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30 June 1999

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

Dear Sir

Suggested Amendments to Constitution Alteration (Establishment of Republic) 1999

I am making this submission as a private citizen. I propose the following amendments to the Bill as introduced, for the reasons given.

These amendments would not change the character of the Bill as giving effect to the outcomes of the Constitutional Convention. The submission thus is framed within the terms of reference of the Committee and does not canvass the merits of the proposed model.

Long title

The long title is what is put on to the people on the ballot paper. For it to include words specifically relating to one element of the Constitution Alteration, which while contentious is arguably not the most significant (cf. the handling of the reserve powers), is at the very least tendentious. What is printed on the ballot paper should either describe the whole package, which is unrealistic, or focus on the essence - i.e. the establishment of a republic.

Therefore, delete all words after 'as a republic'.

Commencement

Having the republic commence at 3pm in the ACT sounds like we are more concerned with being on time for tea than commencing a new stage in our constitutional development. Surely the operative provisions should begin at the beginning of 1 January 2001.

'Head of State'

A lot of ink has been spilled on this concept, nowhere mentioned in the present Constitution. There does not appear to be anything gained by including it now. The Constitution as proposed to be amended otherwise spells out the powers and functions of the President sufficiently. 'Head of State' is a descriptive term belonging in protocol manuals.

Therefore, delete second sentence of proposed section 59.

President's 'Reserve Powers'

Handling this issue in two places - section 59 and Schedule - 3 is awkward, and the explicit reference to 'conventions' without any reference point is unsatisfactory. All that is needed is a seamless continuation of the existing constitutional practice, drafted in such a way as to safeguard against ossification.

Therefore, in place of proposed section 59 para 3 and Schedule 3 paragraph 8, add the following text, based on existing section 63:

"The provisions of this Constitution referring to the President in Council shall be construed as referring to the President acting on the advice of the Federal Executive Council. The provisions of this Constitution referring to the President shall be construed as referring to the President acting on the advice of a Minister of State, except that the President may act without such advice in the same circumstances as the Governor-General might have so acted had that office not ceased to exist."

Removal of President

The decision to leave to the political processes the consequences of the Prime Minister dismissing a President but not being able to secure Parliamentary endorsement of his action is surely right, but the section as proposed requires only that the Prime Minister 'seek' approval. It might be argued that for the Prime Minister make the attempt is sufficient. In any event it leaves the matter oddly up in the air. The text needs to take the process to the point where the Prime Minister has either succeeded or failed. The political consequences follow from the failure not the attempt. That is, if the Prime Minister fails to obtain approval, he has clearly lost the confidence of the House, and the conventions of responsible government operate.

Therefore, in proposed section 62, substitute 'obtain' for 'seek' in the second paragraph.

Consequential Amendments (Schedule 2)

A virtue is apparently being made of not removing outmoded or spent provisions except where it is required as part of establishing the republic. Whether this is a virtue is arguable, but it is not applied consistently. Thus the repeal of the second sentence of section 83 is not strictly required, nor is the replacement of subsection 85(i). If these are to be changed, and there is a good case for so doing, why not clean up sections 5, 7, 10, 15 (in particular - all that transitional baggage from 1977), 25, 26, 29-31, 46, 48, 51(38), 72, 97 and 125 (the reference to 'crown lands' in particular).

At the same time, the opportunity could be taken for the substance of covering clause 5 of the Constitution Act, the only one of continuing relevance, to be included in an amended section 109, which it currently overlaps. This would enable the constitution to be in reality self-contained, a logical part of the process of constitutional 'patriation'.

Note also that paras 38 and 39 both amend section 117 - a typographical error, presumably. Delete para 39, and renumber following para.

Transitional Provisions (Schedule 3)

A good idea to tuck these at the back of the Constitution (cf. the clutter left over from 1977 - see above), but why not provide in the Bill a repeal schedule to remove most of them when they have done their duty:

- 1-3 could be repealed say 12 months after the commencement of the Republic, or retained as an historical memento
- 4 could also be repealed at this time - the effluxion of time and the manifest continuation in the meantime of the offices and actions referred to is surely sufficient. A more robust attitude is not to have the clause at all - why assume such matters would otherwise not continue?
- 5, 6, 7 and 9 can be expressed to be repealed on the severing of links with the Crown by the last State so to do.
- the recommended rewording of proposed section 59 above covers the 'evolution' of conventions dealt with in 8, which is therefore unnecessary.

Conclusion

Of the above suggestions I commend in particular those relating to the long title, the reserve powers and the removal of the President.

Yours sincerely

Stuart Hamilton