5 July, 1999

Ms Claressa Surtees
Committee Secretary
Joint Select Committee on the Republic Referendum
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Ms Surtees,

The Joint Select Committee on the Republic Referendum has asked for written submissions to address the specific provisions of the Constitutional Alteration (Establishment of a Republic) 1999 and Presidential Nominations Committee Bill 1999.

Both were developed under the framework and recommendations made by the Constitutional Convention, and seek to implement the bi-partisan 'two-thirds' model of Presidential selection.

While this author supports in principle the move from a Constitutional Monarchy to a Republic for the Commonwealth of Australia, and recognises the proposed model is an acceptable compromise and adopted by majority of the Convention members, this submission seeks to address some specific provisions in the Bills as inadequate or requiring alteration.

Specifically, the proposed ss59-63 of the Constitution establishing, or at least renovating, the Executive may indeed change the character of that arm of government. Whether the controversial constitutional conventions need be entrenched in the Constitution requires more debate. So too, does the 'term of office' of a new President, as under these proposed changes a President could stay in office indefinitely, at the discretion of the incumbent Prime Minister. As well, the remuneration of the President should be fixed for the length of the occupation by one person, rather than allow a change after 5 years. Furthermore, the process of choosing a new President (or re-electing the incumbent) should be made mandatory after a certain time after the Presidential term of office ends.

The principle problem with the proposed Presidential Nominations Committee lies in the loose and discretionary appointment by the Prime Minister of community members. There should be some more forceful requirement to guarantee a broader representation of Australia's community and communities, than a narrow Prime Minister's discretion.

Moreover, at all times for the Committee to function, it should be required that at least half the members present be community members.

Australians have proven to be stubborn when it comes to changing their Constitution, and rightly so. Any proposed change must go to every possible length to ensure this is the right move, it is being completed in the best possible way, and it is going to guarantee an equitable and democratic system of government that we have come to enjoy over the last century.

Please find attached my more detailed comments on the two Bills.

Yours faithfully,

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COMMENTS ON
CONSTITUTIONAL ALTERATION (ESTABLISHMENT OF A REPUBLIC) 1999

Proposed s59 'Executive Power' (page 3):

The third paragraph of this section, which applies the constitutional conventions to the President is unnecessary. It is not clear why it is necessary to entrench the very convention in the Constitution that made it a custom to follow established conventions. Unless the "constitutional conventions relating to the exercise of that power" are directly and succinctly specified (which are only vaguely discussed in items 5.13-5.17 in the Explanatory Memorandum to the Bill) it is a worthless provision. If they are not specified, who or what is to determine what exactly are the reserve powers of the Governor-General, and what the conventions in existence were, or indeed are? The events of 1975 are an example that by no means are the reserve powers of the Governor-General or various conventions fixed, widely understood or agreed upon. The inclusion of this paragraph could therefore make the conventions, and the President's exercise (or non-exercise) of the reserve powers justiciable, despite item 5.17 of the Explanatory Memorandum. The High Court would no doubt have extreme difficulty in coming to a satisfactory conclusion in any matter on this point. Plus, the last paragraph may indeed prevent the evolution of the conventions, freeze them in time at the change over date (1 January 2001) if the referendum is successful, despite proposed item 8, Schedule 3 of the Bill, and items 5.6 and 5.16 of the Explanatory Memorandum.

If it is clear that to all intents and purposes the President is replacing the Governor-General and Queen as head of the Commonwealth and Commonwealth Executive, there is no compelling reason to suppose that the reserve powers would be denied to the President. In fact, their continued applicability is made clear by the first two paragraphs of proposed s59, and the acknowledged power to prorogue and dissolve Parliament.

I have a general concern over new references to the Prime Minister and Leader of the Opposition in proposed ss59 and 60. Neither position has been previously recognised by the Constitution. In fact, other than mentions of 'Ministers of State' and the Governor-General, the Constitution is quite silent on political individuals. However, I cannot really see anyway around this for the bipartisan two-thirds model to be effective.

Proposed s60 'The President' (pages 3-4):

In order to prevent a President from joining (or resuming membership in) a political party, this section should also prevent that very action, by requiring the President is not a member of any political party during his or her incumbency. This may require judicial determination as item 6.11 of the Explanatory Memorandum notes.

Proposed s61 'Term of office and remuneration of President' (pages 4-5):

It is implicit from this proposed section that an incumbent President does not have to leave office after the five years have expired. If this is possible, it makes a mockery of

any prescribed five-year office, and even further cements the power of the Prime Minister. Overall, it would better to set a limit on the length of time a person could serve as President. It would seem prudent to allow the "outgoing President continues as President until the term of office of the next President begins", but then require a re-nomination process as soon as is possible in order to find a new President (or re-elect the incumbent).

Also, instead of allowing one person to serve more than one term as President, it would be better to specify a maximum number of terms, say two or three.

In addition, instead of preventing a remuneration change during the term of office of a President, it would be more satisfactory to prevent a remuneration alteration during the President's occupation of that office. This would mean that so long as one person occupied that role, the salary could not be changed, and not like the proposed system whereby the remuneration can be effectively changed after the first five years.

The first paragraph of the proposed section is also confusingly drafted.

Proposed s62 'Removal of President' (page 5):

This whole proposed section is a political gambit, and reinforces the curious and potentially destabilising system where the head of the legislature and head of the executive are able to remove the other at a whim. The section includes an apparent disincentive for the Prime Minister to remove the President – a required vote of confidence in the House of Representatives. This, of course, favours the actions of those parliamentary leaders with strong political support, and therefore virtually rules out any such action by a minority government (unless the minority Prime Minister calls an election after the removal). Either way, Parliamentary or popular scrutiny of the Prime Minister's action in removing the President may be just a mere formality.

I suggest only, that a power-sharing arrangement like this proposes should not be reliant on history, and the good and faithful character of future Prime Ministers and Presidents to act within the spirit of the conventions. Australia has been largely fortunate to date in this regard, but this certainly is not guaranteed to continue.

Proposed s63 'Acting President and deputies' (pages 5-6):

This section also provides for a curious situation when the office of President falls vacant – the longest serving State Governor shall act as President. This system appears to have worked well in the past, and I cannot see too much reason why it should be changed, except for the problem of allegiance. The possibility remains that some States will not make the conversion to independent republics within federated Australia (as recognised by item 5 of proposed Schedule 2 to the Constitution). In that situation, some State Governors will have attained their position by right of their appointment by Her Majesty the Queen (albeit through the recommendation of an elected state government), and their sworn allegiance to Her – the very institution we are trying to remove.

Despite the argument that upon their becoming acting Presidents, State Governors only swear allegiance to Australia and its people, and cease temporarily to be Governors, I still see a possible, though unlikely, conflict of interest. What if the Queen were to cut short the tenure of a Governor whilst he or she were acting President? The possibilities of conflict and uncertainty here should induce Parliament to provide that the selection be limited to Governors of States no longer recognising the British Monarchy as its sovereign. In the unlikely possibility that no State makes the transition, the Parliament could otherwise provide.

As regards the third paragraph, by removing the application and extension of all of proposed s61 to an acting President, his or her remuneration may be changed whilst in office. This undesirable possibility should be removed (see above under comment on proposed s61). For example, the last sentence of s63 could have "an acting President" removed from it, as well as a change in proposed s61.

The second paragraph grants the Prime Minister another undesirable power: to define what 'incapacitated' means. The Prime Minister could declare a President incapacitated for any reason. This, at least, should be left to the scrutiny of Parliament, by allowing it to define what the term means, as well as providing whom the Prime Minister should appoint as acting President. This would not be an unreasonable fetter on the Prime Minister's ability to remove a President.

Generally, there should be a provision that upon the office of President becoming vacant (implicitly only through death, removal or resignation; item 9.11 of the Explanatory Memorandum), the process of nomination and election for a new President should take place as soon as possible. It would be most unsatisfactory for Australia to have indefinitely an acting President at the choice of the Prime Minister. Some maximum time limit should be set in order to force the nomination and appointment of a new President.

PRESIDENTIAL NOMINATIONS COMMITTEE BILL 1999

One major problem with this Bill is with its membership, particularly ss8 and 11 requiring the appointment of 16 'community members'. The Prime Minister is granted a "broad discretionary power to appoint community members" (item 5.10 of the Explanatory Memorandum to the Bill), and this "would permit a diverse membership" according to the Explanatory Memorandum. This is, of course, true in theory, but would also allow quite the opposite in practice. The Prime Minister would be guaranteed the 'numbers' on the Committee with this requirement (along with the members from his own party at the Federal level).

I consider community input into this process extremely important, but unfortunately the appointment of community members cannot be as structured or institutional as the appointment of Federal, State or Territory members.

The appointment of up to half the members of the Committee should not be purely in the hands of the Prime Minister, and the choice should be constrained by the compulsory appointment from various groups in society – for example, delegates from the National Union of Students or other such organisation, indigenous groups, women's groups, minority groups, religious groups etcetera. Perhaps a provision could be included in the legislation to have at least 2 community members beneath the age of 25, and as far as possible, have the membership on gender parity.

Specifically, proposed s17(2) of the Bill, 'Effect of Vacancies', requires a quorum of 16 members, 8 of whom must be community members. This is inadequate as the minimum 8 community members could be maintained as politicians disrupt the rough balance intended. To ensure there is less possibility of 'stacking', the subsection should require that the Committee may only perform functions or exercise powers if there are at least 16 members, at least half of whom are community members.