

EXPOSURE DRAFTS OF THE REFERENDUM LEGISLATION.

SUBMISSION BY THE ACTU

16TH MARCH 1999

1. The Constitution Alteration (Republic) Bill

1.1 Long title

This legislation seeks to put into legislative form the preferred model of republic of the 1998 Constitutional Convention.

1.2 As set out in the covering note accompanying the exposure drafts of the legislation this Bill covers five distinct issues, being:

- a President as head of state;
- the mechanism for selecting a President;
- the powers of the President;
- the removal of monarchical references from the Constitution; and
- transitional arrangements.

1.3 The long title of the Bill is therefore inaccurate. This refers to only the first two of the areas referred to above and in so doing does not accurately reflect the model.

1.4 First there is no mention that the President will be head of state, rather the terminology adopted is “to establish the Commonwealth of Australia as a republic”. An alternative would have been to say “to have an Australian citizen as head of state.” This better reflects the terminology explaining the Bill and the intent of the Constitutional Convention.

1.5 Secondly the long title refers to the mechanism for selecting a President and does not refer to the three other matters referred to in the explanation of the Bill, that is the powers of the President, the removal of monarchical references and transitional arrangements. It is normal for a long title to be comprehensive in its treatment of the relevant legislation it is describing.

1.6 Worse, the reference to the mechanism for selecting a President is itself incomplete and inaccurate. It makes no reference to the nomination process which involves all Australian citizens. It inaccurately summarizes the Parliament’s role in the selection process as ‘choosing’ when it is in fact approving or not approving a motion putting forward a single nomination.

- 1.7 The terminology in both the Constitution Alteration (Republic) Bill and the accompanying Presidential Nominations Committee Bill moves variously from 'appointment' to 'chosen' in relation to the selection process. In the first paragraph of section 60 of the Constitution Alteration (Republic) Bill, there is reference at the start to 'appointment' and later in the same paragraph this changes to 'chosen'. Throughout the Presidential Nominations Committee Bill the term 'appointment' is used.
- 1.8 The correct characterisation of the model preferred by the Constitutional Convention is that the 'appointment' of a President follows a process of public nomination to the Presidential Nominations Committee Bill. That committee then reports to the Prime Minister. The Prime Minister then puts forward a single nominee to a special sitting of the federal Parliament, seconded by the Leader of the Opposition. That sitting of Parliament then approves that nominee or does not approve it. This is consistent with the terminology used in the second paragraph of section 60 which refers to the Parliament 'affirming' the motion. The appointment of the President occurs with the taking of the oath of office as per the proposed section 61. Each of these separate steps, taken together represent the method by which the President is 'chosen' under the model supported by the Constitutional Convention.
- 1.9 It is therefore completely inaccurate to describe the method in the long title to the Bill as: *"a President chosen by a two thirds majority of the members of the Commonwealth Parliament."*
- 1.10 A more accurate way of phrasing the long title of the Bill, if it was to concentrate solely on this aspect of the model of the republic which is contained in the Bill, would be to say: *"a President chosen from among nominations submitted by the people and approved by a two thirds majority of both houses of the federal Parliament"*.
- 1.11 A more accurate long title of the Bill would follow the terminology describing the Bill, that is: *"A Bill for an Act to alter the Constitution to provide for an Australian citizen as head of state, including a mechanism for selecting a President, the powers of the President, the removal of monarchical references from the Constitution and transitional arrangements"*.
- 1.12 Alternatively the long title should end after the word 'republic' and would then read: *"A Bill for an Act to alter the Constitution to establish the Commonwealth of Australia as a republic"*.
- 1.13 The least preferred alternative would be to depict the method of selection of the President accurately as set out above which would see the long title read: *"A Bill for an Act to alter the Constitution to establish the Commonwealth of Australia as a republic with a President chosen from among nominations submitted by the people and approved by a two thirds majority of both houses of the federal Parliament"*.

1.14 Section 60 – The President

The language in the proposed section 60 should also reflect more accurately the process. First, in the first paragraph, the Prime Minister should be required to present the motion as set out rather than have a discretion to do so. The word 'may' should be changed to 'shall'. The word 'chosen' in both this paragraph and at the end of the second paragraph should also be changed to 'affirmed' to reflect what the Parliament is in fact doing.

1.15 In the third and fourth paragraphs the term 'chosen' should be replaced by 'appointed' as this more accurately reflects the requirements of the model.

1.16 The word 'chosen' in the fifth and final paragraph of the proposed section 60 should be changed to 'affirmed'.

1.17 Section 63 – Deputies

The Constitutional Convention did not consider the question of deputies. This proposed section probably follows the present section 126 of the Constitution under which the Queen has the power to authorise the Governor-General to appoint deputies. Given that there is provision for an Acting President and the fact the President continues in that capacity when overseas and the fact that the Constitution specifically empowers the President to delegate specified functions it would seem that this provision is unnecessary.

1.18 If it were to be maintained, there should be some provision for consultation with the Prime Minister before deputies are appointed which would be consistent with the scheme of the proposed changes, and the fact that in the past the Governor-General did not actually have this power acting alone.

1.19 Spent or transitory provisions

The Bill contains in Schedule 2 a series of consequential amendments removing monarchical references.

1.20 It does not however do as the Constitutional Convention recommended and remove 'spent or transitory provisions of the Constitution'.

1.21 This was an important matter that was debated and resulted in a serious recommendation from the Convention which saw the Constitution as an important document that should be far more accessible for all Australians. Part of the process of making it more accessible is the removal of obsolete provisions of which there are many.

- 1.23 There was specific debate at the Convention regarding section 25 which is, in its present terms, offensive in implicitly condoning the disqualification of persons from voting on racial grounds. This is now illegal under the Commonwealth Racial Discrimination Act. However the section should clearly be removed from the Constitution.
- 1.24 Other provisions which are spent or clearly transitional include: sections 10, 26, 31, 41, 48, 87,88,89,93,95, 97.
- 1.25 The opportunity should now be taken to remove these provisions from the Constitution.

2. Presidential Nominations Committee Bill

2.1 Purpose of Bill

This Bill seeks to provide for the establishment of a committee to invite and consider public nominations for a President.

- 2.2 This is a key component of the model approved by the Constitutional Convention. As stated in the Convention Communique: *“The objective of the nomination process is to ensure that the Australian people are consulted as thoroughly as possible. This process of consultation shall involve the whole community”*.
- 2.3 It went on to specifically mention: *“State and Territory Parliaments; local government; community organisations, and members of the public”* as sections of the community which should be involved.
- 2.4 It is important that the committee thus established is properly representative of the community and is able to reach out to all sections of the community.

2.5 Membership – Part 3

Part 3 of the Bill deals with membership of the committee. This provides for 8 Commonwealth members, and 8 State/Territory members and 16 community members making a total of 32 members. This would appear to be too many and in particular with too many political members.

- 2.6 There is no need to have the same number of Commonwealth members as State and Territory members. As the Federal Parliament will in due course consider the issue in the context of a joint sitting, all members of that Parliament are necessarily involved in the process of approving any proposed nominee. It would be more appropriate to have only four members of the Federal Parliament appointed to the Committee. This would make a total of 12 political members.

- 2.7 As the key role of the committee is to ensure community involvement in the process of selecting the President, it is appropriate that community members should outnumber political members. For instance 14 community members might be an appropriate number.
- 2.8 This would make a more workable committee of 26 rather than 32.
- 2.9 There should be a requirement that the committee not commence unless there are at least equal numbers of political and community members. This requires amendment to the proposed subsection 4(2). Whether there should be 16 members appointed before the committee commences its work or a lesser number given the lesser number of members recommended in this submission is a possibility. The principle of allowing the committee to commence its work without its full membership finalised should only be a last resort if it is not possible to have all members appointed in a timely fashion. This should be stated in the legislation.
- 2.10 With respect to State/Territory members there should be an equivalent section to section 11 of the Constitution included which provides that the failure of a State to provide a representative does not impede the business of the Senate. This is important given the mandatory nature of the Prime Ministers duty to appoint State and Territory members through the use of the term 'must' in section 8.
- 2.11 With respect to community members there should be a requirement imposed on the Prime Minister in section 9 to take into account: *"so far as practicable considerations of federalism, gender, age and cultural diversity"*. These are the words of the Constitutional Convention and should be included in the legislation.

2.12 Convenor – section 10

It should be left to the committee to choose its own convenor although consideration should be given to requiring that this be a community member rather than a political member.