

Senate Inquiry into an Australian Republic

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Introduction

I have been active in the republic debate for the past decade. On 1 August 1994 the Melbourne *Herald Sun* published a letter of mine, warning that any referendum to bring in a republic would fail if it did not allow the people to vote for their head of state. I suggested a compromise model, in which Parliament would make the selection, which would then be ratified by a public vote. I also suggested that the reserve powers could be converted into a right for the head of state to call a vote of the people to resolve a constitutional crisis.

In the years that followed, I urged our leaders—Mr. Keating, Mr. Howard, and the various State leaders who spoke out on the issue—to adopt a compromise model. I wrote to a number of delegates at the 1998 Constitutional Convention. My suggestion is contained within the papers of the Convention.

However, no compromise was sought, and, as predicted, the 1999 referendum failed. Even the ARM acknowledged that it was defeated by the widespread wish for the direct election of the head of state.

Following the referendum defeat, I set out to construct a model with full direct election of a President who would have the same constitutional powers that the Governor-General does today. Richard McGarvie kindly checked my draft Constitution; in his opinion it was sound. (He did, however, believe that his own ultra-minimal model would prevail.) My draft Constitution, and a lengthy discussion paper on it, were widely distributed in April 2000.

Following the announcement of the Senate Inquiry in mid-2003, and Mark Latham's ascension to the leadership of the ALP on a platform including support for a direct-election republic, I followed through on an earlier recommendation that my April 2000 manuscript be expanded into book form.

The book, which has a working title of *A Republic For All Australians*, will be ready for publication in 2004. Pre-publication proofs of the manuscript will be sent to members of the Senate Inquiry in mid-January 2004. For copyright reasons I cannot include it with this formal submission, but non-distributable copies may be obtained from me directly by any other interested parties.

My answers in this submission are brief, and provide only an indication of the opinions and arguments presented in *A Republic For All Australians*. But I remain flexible on many of the fine details, and on the proposed mechanisms for progress. I commend this Senate Inquiry for its flexibility, foresight and vision.

John Costella

Responses to Discussion Paper questions

Question 1 *Should Australia consider moving towards having a head of state who is also the head of government?*

No. The Australian people would not support the Prime Minister becoming our head of state, nor is there more than negligible support for a U.S.-style executive presidency.

Question 2 *What powers should be conferred on the head of state?*

The President should be given powers that very closely approximate those of the Governor-General today. This is no trivial task. Direct election of the President changes the balance of power substantially; such a President has a greater popular mandate than the Prime Minister. The Constitution needs to have compensating changes made if we are to retain the status quo, with the President being the non-partisan guardian of the Constitution on behalf of the people of Australia. See *A Republic For All Australians* for the full details.

Question 3 *What powers (if any) should be codified beyond those currently specified in the Constitution?*

The President should retain a discretion to not act on Ministerial advice in those circumstances which correspond to the reserve powers of the Governor-General today. Such an action must be accompanied by an “emergency vote” of the people to resolve the crisis (to dismiss either or both Houses of Parliament, or the President, or any combination of these three). This should be written into the Constitution, together with specified time periods within which the President must act, one way or the other, or else face automatic dismissal. The President should also have the discretion to actively call an “emergency vote” if they see fit. The Constitution will specify that all other actions of the President *must* be in accordance with Ministerial advice, that all business of the Executive Council and the Government in general must be kept confidential by the President, and that the President may not be a member of a political party while in office, nor take advice from the Opposition without Ministerial permission. The commissioning and decommissioning of Ministers, and the dissolution of the House of Representatives, will continue to be performed by the President but only on the recommendation of a resolution of the House of Representatives.

The issues are complex, and I refer the interested reader to my manuscript. Basically, however, the idea is that the President only acts on Ministerial advice, but has a time period in which the “advise and warn” philosophy may be employed fruitfully. If a constitutional crisis is looming, the threat of an “emergency vote” will usually provide a solution. If not, the people will decide which of the three components of our Federal Parliament (the President, the Senate, or the House of Representatives) need to be replaced. There is no need for the constitutional contortion of a Dismissal to bring about such a solution. In

further recognition of the remarkable power of the Australian Senate to block supply, a constitutional provision will be added so that, while awaiting an “emergency vote”, temporary supply may be authorised by the President.

In other words, the *mechanisms* by which the President may invoke the reserve powers will be fully codified—and in some respects will introduce completely new machinery—but the *reasons* for invoking such powers will be left completely discretionary. I agree with those scholars who believe that full codification of the reserve powers would make them too inflexible and, ultimately, fragile. I disagree, however, with those commentators who argue that a directly elected President could be simply given the Governor-General’s powers holus-bolus, without greatly endangering our current form of parliamentary government. The structures need to be strengthened to *enforce* the non-partisanship of the President. Again, my manuscript goes into much greater detail on these issues.

Question 4 *Should some form of campaign assistance be available to nominees, and if so, what assistance would be reasonable?*

No assistance should be provided. The office of President will be designed to be that of a manifestly non-partisan umpire, like the Governor-General today, and all political parties will realise that they face more damage than advantage by pushing a partisan candidate. The President will be a well-respected Australian, who the people believe will be a good watchdog over the Parliament on their behalf. The method of selection will also dissuade any political campaigning (see Question 7 below).

Question 5 *Should/Can political parties be prevented from assisting or campaigning on behalf of nominees? If so, how?*

This follows on from Question 4. If the office of President is well-designed, there will be no incentive to campaign on behalf of nominees. Regardless, I do not believe that there is a need for constitutional limitations on such activities; if, for some reason, it became a problem, ordinary legislation could be passed to moderate or ban the practice.

Question 6 *If assistance is to be given, should this be administered by the Australian Electoral Commission or some other public body?*

No assistance to be given.

Question 7 *If the Australian head of state is to be directly elected, what method of voting should be used?*

This process is crucial, and no effort or expense should be spared in getting it right. My recommended method of election may seem complicated, but each step plays a crucial logistical, political and constitutional role.

Firstly, both Houses of Parliament come together to form the “Presidential Selection Council”, which will take nominations from citizens and organisations, and indeed will take advice from the news media and polling organisations. An in-camera subcommittee will sift through the many nominations, and select 36 nominees, who must agree to their nomination. This large number will allow representation of worthy nominees from the various States, walks of life, ethnic and indigenous groups, and so on, but will allow the weeding out of frivolous nominations.

These 36 nominees will be discussed publicly in the Presidential Selection Council’s joint sitting. It will be expected that the virtues of the nominees will be extolled; this will, in itself, be a way of honouring them. If an obviously partisan nominee has been “put up”, however, the debate will be less favourable.

Nine nominees will then be selected by the Presidential Selection Council as candidates, for a vote of the people. Opinion polls may be used to aid the formulation of this final shortlist. Our parliamentarians will ensure that the shortlist is sensible, yet fully supported by public opinion.

All the voters of Australia will then have a vote. The ballot paper will have ten places: the first nine will be the nine nominees, with places determined by lot; the tenth will be “none of the above”. All ten places will be numbered preferentially from 1 to 10 by voters. If “none of the above” gains the greatest number of first-preference votes, then both Houses of Parliament are automatically dissolved. In other words, don’t try to stack the ballot paper.

The Presidential Selection Council then meets again to crunch the numbers. It is crucial that there is *no* pre-determined mathematical formula to determine a “winner”; any mathematical formula can produce a result that is contrary to common sense in some situations. (Just look at the AFL’s agonies over the years with its Finals; every formula seems to provide a silly result after just a couple of years.) The numbers can be analysed in as many different ways as might shed light on the result; wide support across most, if not all, States would be most preferable. The process can be made public, so that the media can digest the figures and get public feedback.

Finally, the Presidential Selection Council will, on the basis of these exhaustive analyses, choose one of the nominees as President-Elect.

To ensure that the people concur that this has been done fairly, and to ensure that all Australians rally behind the new President, this decision will be put to a ratification vote, generally one week after the preferential vote. If our parliamentarians have done their job impartially and fairly, to the best of their abilities, the choice will be ratified. The same majorities will be needed as for a referendum, so that up to two States can disagree with the result without it being thrown out—although it would be more usual to expect an overwhelming ratification in every State. The President-Elect, after all, will, in some sense, be the most respected Australian in the land.

Question 8 *If direct election is the preferred method for election of a non-executive president, will this lead to a situation where the president becomes a rival centre of power to the Government? If so, is this acceptable or not? If not, can the office of head of state be designed so that this situation does not arise?*

This is a very real danger, and anyone who argues otherwise either does not understand our system of government well enough, or has not given it enough thought.

It is not acceptable. If an executive presidency were desired, we should re-write our Constitution to create one; but, as noted above, I do not believe there is anything but negligible support for such a change.

The office of head of state *can* be designed to prevent this situation. It is not trivial, but it can be done. My book discusses these issues in great detail; my answers here provide a skeleton outline of how it can be done.

Question 9 *Who should be eligible to put forward nominations for an appointed head of state? For an elected head of state?*

In my model, any Australian citizen or organisation may put forward nominations to the Presidential Selection Council.

Question 10 *Should there be any barriers to nomination, such as nominations from political parties, or candidates being current or former members of parliament?*

No. Former politicians with suitable personal qualities have made good Governors-General; they can make good Presidents just as well. Provided that the public is given a choice, and provided that the choice is real (i.e. that there is a “safety valve” to avoid the ballot paper being stacked with political or unpopular choices), then there should be no barrier to politicians being nominated. The people should be able to make that choice for themselves. These properties are built into my model.

Question 11 *Should there be a maximum and/or minimum number of candidates?*

My model specifies that the Presidential Selection Council selects 36 nominees, from which 9 candidates are selected. There is no limit to the number of nominations that may be made to the Presidential Selection Council.

Question 12 *Should there be a minimum number of nominators required for a nominee to become a candidate?*

In my model, this part of the process is carried out by the Presidential Selection Council. It is not directly dependent on the number of nominators. Indi-

rectly, however, public support, reported through the media, will influence or dictate these decisions.

Question 13 *What should the head of state be called, Governor-General, President of the Commonwealth of Australia, or some other title?*

President of the Commonwealth of Australia.

Question 14 *What should be the length of a term of office for head of state?*

I believe that this should be left unspecified in the Constitution.

A non-binding undertaking could be made at the start of a President's term, indicating how long they expect to hold office before resigning. In the first instance, that may be five or seven years. But the President should be able to remain in office to oversee the Parliament and the Executive Government, especially when these may change after an election; it would not be wise to tie presidential elections to general elections, because this would send mixed messages to the electorate. Having a presidential election mid-term would be the best outcome.

I would argue that a dignified President, who has been a credit to the office, should be allowed to choose their own retirement date, at their own choosing, when the time comes. This will also avoid pretenders being "groomed for the job" throughout a President's term. Avoiding a regular schedule of presidential elections will help take the office out of the sphere of partisan politics.

Question 15 *Should a head of state be eligible for re-appointment/reelection?*

If the President is dismissed by an "emergency vote", or if they are dismissed automatically because they transcended their powers by failing to act on Ministerial advice but also failed to call an "emergency vote" to resolve the crisis, then they should be ineligible for re-election at any future time.

In all other circumstances, a President should be eligible to be re-elected in the future. However, I am also recommending that there be no fixed terms, and that, in the normal course of events, a President will retire at a time of their choosing. This means that, barring exceptional circumstances, a President will not usually seek re-election.

Question 16 *Should there be a limit on the number of terms an individual may serve as head of state?*

No. See Questions 14 and 15.

Question 17 *Who or what body should have the authority to remove the head of state from office?*

If the people of Australia want to decide who the head of state is, then they will hardly tolerate anyone taking away their right to determine whether the head of state should remain in that office.

I recommend that either House of Parliament be empowered to call an “emergency vote” of the people, seeking to dismiss the President. The case can then be put before the people. Of course, the President may simultaneously seek to dissolve the House that sought their dismissal. (This is discussed in detail in my book.)

In clearly justiciable cases (for example, a President failing to fulfil the eligibility requirements for office), the matter might alternatively be dealt with by the High Court. One would expect this to be a rarer occurrence.

Question 18 *On what grounds should the removal from office of the head of state be justified? Should those grounds be spelt out?*

In general, they should not be spelt out. Either House of Parliament should have untrammelled power to call an “emergency vote” of the people to dismiss the President. The grounds can be then laid before the people. Of course, this same House will need to defend its own actions, if the President simultaneously seeks to have it dissolved.

There are some special cases that call for explicit codification in the Constitution. If the President is unconscious or incapacitated for an extended period of time (say, for more than a couple of days), and both Houses pass a resolution to terminate the President’s office, then that should occur. If a recovery occurs before the presidential election is held, the former President can be re-nominated. Likewise, if a President disappears (either in the mode of Holt, or simply goes into hiding or leaves the country), then there should be a process by which the Prime Minister can publish a public notice requesting to be received by the President, and if the President does not respond, the office should fall vacant.

Question 19 *How should a casual vacancy be filled?*

In my recommendation, *all* vacancies of the office of President are “casual” vacancies; there is no fixed term of office.

When the office of President falls vacant, a Presidential Council will automatically be constituted, to carry on the President’s duties in a “caretaker” role. This Presidential Council will have exactly one representative from each State. This representative will usually be the Governor of the State, but there are provisions to allow for other residents of that State to step into the role if the Governor is not present; for example, in time of war or great natural emergency. The hierarchy would go through former Governors of the State, former

Members of Parliament of the State, and finally ordinary citizens of the State who have been resident in the State for a specified period of time.

Question 20 *What should the eligibility requirements be for the head of state?*

The same as the eligibility requirements for a member of the House of Representatives.

Question 21 *On what grounds should a person be disqualified from becoming of head of state?*

The same as the grounds for disqualification from becoming a member of the House of Representatives.

In addition, before taking the oath or affirmation of office, the President-Elect must resign from any political party they may be a member of, and from being a member of any parliament, and from any position of employment or remuneration they may hold. In cases where it is not in the President-Elect's power to resign from a position of remuneration (for example, in a trustee arrangement) then a signed undertaking must be made to donate any net remuneration from such an unavoidable arrangement to Consolidated Revenue.

Question 22 *Should the head of state have power to appoint and remove federal judges?*

Appointment should be by the President in Council, as it is today by the Governor-General in Council.

The power to remove a federal judge should be passed to the people, by the same process of an "emergency vote", called by either House of Parliament, or by the President. Such a judge, however, should then be empowered to simultaneously seek the dismissal of either House of Parliament, the President, or any combination of the three.

Question 23 *Should the head of state have the prerogative of mercy?*

There should be no change from the prerogative of the Governor-General.

Question 24 *Should the head of state be free to seek constitutional advice from the judiciary and if so, under what circumstances?*

The President should be free to seek constitutional advice outside that provided through Ministers, but not from serving federal judges, particularly not from serving High Court Justices; there is too much risk of conflict of interest, or apparent conflict of interest.

Presidents clearly need some assistance with constitutional law, but this advice should not be from any member of a political party who is not a Commonwealth Minister, nor from a State parliamentarian, and so on. The advice should be as independent as possible.

Question 25 *What is the best way to deal with the position of the states in a federal Australian republic?*

Each State should be free to determine for themselves how to deal with the republic issue. Forcing them to do otherwise is against the spirit of our Federation. (Senators need hardly be reminded of this!)

Question 26 *Should there be an initial plebiscite to decide whether Australia should become a republic, without deciding on a model for that republic?*

This could be dangerous.

The question made sense in 1996 when Paul Keating suggested such a plebiscite. The republic issue was still new, and people had not yet made up their minds. After the 1999 referendum, this is no longer the case.

If there was truly no indication given as to what sort of model is in mind, the question would be meaningless. If it could be painted as a return to a Turnbull republic, it may even be defeated.

However, with Mark Latham expressing clear support for direct election, such a question may now be interpreted—implicitly—as asking whether Australia should become a direct-election republic. It would then succeed.

I can see no reason why this “threshold” plebiscite cannot be held at the same time as another on the favoured model. That would allow all republicans the chance to say “yes” to the first question, because they would be expressing their clear opinion in the second question. There would be no fear that their support would again be hijacked for a “politicians’ republic”.

Question 27 *Should there be more than one plebiscite to seek views on broad models? If so, should the plebiscites be concurrent or separated?*

If you put my model up against any other model—broad or otherwise—it will win the plebiscite. There is no need for more than one plebiscite on the desired model.

Question 28 *Should voting for a plebiscite be voluntary or compulsory?*

It should be compulsory. When all other Federal and State voting is compulsory, a voluntary vote stands out as either not really serious, or else an attempt to skew the results. A full vote of all Australians only costs \$3 a head. It’s a small price to pay for our future.

Question 29 *What is the best way to formulate the details of an appropriate model for a republic? A convention? A parliamentary inquiry? A Constitutional Council of experts?*

You only have to read my book. Then put it to a referendum. Easy.

Seriously, any or all of these options are fine. It doesn't matter what procedures you put in place: what matters is that the details are sorted out to create a republic model in which the President is elected by the people, in which the President has the same powers as the Governor-General does today, and which is constitutionally sound and robust against attempted manipulation. Any model that satisfies these requirements will be overwhelmingly supported by the people of Australia.

My model satisfies these requirements, and I have the constitutional amendments ready to go for you. A full copy of the amended Constitution is contained in the final chapter of my book.

Alternatives that satisfy these requirements could be created. Or my model could be altered in small ways, depending on feedback from a convention, an inquiry, a council of experts, or any combination of these. Just don't forget to invite me along too.

Question 30 *What is the preferred way for a process to move towards an Australian republic?*

Politically, the preferred way is probably through the mechanisms you outline above. But the Australian people don't really want to have to work out all the fine details for us. They want to elect their President; they don't want our system of government to change; they don't want the President to have any less power than our Governor-General now has; they don't want to abolish or curtail the Senate; they don't want to mess with the States; they don't care how many constitutional amendments it takes the legislators to make it happen. Put all these things together for them in a referendum proposal, and they will vote it into existence. There is no question about that.

That's always been my philosophy, and that's the philosophy espoused in my book. I've done the hard work for you—and I have no political axe to grind. But Section 128 of the Constitution doesn't allow me to put it up at a referendum—that's something that only Parliament can do.

I have faith in you.