most importantly, there should be no incentive for a President to act so as to maximise political support for his or her reappointment. If there is a possibility of reappointment, a President may modify his or her behaviour accordingly. Like judges, a President should not be subject to the political pressures associated with seeking reappointment.

Section 62 – Removal of the President

The section departs from the 1998 Constitutional Convention model in that a failure of the House of Representatives to endorse the Prime Minister's removal of the President would not amount to a vote of no confidence.

Given that the President would be appointed by a two-thirds vote of the Parliament, it is inappropriate that he or she be removed solely according to the wishes of the Prime Minister.

This process also raises the spectre of the President seeking to exercise the reserve powers of the position to remove the Prime Minister, as did Sir John Kerr in 1975, only to see the Prime Minister rushing first to remove the President.

An appropriate compromise between the suggestion that the President should only be removed by the vote of both Houses, and that removal could be achieved by the Prime Minister alone, would be that the President could only be removed by the vote of an absolute majority of the House of Representatives on a motion put by the Prime Minister.

Schedule 2 – State transitional provisions

The Bill could do more to enable the States to attain republican status in the event of a successful federal referendum. At present, some States would require their own referendum (New South Wales, Queensland, South Australia and Western Australia), while others would not (Tasmania and Victoria) (see Williams, "The Australian States and an Australian Republic" (1996) 70 *Australian Law Journal* 890).

The Australian Constitution could be amended to allow a State an alternative means of making the transition to republican status other than by holding a referendum. The State might be empowered by the Constitution to make the transition by achieving a two-thirds vote of the total membership of its Parliament. This would facilitate a simultaneous move to a republic.

A State would not be required to make the transition via this means. A referendum could still be held if appropriate. This would simply give each State the option of avoiding an anti-climatic and costly referendum that might need to be held other than on the general election day.

Presidential Nominations Committee Bill 1999

Section 8 – Size of Presidential Nominations Committee

A Committee of 32 members is too large to be workable given the nature and breadth of the discussions involved and the need for each member to express a view on the range of candidates.

The Bill should be amended to reduce the membership of the Committee to a maximum of 16 persons.

Section 10 – State/Territory members

This provision does not state how the member is to be chosen by the relevant Parliament. Is a simple majority of both Houses required, or must the two Houses sit together? Or, is this left to the State or Territory Parliament itself to decide?

An alternative would be to allow the Premier or Chief Minister to make the appointment directly. This would reduce costs and avoid unnecessary politicisation of the appointment. It would also enable a fast appointment process should one be required.

Section 22 –Committee's report

The report of the Committee should also be given to the Leader of the Opposition. This would be consistent with his or her role in seconding the nomination of the President and with the need for bi-partisanship in the appointment process.

This section should also be redrafted to provide for greater public input and scrutiny of the report by the Australian people. The report should be tabled in Parliament within 14 days of it being provided to the Prime Minister and the Leader of the Opposition. While the deliberations of the Committee and the full list of persons nominated should be confidential (in accordance with the 1998 Convention Communique), the final short list should be made public.

Unless this occurs, the appointment will be seen as being made entirely behind closed doors and will not be seen as sufficiently involving the Australian public. As drafted, this section does not meet the objective set out in the 1998 Convention Communique that "the Australian people are consulted as thoroughly as possible". It also fails meet the legitimate aspirations of persons, otherwise preferring a direct election model, that the community be involved in some way at the final stages of the selection of the President.

Note: These changes would require consequential amendments to section 5(1)(c).

George Williams
Barrister
Senior Lecturer in Constitutional Law

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