

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

Dear Secretary,

I wish to make the following submission about proposed s 70A of the Constitution.

submission to joint select committee on the republic referendum

Dr Nick Seddon
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My submission concerns proposed s 70A of the Constitution. The proposed section as presently drafted provides:

Until the Parliament otherwise provides, but subject to this Constitution, any prerogative enjoyed by the Crown in right of the Commonwealth immediately before the office of Governor-General ceased to exist shall be enjoyed in like manner by the Commonwealth and, in particular, any such prerogative enjoyed by the Governor-General shall be enjoyed by the President.

The use of the word "prerogative" may be insufficient to achieve what is evidently intended. There has been a long-standing controversy about what precisely the prerogatives of the Crown include. This controversy relates to the positive powers of the Crown (to make treaties, to make contracts and so forth) and to Crown immunities and privileges.

I am concerned about what might be termed the negative powers, that is, Crown privileges and immunities. I assume that it is the intention not to disturb the existing privileges and immunities of the Crown (at least not through the process of transforming to a republic). One reading of s 70A is that it is only concerned with the positive prerogatives (because of its focus on the Governor-General) and not with Crown immunities and privileges which may be claimed by the body politic.

The main area of practical importance where Crown immunities are still discussed is in relation to legislation. There is a common law presumption that the Crown (that is, the government) is not bound by legislation unless the legislation expressly or by necessary implication provides otherwise. In *Bropho v Western Australia* (1990) 171 CLR 1 at 14-16 six judges of the High Court said that the traditional immunity was not a prerogative but was, instead, a rule of statutory construction. Nevertheless, they discussed the rule in terms of "the Crown". Its origins certainly go back to the person of the sovereign.

It could therefore be termed a non-prerogative Crown privilege or immunity.

It is therefore possible that, if s 70A is passed in its present form, it could generate an argument that the previous Crown immunity from statute no longer applies because the notion of the Crown has been dispensed with (through the transformation to a republic) and s 70A makes no mention of the traditional immunities and privileges which do not come under the description of "prerogatives". One consequence of this could be that legislation does bind the government unless there is express provision to the contrary, a result which I would not find disturbing but I am sure is not intended. Another consequence may be that a statutory provision which states that legislation binds the Crown becomes meaningless because there is no such thing as the Crown.

One would hope that such an argument would not succeed if it came before a court. It is obvious that the change to a republic is not intended to bring about fundamental changes of the kind here being discussed. Therefore my submission is more in the nature of one "for the avoidance of doubt".

It would require a small alteration to the draft of s 70A. I suggest something along the lines of:

Until the Parliament otherwise provides, but subject to this Constitution, any prerogative, immunity, privilege or rule of statutory interpretation enjoyed by the Crown in right of the Commonwealth immediately before the office of Governor-General ceased to exist shall be enjoyed in like manner by the Commonwealth and, in particular, any of those enjoyed by the Governor-General shall be enjoyed by the President.

Some might argue that this should be done in an amendment to, for example, the Acts Interpretation Act 1901 (Cth). My answer to this would be that if s 70A is going to deal with prerogatives then it should also deal with Crown immunities and privileges. There will, of course, also have to be legislative provisions dealing with the myriad references to the Crown and the Governor-General in Commonwealth legislation.

Regards from Nick Seddon
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