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

Review of the Constitution Alteration (Establishment of Republic) Bill 1999

I hereby submit my concerns as to the implications of proposed Items 5, 6 and 7 of Schedule 3 of the Proposed Law. Because Constitutions (and their amendments) endure for many years and are often considered by the High Court after a number of decades, I believe that these Items have adverse implications for the constitutional autonomy of the States, and for the long-term future of our federal Constitution.

I am also concerned at the implications of Items 38 and 38 of Schedule 2 of this Bill, possibly affecting existing citizenship rights.

Should the Committee hold public hearings in Western Australia I would make myself available to put forward this submission. It is well appreciated that the Joint Select Committee is not inquiring into the principle of a change to a republic, nor taking submissions as to alternative republican models. This submission I trust falls well within these necessary guidelines.

Yours sincerely

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1. ADVERSE IMPLICATIONS FOR FEDERALISM

(A) Constitutional basis of State Executive

Item 5 of Schedule 3 of the Bill appears to authorise the States to retain links to the Crown until they have altered their own laws, in effect their respective State Constitutions. This Item is not only unnecessary but implies that the States require the permission of the Commonwealth to retain the integrity of their own Constitutions.

That is, this provision may (at some stage) be interpreted as being the source of the constitutional authority of the States' executive institutions, offices and powers. As a result, the reason why there is and can be a State constitutional monarchy may well be because of the Commonwealth Constitution and not the State Constitution. At least two other consequences might then flow from this situation.

First, because Section 128 could amend (in the future) Item 5 of Schedule 3, the inclusion of this provision raises the distinct possibility that State Constitutions, or the Constitution of a particular State (dealing with the State executive) could be amended – against the wishes of that State's electors – via a Section 128 referendum. That, of course, runs counter to the present view that Section 128 cannot (as the Constitution presently stands) be used to amend State constitutions. Secondly, it may well mean that State executive power becomes a matter of Federal jurisdiction.

An analogous example is Section 106 of the Constitution, that affirms that the Constitutions of each State shall continue as before, "until altered in accordance with the Constitution of the State". There is a school of thought (for example advanced by Chief Justice Barwick and Justice Murphy) that chooses to interpret this as implying that State Constitutions derive their authority from the Commonwealth Constitution. Equally there is a strong opposing and orthodox belief that as the Commonwealth did not create the States, State Constitutions are independent of the Commonwealth Constitution.

Certainly the electors of Western Australia have never been asked by Constitutional referendum to approve the first dubious proposition, that our State Constitution exists on the sufferance of the Commonwealth. It is most unfortunate then that this Item of the Bill appears to give credence to, and strengthen, the centralist interpretation of Section 106 and its consequences.

It may be argued that the intent of Item 5 is only to clarify the constitutional position of the States. Nevertheless it can surely be interpreted as not merely recognising State constitutional responsibilities, but actually permitting and authorising their exercise. Once the Commonwealth appears to give its gracious permission for the exercise of a right, doubt arises as to whether it is indeed a constitutional right. The ability of the States to determine the future of their links to the Crown should not be seen to depend upon an Act of the Commonwealth Parliament.

Section 73(2) of the Constitution of Western Australia insists that a state referendum be held to approve any alteration in the constitutional position of the State Governor. It is not for any Commonwealth Act or the Commonwealth Constitution to directly or

indirectly confer or withhold permission for the Parliament and electors of Western Australia to change our State's Constitution in the manner prescribed.

The Constitutional Convention in February 1998 determined in its final communique:

> That any move to a republic at the Commonwealth level should not impinge on State autonomy, and the title, role, powers, appointment and dismissal of State heads of State should continue to be determined by each State.

This matter was debated extensively at the Convention and it is significant that despite the broad range of political philosophies represented among delegates, there was no serious attempt to support any move to impose constitutional change on the States simultaneously through a referendum under Section 128. During the debate on February 11 speaker after speaker affirmed the desirability of non-interference with State Constitutions.

It was argued unsuccessfully at the Convention that a Commonwealth referendum to establish a republic should require a majority in all six States rather than four, so that each State Parliament should have a mandate to proceed with alter their own Constitutions. The majority view was however that there should not be a departure from the established procedure of Section 128.

It follows that if the Commonwealth is to keep to established procedure for changing its Constitution, the same principle holds good for the States. Should the referendum be carried in November with the electors of Western Australia voting 'NO', then the requirement of the State Constitution for a further referendum to be held on the status of the Governor will enable these voters to decide whether in fact it would be futile to retain a State monarchy in the context of a republican Commonwealth.

However it is most unlikely, given the history of Commonwealth referenda, that this referendum would succeed without majorities in every State. Anxieties over temporary anomalies of continuing State monarchies are far less important than the need to retain the integrity of State Constitutions, free of any imputation that they function on the sufferance of the Commonwealth Parliament.

(B) Australia's federal system

In Item 6, entitled "Unified federal system" I object strongly to the terms "unified" and "unity". Such a provision would for the first time enshrine in the Commonwealth Constitution a particular type of federalism (as opposed to others such as coordinate federalism). Indeed, the words "unified" and "unity" may well, in future interpretations of the Constitution, result in a far more centralised federalism than was originally envisaged in 1900 or is wanted by Australians today.

It is in the very nature of democratic federations that there be diversity and not centralised uniformity. There may need to be "coordination" in a federation, and a far more suitable result is cooperative Commonwealth-State legislation.

I appreciate that it may not be the intention of the Bill to imply that Australia has or should have "uniformity" between Commonwealth, State and Territory legislation and

administrative practice. Unfortunately future legal judgements may place a literal, centralist interpretation on this Item, so that it becomes yet another building block in undemocratic, anti-federal centralisation. Ambiguous and emotive words do not belong in constitutional legislation. If it is truly thought necessary to retain Item 6 as insurance to protect our Common Law heritage, then let it refer to "coordination".

Item 7 falls into the same category as Item 5: unnecessary while inadvertently subordinating State Parliaments to the Commonwealth Parliament. Not only would this mean that the Commonwealth is conferring more legislative power on the Commonwealth Parliament, but it sets a most undesirable precedent: it implies that the Commonwealth must legislate in the matter of links to the Crown, that is a central responsibility of the States. Section 15(1) of the Australia Acts should be the only amendment mechanism utilised.

2. ADVERSE IMPLICATIONS FOR CITIZENSHIP

Under Schedule 2 of the Bill, Items 38 and 39 on the surface appear to make a reasonable and minor amendment to Section 117 of the Constitution that safeguards equal treatment across the States. The term "a subject of the Queen" is to be replaced by "an Australian citizen", more appropriate terminology in a republican Constitution.

However, the Constitution as amended will not contain a definition of an Australian citizen. This is left to the Commonwealth Parliament, and as such is subject to normal legislative change, which will, for example, enable the Commonwealth Parliament to determine who can and cannot obtain the protection of Section 117. In addition, the amendment apparently fails to recognise those "subjects of the Queen" who enjoy such rights of citizenship as voting in State and Commonwealth elections but who are not formally Australian citizens. These people will presumably lose the protection of Section 117 that they currently have through this amendment.

It is now a fact of history that some 15 years ago UK migrants lost the automatic privileges of citizenship unless they formally applied to become Australian citizens. This was a timely reform, but those non-citizen "subjects of the Queen" already on electoral rolls were able to remain there. They are in effect "citizens of Australia" but not "Australian citizens".

This apparent anomaly from time to time exercises the spleen of purists, but most people would concede that a right once recognised should not be lightly removed, especially from a necessarily aging component of the population. Many of these British subjects would in the 1960s have been liable for National Service in the Australian armed forces. Any Government advocating the removal of their right not to be discriminated against presumably would do so with full publicity and knowledge regarding the deprivation of a constitutional right that such people now possess. Most certainly such rights should not be called into question as the apparently unintended consequence of a subsidiary and consequential amendment to the Constitution.

Naturally a republican Constitution should not refer to citizens as royal subjects. However the change should not risk depriving any category of citizen of the

protection of Section 117, or ultimately of those rights of citizenship that have been explicitly confirmed by the Commonwealth Parliament.

Australians in November will be asked to approve a particular method of electing a republican Head of State. This should be the sole purpose of the referendum, and its sole effect if carried. It should not run the risk of inflicting greater centralism on our federal democracy, or of diminishing any rights of citizenship by stealth or inadvertence.

I ask therefore that the Joint Select Committee take note of these concerns and recommend necessary changes to the Proposed Law.

Jeremy Buxton