

Submission on the *Plebiscite for an Australian Republic Bill, 2008* by Australians for Constitutional Monarchy

6 February 2009

1. Introduction

1.1 This is a submission by Australians for Constitutional Monarchy ("ACM") on the *Plebiscite for an Australian Republic Bill, 2008* (the "Bill"). The Bill seeks to prepare the way for the most significant and far reaching change to our constitutional system since Federation.

1.2 The polity established at Federation was an indissoluble Federal Commonwealth under the Crown, discussed in Paragraph 2 below.

- As the bill is intended to foreshadow the establishment of some as yet unknown form of politicians' republic, this submission recalls that on this issue the people have already spoken and rejected the very model preferred by a clear majority of republicans at the 1998 Convention, in Parliament, and in the media: Paragraph 3.
- Given that the constitution prescribes the one way in which it may be changed, it is

appropriate to ask why a referendum is not being proposed: Paragraph 4.

- The details of the proposed changes to the constitution should be revealed to the people before they vote: Paragraph 5.
- The referendum process is designed to protect the interests of the states - as a practical matter Queensland, Tasmania, South Australia and Western Australia. The plebiscite would override those interests: Paragraph 6.
- Millions and millions of taxpayers' money have already been diverted from schools, hospitals, water, keeping jobs etc. to this venture. The taxpayer should not be called on once again to fund the republican campaign: Paragraph 7
- The plebiscite invites a vote of no confidence in one of the world's most successful constitutional systems, with every likelihood that the eventual referendum will be defeated. It is difficult to conceive of a more irresponsible proposal: Paragraph 8.

1.2 The ACM national office is at Level 6 , 104 Bathurst Street Sydney, Box 9841 Sydney 2001, telephone (02) 92512500, fax (02) 92615033, website [http://:www.norepublic.com.au](http://www.norepublic.com.au), and email acmhq@norepublic.com.au.

1.3 The mission of ACM is to preserve, to protect and to defend our heritage: the Australian constitutional system, the role of the Crown in it, and our Australian Flag.

1.4 Launched in June, 1992, ACM is the nation's oldest and largest constitutional monarchist organization. Its Charter signatories included Justice Michael Kirby, the Rt.Hon. Sir Harry Gibbs, former Chief Justice of Australia, Justice Lloyd Waddy, Neville Bonner AO, Dame Leonie Kramer, The Hon Barry O'Keefe, Sir John Atwill, Dr Margaret Olley, The Hon Helen Sham-Ho MLC and others. The first National Convenor was Justice Waddy, who was succeeded by Professor David Flint. The national Executive Directors have been successively Mr. Tony Abbott, Mrs. Kerry Jones and Mr Thomas Flynn. Since its inception, Divisional Councils and Branches have been formed across the nation. ACM, a major grassroots community organisation, is non-aligned politically. ACM campaigns for the retention of the existing Constitution, the essence of which is declared in the Preamble to the *Commonwealth of Australia Constitution Act, 1900 (Imp.)* as approved by the Australian people. The Preamble recites the people's agreement, "humbly relying on the blessings of Almighty God," to unite in "one indissoluble Federal Commonwealth under the Crown."

1.5 In the lead-up to the referendum in 1999, ACM organized a campaign for the election of delegates to the Constitutional Convention winning 19 seats. (Other groups winning seats included the Australian Republican Movement (ARM) with 27 seats, the Ted Mack group with 2 seats, the Australian Monarchist League with 3, Safeguard the People with 2, Real Republic with 2, Clem Jones Queensland Constitutional Republic Team with 3 and Queenslanders for Constitutional Monarchy with 2.)

1.6 ACM played a significant role in the 1999 referendum campaign, with offices in every state and over 55,000 active supporters across the Commonwealth.

1.7 Today, the organisation continues to advocate the retention of the constitutional monarchy or crowned republic as the preferred model of governance for our Commonwealth, as well as support for the retention of our Australian Flag. ACM's activities are wide and diverse. They include publishing journals and books, maintaining websites, producing educational materials, providing speakers for public forums and organising gatherings where fellow Australians can have an opportunity to learn more about the unique system of government that has helped to safeguard our cherished democratic traditions and freedom. Each year, ACM holds a National

Conference which brings together delegates from its divisions and branches.

2 An indissoluble Federal Commonwealth under the Crown.

2.1 The Commonwealth of Australia is an "indissoluble Federal Commonwealth under the Crown," and thus a constitutional monarchy or a crowned republic, as term many, including the Hon. Michael Kirby, use. To the great Founding Father Sir Henry Parkes, the Australian colonies were republics *simpliciter*. Indeed, the great Catholic leader at the time of Federation, Patrick Cardinal Moran, whose statue stands at the foot of St Mary's Basilica in Sydney, described the Australian constitutional system as the "most perfect form of republican government".

2.2 In his Second Reading Speech on the Bill, Senator Brown said "The question of whether Australia should be become a republic has been close to the hearts of many Australians since Federation." Senator Brown was no doubt referring to a politicians' republic. It is curious then that no delegate at the Federation Constitutional Conventions proposed that Australia become such a republic. The republican historian, Dr Mark McKenna, says that "...the truth was that it was only through devotion to monarch and empire

that Federation was able to take place." It was not until the formation of the Communist Party of Australia in 1920 that any twentieth century political party called for an Australian (politicians') republic, albeit a "workers and farmers republic" on the Soviet model.

2.3 Before that the only significant republican movement in Australia had been one in the nineteenth century. The Bulletin, whose masthead proclaimed "Australia for the White Man" was its principal advocate. Their agenda was the establishment of an independent white republic, the principal purpose of which was to escape the racial liberalism of the Empire, particularly in relation to immigration. As noted above, the next movement was the call by the Communist Party of Australia for the establishment of a Soviet style republic. The third republican movement was driven by an agenda to remove the Crown. It only achieved political impetus when its agenda was espoused by a former prime minister, the Hon. Paul Keating, as government policy. The present republican movement is a united front between those who supported the 1999 model and those who wish that the president be elected by the people. It refuses to say what sort of republic it is proposing.

2.4 To change to such a politicians' republic, or to a model similar to that offered in 1999, would involve removing our oldest institution, one

providing leadership beyond politics and one which is a central to and an important check and balance in our constitutional system, both federally and in the states.

2.5 It is generally accepted that such a fundamental change could be achieved under section 128 of the Constitution. Some eminent jurists believe this would require the approval of the people in all the original states, which was the basis of the original federal compact. Given that only one of the successful referendums was passed with the concurrence of less than six states, the question is probably academic.

2.6 However, ACM remains of the view that it would be wrong to attempt to change the federation into a politicians' republic and to leave the states as constitutional monarchies or crowned republics. This would be, as one prominent republican said, a "constitutional monstrosity." He then introduced the bill for a referendum to do precisely that.

2.7 The threshold for constitutional change in Australia is high, but not impossibly high. This was the carefully considered choice of the founders of our nation, one which was expressly approved by the people. Change must be approved by a double majority, both nationally and federally, that is by a majority in a majority of states. Only the federal parliament, or in certain circumstances, either

house, can institute a referendum –there is no provision for a citizens' initiative or one by the states. As this must be by way of a bill, details of the precise changes are apparent before the vote. Under legislation, a handbook setting out the Yes and No case is circulated to all voters.

As the seminal constitutional text argues, these requirements are not to prevent change as such, but only to prevent change being made in haste or in stealth. Above all the intention is to encourage proper debate, and to delay change unless and until, as that text argues, there is strong evidence that the change is “desirable, irresistible and inevitable.” Given that most proposed changes have been either to increase federal powers, or perceived to reduce the federal nature of the Constitution, it is not surprising that only eight out of forty four referendums since Federation have been approved.

2.8 Notwithstanding strong media and political support, with the republicans given a free hand to draft the changes proposed, as well as being involved in determining the form of the question to be put to the people, the 1999 referendum was defeated both nationally and in all states. It is unlikely that another referendum, at least one held in the near future, would succeed.

2.9 According to the former republican leader, Malcolm Turnbull, another referendum:

“... should not be put up for another vote unless there is a strong sense in the community that this is an issue to be addressed NOW...In addition, in order to be successful a republic referendum needs to have overwhelming support in the community, bipartisan support politically and, in truth, face modest opposition. A republic referendum should not be attempted again unless the prospects of success are very, very high..... I do struggle to see how a republic referendum could get the level of support it needs to win during the reign of the present Queen.”

2.10 Turning Australia into a politicians' republic would be a more significant change than many believe. Some years before republicanism came onto the serious political agenda, an eminent constitutional lawyer, Professor P. H. Lane, argued that rather than attempting piecemeal amendment, that is the grafting of a republic onto the existing Constitution, republicans would be better advised to propose a new constitution. This advice remains ignored by most republicans.

2.11 This is not to say Australia could not make fundamental changes to her constitution. As we have seen, Australia may already be considered a

crowned republic, a proposition accepted by the Republic Advisory Committee. But those who propose fundamental change have a moral duty to understand what they are doing, and to propose change which will ensure that the constitutional system is not damaged. Unfortunately, the republican movement has a record of failing to ensure that it is always well informed on matters crucial to its campaign. During the 1999 referendum, it became clear that the republican ministers charged with advancing the republican change, as well as the republican leadership, were unaware of the process by which a member of the Commonwealth of Nations changing to a republic may seek to remain within that organization. And again, it was surprising that in publishing an attack on the Governor-General, Major General Michael Jeffery, a former head of not one, but two Commonwealth departments, demonstrated that he seriously misunderstood the role and function of the Federal Executive Council.

2.12 In anticipation of achieving some form of a politicians' republic, the agenda has been to minimize or even to hide the role of the Australian Crown. Yet the Crown is the nation's oldest institution, and is central to the constitutional and legal system.

2.13 To an extent any success in minimising or hiding the role of the Sovereign has been a side-effect of the debate over the head of state, a debate which has been condemned by a prominent republican constitutional lawyer, the late Professor George Winterton, as "arid and irrelevant". The debate arose because the principal republican argument for a republic has been the need for an Australian head of state.

2.14 This is not a term used in any of the constitutional documents of the nation, nor was it of general public usage when it was first introduced to the debate. Its origin is as a diplomatic term the usage of which is governed by international law. The term head of state gradually replaced the previous generic term "prince" which, with an increasing number of republics in the nineteenth and twentieth centuries, had become inappropriate. As such there can be no doubt that under international law an Australian governor-general is undoubtedly a head of state.

2.15 The entirely separate argument that the Governor-General is the constitutional head of state has been presented by Sir David Smith in a major work, which to date has gone virtually unanswered, and curiously, has been little reviewed by a media otherwise obsessed with republicanism.

2.16 A compromise view, one advanced by the former Prime Minister, the Hon. John Howard, is that the Governor-General is the “effective head of state.” However, recent research by ACM reveals that as long ago as 1907, the ultimate authority on things constitutional, the High Court of Australia, decided this issue. The Court held unanimously that a Governor is the “Constitutional Head” of the State and the Governor-General is the “Constitutional Head of the Commonwealth.” The bench in that case consisted of five eminent Founding Fathers, Sir Samuel Griffith, Sir Edmund Barton, Sir Isaac Isaacs, Justice Richard O’Connor and Justice Henry Bournes Higgins, who had come from across the political spectrum and who were all intimately involved in the design of our constitution. Since 1907 that decision has not been challenged.

2.17 The effect of this debate has been to emphasise the considerable constitutional functions of the Governor-General, and to compare them with those of the Sovereign, whose principal constitutional functions are to appoint and remove the Governor-General and the Governors. It would be a serious mistake to conclude the exercise of these functions is the only involvement of the Crown in the Australian constitutional system.

2.18 It is crucial for all to understand that it is not the power which the Crown wields which is important; it is the power which it denies others.

3. The people have spoken

3.1 In 1999, the people were asked in a referendum "Do you approve of an Act to alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament?"

3.2 The republican model was the overwhelming choice of the republican delegates to the Constitutional Convention, the politicians and the media. The question was approved by both republicans and monarchist politicians, although both the ARM and the ACM would have preferred changes. ACM would have preferred that the crucial and internationally unprecedented way the President could be removed should have been included. The ARM wanted two words removed.

They were any reference to the word "President" and, curiously, any reference to the word "republic". In any event, the proposal was defeated nationally, in every state and in 72% of Federal electorates.

3.3 The referendum had been preceded by the consultations of the Republic Advisory Committee (which excluded constitutional monarchists) and its report, the election of the Constitutional Convention and a major campaign. The republican movement was better endowed financially than the constitutional monarchists and had the advantage of very strong media and political support.

4. Why is the referendum process not being used?

4.1 The Constitution prescribes one method for constitutional change, a referendum under section 128. It is sometimes said that this provision makes it too difficult to change the Constitution. That is not so. As two of our Founders, Sir James Quick and Robert Garran wrote (*The Annotated Constitution of the Australian Commonwealth*, 1901, reprinted in 1995, at 988), the safeguard in s.128 is:

"... necessary not only for the protection of the federal system, but in order to secure maturity of

thought in the consideration and settlement of proposals leading to organic changes. These safeguards have been provided, not in order to prevent or indefinitely resist change in any direction, but in order to prevent change being made in haste or by stealth, to encourage public discussion and to delay change until there is strong evidence that it is desirable, irresistible and inevitable".

4.2 The Founding Fathers were aware of the misuse of constitutional plebiscites in the nineteenth century and consciously and deliberately chose the Swiss style referendum over the plebiscite. The difference is that in a referendum the details of any proposed change are on the table before and not after the people vote.

4.3 A plebiscite can not in itself change the constitution, but it is doubtful if the public knows this. Although it will be little more than an opinion poll, it will have all of the appearances of a referendum.

4.4 The plebiscite will appear to many as if it were a referendum because it will be administered in similar circumstance and places as a referendum, and simultaneously with a general election. In addition, section 6 of the bill provides that the *Referendum (Machinery Provisions) Act, 1984* will apply to the plebiscite with such modifications as are necessary to allow the submission of the

question and scrutiny of the result on the same basis as a referendum under that Act.

4.5 Since the information gained from it can readily be obtained from an opinion poll, the question has to be asked why this is being held as a disguised referendum. The first likely reason is that the proponents fear they would lose another referendum. The second likely reason is that the proponents know they are not required to give any details of what they are planning to do. The third likely reason is the proponents believe the voters will be locked into an affirmative vote in any subsequent referendum. This would assume that Australians voters have abandoned their usual independence of thought in these matters.

5. Details of the proposed change are being kept from the people

5.1 The details of the proposed change are being kept secret. It would appear that the proponents of a politicians' republic cannot agree among themselves about the form of change they want. This is akin to demonstrators chanting "We want a republic....but we haven't the foggiest idea what sort of republic we want."

5.2 There appears to be a continuing and irreconcilable division between the proponents for

a republic in which the politicians choose the president, and a republic in which the president, vice president, governors and lieutenant governors etc are elected politicians. These two camps are divided as to whether there should be a second plebiscite on the form of a politicians' republic. Nevertheless they have formed a shaky united front in the new republican movement, one which appears doomed to disintegrate.

5.3 In the question in the Bill, the Australian people will be asked to give a vote of no confidence in the Australian constitution without in any way whatsoever knowing what is planned to replace it.

5.4 ACM believes that it would be improper to invite the Australian people to vote on constitutional change without the proponents revealing what change is being proposed, and about all consequential changes under contemplation, including changes planned about the Australian Flag.

6. The proposal is directed against the states, especially Queensland, Tasmania, South Australia and Western Australia

6.1 Apart from ensuring the Australian people are fully informed about what is being proposed before

they vote, the referendum provision was designed to protect the interests of states outside of the centres of power. Accordingly section 128 requires that for any referendum to pass, it must be approved both nationally and by the people in a majority of states.

6.2 The Bill circumvents this protection this by making no provision to preserve the rights of the people in the states.

7. No more taxpayers' subsidies

7.1 Given that millions and millions of dollars have already been diverted into trying to find a politicians' republic, ACM believes that not one dollar more of taxpayers' money should be spent on this.

7.2 The taxpayer has already funded several major exercises to support the conversion of Australia into a politicians' republic. They were the Republic Advisory Committee, on which only republicans were invited to serve, the election for the Constitutional Convention, the Constitutional Convention, the referendum campaign, the referendum, a Senate Inquiry and Report, and the 2020 Summit. Vast sums of taxpayer's money have been diverted from schools, hospitals, water, the protection of jobs etc to this exercise which has effectively subsidised the republican movement.

7.3 If the republican movement cannot work out what sort of politicians' republic they want, they should pay for the cost of working this out themselves and not try to suborn taxpayers to pay for their campaign.

7.4 In the midst of a global financial crisis, is it right to divert even more of the taxpayers' funds into this obsession? This is particularly so when polling demonstrates that this is a low order issue among Australians.

7.5 In this context it is appropriate to note that the Australian people are not being invited to vote on issues of greater concern or interest to them. The desirability or not of Citizen Initiated Referenda (CIR's) is not a matter within the remit of ACM; however it would be surprising if citizens did not wonder why they are not allowed to vote on issues of concern to them if they are asked to vote on an issue about which they are not much concerned and on which they have already voted.

8. An irresponsible proposal

8.1 The plebiscite invites Australians to cast a vote of no confidence in one of the world's most successful constitutional systems. It does this

without even indicating what is proposed to replace it.

8.2. If the question in the plebiscite were to be approved, the result would be a long period of constitutional instability, although there will be every likelihood that any subsequent referendum will be defeated.

8.2 Republicans believe they would lose another referendum. That is why they want a plebiscite instead of going straight to a referendum. It is unlikely that after proper debate Australians will come to a conclusion different from that in 1999. The latest Morgan Poll indicates that even the model assumed to be more popular, a republic where the president is elected by the people, attracts 45% support. This is before any campaign or debate. Experience indicates support would fall after such a campaign.

8.3 ACM says that it would be extremely irresponsible to risk the possibility of years of constitutional instability.

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