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The Secretary
Senate Legal and Constitutional References Committee
Parliament House
Canberra Act 2600

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Submission on Inquiry into an Australian Republic

This submission is lodged to assist the Committee in considering its terms of reference.

Personal Details

I am a third generation native born Australian Citizen. Five generations of my ancestors have been in this country for over 150 years.

I have never been a member of any political party. I am an ordinary member of the Australian Republican Movement but have never held any positions in that movement. I am 50 years old, am a lawyer with an interest in constitutional law but do not practice in that area.

This submission represents purely my own views.

My submission

This submission addresses the Committee's terms of reference and certain questions raised in the Committee's discussion paper.

The most appropriate process for moving towards the Establishment of a Head of State

We have already had a referendum in which a minority, but nevertheless substantial minority, of Australians indicated their desire for an Australian Republic based on the model presented to them. Polls would suggest that there is a clear majority of Australians who support the general concept of a republic.

I believe the Parliament should put trust in the intelligence and good sense of the Australian People. It should be the people rather than politicians which set the agenda. Rather than a series of referenda (or plebiscites), I suggest one referendum putting a series of key multiple choice questions. An attempt to initially ask simply whether people want a republic or not, will likely fail, as no matter what the process people will feel they are being asked to sign a blank cheque. Each question should give all obvious choices.

I believe the referendum should ask the following key questions:-

- i. Do you support the general concept of an Australian Head of State responsible to the Australian people rather than our symbolic head being the British Monarch as King or Queen of Australia?
- ii. Do you think our head of state should be called
 - (a) President
 - (b) Governor-General
 - (c) King or Queen
- iii. Would you like that person to be selected by:
 - (a) being directly elected by the people
 - (b) being elected by a substantial majority of the Parliament
 - (c) being appointed by the Prime Minister of the day after consultation
 - (d) entitlement of birth based on a system of hereditary monarchy.
- iv. Would you like the head of state to be
 - (a) Powerful with the right to select who he or she considers the right people to run the government subject to controls imposed by Parliament.
 - (b) Symbolic with only limited specified powers with the main power remaining with the leader of the majority party in the House of Representatives as Prime Minister.

Once the people have provided their answers, an all party committee of members of Parliament and constitutional experts should be asked to prepare a model which as far as possible addresses the majority view with necessary safeguards. Extensive hearings and consultations should take place to ensure all interested citizens can put their views. The resulting model should then be put to the people for either approval or rejection.

It might be said this approach is too democratic, may raise too many conflicting ideas and may not produce a result that a majority of the Parliament are happy with. This may be true but if we are not ready for democracy then we are not ready for a republic which after all does mean “of the people”.

The Functions and Powers of Head of State

It follows from the above that this should be a matter primarily for the people to answer.

However I make the following observations:-

1. If one is to consider the functions and powers of the Head of State we must recognise the current reality. On Federation we were effectively an internal democracy but with the imperial government in London still having a significant role in military and external affairs matters. At the time this was seen as a natural and beneficial part of Australia's membership of the British Empire. Part of this was the role retained in the Constitution for the appointment by the British Monarch of British representatives to perform the vice regal role of Governor-General in the new Australian Federation.
2. Since Federation Australia has, with the exception of the constitutionally symbolic role of the British monarch developed as a fully independent nation and Britain has itself changed and moved away from its focus on its empire (and now Commonwealth) to a focus on its membership of Europe both economically and politically.
3. At the beginning of last century the Monarch and Governor-General were seen as a balance to local interests and part of the checks and balances of the system and a very real link to the British Empire and "home".
4. Today although the constitutional arrangements remain the same, we no longer see either Britain or the British Monarch in the same way, and the British Monarch is no longer seen as having any real role or influence in the course of Australian events in the way Queen still has in the United Kingdom. As a result the role and influence of her representative the Governor-General, has also diminished.
5. Whilst at times, given this reality, the Governor-General of the day has sought to re-invent his role as one of a representative of Australians (a defacto Republican role) this has not always been welcomed by the Government of the day and really flies in the face of the constitutional position.
6. As a result, the Prime Minister is rapidly becoming the defacto Head of State and Head of Government combined. This is because in the absence of a relevant role for the Governor-General the Prime Minister is rapidly assuming the symbolic role as the head of all Australians previously performed by the British Monarch as sovereign and through her representative the Governor-General. As distinct from the position at Federation the Prime Minister of the day has now has an unfettered discretion to appoint the Governor-General (who is now always Australian) by so advising the British Monarch. As a result except in times of constitutional crisis the role of Governor-General has in reality become subservient to the Prime Minister, which of course the opposite of the original intent.
7. In assuming this role the Prime Minister of the day is not subject to the checks and balances which exist in the American system. As long as he (or she) maintains the confidence of his or her own party the Prime Minister can pass legislation and control the executive arm of Government in ways, which despite all his powers, can only be dreamed of by an American President. Generally the only check on this power is the High Court, and, where it is not controlled by the same party, the Senate.

8. The issue then is not whether we should maintain the status quo, or whether a President might detract from the traditional role of the Prime Minister, but whether we are content to allow the continued evolution of the office of Prime Minister as both executive head of government and de facto Head of State without appropriate checks and balances.
9. The functions and powers of the Head of State will depend on the model selected. One model may be to formalise the current effective position by making the Prime Minister also President. This would appear to be dangerous. The second option is to create a symbolic head of state to clearly distinguish that role from the role of the Prime Minister. The above discussion and the result of the 1999 referendum would suggest that for this to be effective the Head of State should be transparently appointed other than at the whim of the Prime Minister or politicians and that the people have a direct say in the process. The third option would be to create a powerful, directly elected executive President on the American model, but like that model, completely separate from Parliament.
10. Again, the model selected should flow from the preferences of the people.

The method of selection and removal of the Head of State

I believe that one of the lessons of the 1999 referendum is that Australians are not comfortable with a selection process which denies them a direct say in the system.

It could be argued that part of the reason for the disaffection of Australians from the current political system is the lack of direct democracy. Whilst Australians elect their Member of Parliament and thereby have a say in selecting the majority party this is a very limited form of democracy.

This is because:

- Many Australian live in electorates where the same party always gets elected
- Even in marginal electorates the only persons usually likely to be elected are members of the 2 main parties. When there are genuine independent candidates available, these are often enthusiastically embraced by the electorate.
- Under Australia's disciplined party system, members of parties have to follow the party line.
- Because of the similarities between the major parties, even general elections provide only limited choice.

In particular, the people have no direct say in the selection of the Prime Minister and can only choose between the 2 major parties who select their leaders. If they prefer the policies of a party but not its leader they must make a choice between the two.

As this is the only real means of Australians directly deciding how they are led, elections have become "presidential" with the main focus being on the character and qualities of the Prime Minister and potential Prime Minister rather than policy. This

only reinforces the current reality of a powerful combined “Presidency” and Prime Ministership.

In these circumstances it seems clear that whatever the particular difficulties Australians, will not support a republican model which does not give them a say in the selection of the Head of State probably by direct election. For the reasons given above, people are unlikely to accept even a substantial majority of the Parliament as their legitimate proxies in this regard.

The Relationship between the Head of State with the executive, the Parliament and the Judiciary

This is a complex issue and will obviously be affected by the model selected.

Whilst retaining the “Westminster system” of Parliamentary democracy our federal Constitution was heavily influenced by the American model.

Indeed, the constitutional crisis which developed in 1975 can be seen as a conflict between the concept of the primacy of an executive deriving its powers under the sovereign from the House of Commons (in our case House of Representatives) on the British model, and a powerful Senate controlling the executive, on the American model. As discussed above the always limited, but now even symbolically diminished, role of the British Monarch in our case has also weakened the checks and balances existing under the British system.

Given that our original Constitution was influenced by the American Constitution it seems logical that we look to the American experience in developing the relationship between the Head of State, the Parliament and the judiciary.

It is interesting to speculate that even in the late 19th century, the fathers of Federation foresaw that we would eventually move further along the American model towards some form of republic. Of course there were individuals who had republican views even then. Certainly the choice of name “Commonwealth of Australia” has a definite republican tone. So does the fact that constitutional amendments must be referred to the people for approval by referendum.

How far we move towards a full American model or indeed some other model is of course a matter to be decided. The Irish model has also been referred to as an example of a symbolic Presidency. However given that our Constitution was originally influenced by the American Experience, it seems logical to look to that experience in determining the relationship of the Head of State to the other arms of Government. Even if we maintain the so called “status quo” we should definitely consider additional checks and balances on the American model in relation to such matters as the appointment of the Governor-General, the appointment of members of the High Court, the making of treaties, the declaration of war and the oversight of Ministers and the bureaucracy, to address the increasing lack of accountability of the office of Prime Minister, no matter who the occupant. This is necessary as the Westminster concepts of responsible government break down, in the face of increasingly complex and powerful bureaucracies and the increasingly “presidential” nature of the office.

No one claims of course that the American system is perfect, including I am sure most Americans. Indeed there are excesses of that system we would not want to emulate. However as in the past I think we can draw lessons from that system. We can also draw upon the Irish and other systems as appropriate. We can apply the best features of those systems in our own way, which regardless of the structure of the Constitution will always be distinctly Australian.

Summary

My essential position is that the issue of a move to a republic is an important one for the Parliament and Australia and Australians.

Regardless of one's views on the merits of a Republic or a Constitutional Monarchy it is clear that the current system has developed serious deficiencies which must be addressed. These relate particularly to the role and functions of the office of Prime Minister.

Whilst Parliament has a role in identifying options and informing the debate, it should be left to the people to decide what model they prefer.

Yours faithfully

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