

Submission to the Senate Inquiry into an Australian Republic

Introduction

The first assumption on which this submission is based is that the organisation of Australian government, and therefore the Constitution, will not be able to meet the challenges that the Australian community will confront over the next half century.

These include:

- an ageing Australia where more than 25 per cent of the population will be over 65;
- younger, working age Australians will have a reduced standard of living compared with those living today;
- our population on present migration levels will be more than 27 million, or another two cities the size of Sydney; and
- half of our children (under 15) will be living in poverty.

To develop policies to manage these challenges, our political system needs democratic reform.

The other assumption is that reform of the Constitution, on the past history of referendums, will be difficult where there is not broad community consensus. This has been most recently demonstrated by the referendum on the republic. The only glimmer of hope that came out of that vote, as well as some opinion polls, is that a referendum in favour of a directly elected head of state may receive the support of a majority of Australians. To argue for this model will be the starting point of this submission.

The caveat is that a single referendum may not be able to settle all the issues related to implementing constitutional change in favour of a popularly elected head of state. The proposed process of plebiscites and conventions may do as much to delay as to facilitate what would most likely be the preferred outcome. The devil, as the Senate's discussion paper highlights, is in the detail.

With this in mind, I would like to digress briefly at the outset to propose an alternative route that possibly would require only one referendum. This proposal, however, is predicated on electoral reform providing for proportional representation in the House of Representatives, similar to voting for the Senate. The effect of this change would be to ensure that the Parliament is more representative of the will of the people than it can be under the present system of preferential voting for the lower house. A more democratically elected Parliament would command greater confidence and trust than at present, where the government is formed and the Parliament dominated alternately by the two major parties.

A reformed Parliament may then be in a position to claim that it should be empowered to amend the Constitution through the normal legislative process

rather than needing to resort to a referendum. To give the Parliament this power would of course require a referendum - the last. A democratically elected Parliament would be able to pass the necessary legislation on becoming a republic, including which model and the other issues identified in the discussion paper. No more referendums, no more conventions, and no plebiscites. Such a Parliament, incidentally, would also become in practice the sovereign Parliament it remains in theory.

This is perhaps not the revolutionary step it may seem. Until *Trethowan's* case (Attorney General for New South Wales v Trethowan) in 1932, relating to the manner and form of amendment of the NSW constitution, it remained unclear whether Australian constitutions at the state or federal level could be amended by any subsequent Act of Parliament. The basic issue was whether, in proposing to amend its constitution, a sovereign parliament exercising plenary power was bound to act in accordance with the 'manner and form' requirements prescribed in a constitution act made/passed by a predecessor parliament. In *Trethowan*, the Privy Council decided the question. Effectively, it entrenched the Constitution by requiring referendums to amend it, as provided under section 128.

My proposal is that we should turn the constitutional clock back to where it stood before 1932. That is to say, the Australian Parliament, acting as a sovereign parliament, should not be bound by 'manner and form' requirements in amending the Constitution.

This would require a public education campaign that would include visiting not only an obscure corner (but crucial turning point) of our own constitutional history but also adverting to the fact that the Australian parliament is modelled directly on that of the United Kingdom, which has no written constitution. No awareness campaign, however, would be likely to persuade the Australian people in the present day to give back power to amend the Constitution to the Parliament in the absence of electoral reform, namely, proportional representation in the House of Representatives. Since neither major party is likely to support electoral reform we have reached another sticking point.

The question becomes which is the more likely to be overcome: continuing down the present path with limited likelihood of any constitutional change in the foreseeable future or also canvassing this other option for parallel public consideration, perhaps with a no less limited prospect of success, given the two-party duopoly?

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

Yes.

This process would effect a true separation of powers on the American model. In the light of their experience with the British government, the American constitution-makers became committed to the notion that the executive (meaning the head of state as the head of government) should be separate

from the legislature. James Madison, for example, writing in 1792 said that the separation of powers comprising the legislature, the executive and the judiciary was “a first principle of free government.”

The separation of powers was the first of a series of checks and balances required to prevent corruption of government and abuse of power by any one individual, faction or party. Other checks included a bicameral legislature and, under a federal system, separate state governments (on the role of the states, see further Question 25 below).

By the ‘Madisonian’ test Australia does not have ‘free government’ because the executive is domiciled in the legislature. Its head is the Prime Minister, who is the leader of the party controlling the majority in the House of Representatives. The Cabinet or Ministry is made up of members of the government from both the lower and the upper houses. The upshot of this customary arrangement is to subordinate the legislature to the executive. The Parliament, sovereign in theory, would be transformed into little more than a rubber stamp for the executive if the government of the day also held a majority in the Senate.

While having a strong preference for a directly elected head of state, the Australian people would not accept an immediate move to an American-style presidency. This is in part because of our constitutional tradition and negative perceptions of the American system as it has evolved over the past two hundred years. Arguments about the need to have a strict separation of powers to prevent abuse of power would make little headway, also in part because we are not accustomed to think about the implications of this principle, despite the fact that it is enshrined in the Constitution.

In recognition of these facts, a change that may command popular support would be a popularly elected head of state, while for the time being keeping the present and familiar Westminster system.

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

A directly elected head of state under the transitional model would have the same powers as the present Governor-General.

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

None.

A directly elected head of state would start a process of political evolution that would lead eventually to a full separation of powers, or government on the American model as it was originally established. The office, symbolising the executive power, would attract ideological support from that doctrine, as well as from owing its existence to direct election. The office’s powers should not be codified so that in any future political crisis as occurred in 1975 the head of

state would have the legitimacy of popular election to exercise the reserve powers.

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

Yes.

Secretariat support should be funded similar to that for electorate offices of federal Members of Parliament, up to a limit to be agreed, from the date of acceptance of the nomination by the Australian Electoral Commission or for three months before the poll, whichever is the later. This would allow for nominations to be accepted at any time during the incumbency of a President but nominees would receive funding support only for three months preceding the poll. Expenses in excess of that allowance would be reimbursed only if the candidate received one per cent of the vote, again up to a limit to be agreed.

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

No. However, an upper limit on the amount of campaign funding should be imposed.

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

The Australian Electoral Commission.

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

Optional preferential voting.

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?*

As indicated at Questions 1 and 3 above, a directly elected, non-executive president may become a rival centre of power to the Government depending among other things upon what unanticipated events occur. The emergence of a rival power centre may facilitate the formal separation of the executive from the legislature, which would not be widely accepted at present. Through direct experience, it may bring with it a general recognition and acceptance that having an executive separate from the legislature is the best way to organise government to prevent the abuse of power.

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

For an elected head of state it should be nomination by persons eligible for registration on an electoral roll of a Federal Division. Only one candidate may be nominated by any one nominator.

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

There should be no nominations from political parties in the sense that party nomination is sufficient as at present under the Electoral Act for endorsed party candidates. All candidates would be effectively required to stand as 'independents' with the required number of nominators (see further Question 12 below).

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

No.

Nomination requirements should make this unnecessary (see Question 12 below)

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

Yes.

For non-party (independent) candidates, the minimum should be 50 nominators as for an independent candidate standing for election to Parliament under the Electoral Act. For candidates who are current members of political parties (that is, party candidates) a minimum of 500 nominators should be required, as for the registration of a political party. Lists of nominators for each candidate to be made available for public inspection on the same basis as for independent candidates standing for Parliament under present electoral law.

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?*

Four years, with the caveat that presidential elections are not to be held simultaneously with federal elections.

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

Yes.

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

Yes. A maximum of two terms only.

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

The Parliament.

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

Grounds for removal would comprise 'proven misbehaviour or incapacity' as determined by a majority of members in a joint sitting of both houses of parliament (cf impeachment proceedings under the US constitution).

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

By conducting a new election.

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

Eligibility requirements should comprise:

- Australian citizen
- Continuous residence for a total of 10 out of previous 12 years
- Minimum age 35 years
- Renunciation of allegiance to any other state.

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

Section 44 provisions as well as being a member of parliament (whether federal, state or territory) but not a former member of parliament. Current membership of a political party should not be grounds for disqualification but only if the nomination requirements above at Question 12 apply.

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

As at present.

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

No.

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

No, if a system based on a strict separation of powers of the executive from both the legislature and the judiciary is accepted as the ultimate goal.

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

A federal system of government adds to the range of checks and balances designed to curtail the abuse of power. Under this system, it would seem that the states are immune from scrutiny as to the importance of their role. Indeed, if a poll were conducted on abolishing the states, many Australians would probably support their continued existence on the grounds that the states act as a countervailing weight, particularly where the federal government is of one political persuasion and the states another, as at present.

From one perspective this is positive for it shows that Australians have a strong distrust of political power and those who would wield it unchecked. As a people we have an ingrained view that there must be checks and balances to prevent the abuse of power. We are 'classical republicans' by nature, if not by education.

On the negative side, an unthinking commitment to the 'checks and balances' argument may conceal from us certain facts about our political and constitutional evolution as this has impacted upon the role of the states. Decisions by the High Court under the external affairs power have deprived the states of their legal autonomy in the area of those powers left to the states when the Constitution was drawn up. Fiscal centralisation commencing with another High Court decision in World War II has deprived the states of any autonomy in that area. Effectively, the states have become an artefact of the old federation, and a very expensive one to keep at that (the cost of duplication has been conservatively estimated at \$30 billion).

A consistent application of the 'checks and balances' argument in this area would in fact recognise that *de facto* the states have already been abolished. It would seek their *de jure* abolition primarily on the grounds of fiscal expediency. In their place, local/regional governments or authorities (but fewer than the number of local government bodies we have at present) would be recognised constitutionally as forming the second of a two-tier system of government. They would be recognised as providing the checks and balances needed to ensure that central government policies and programs interfaced with the needs of local communities, as identified at the local level.

There is no reason, therefore, why advocating the abolition of the states should not in fact gain force from harnessing the weight of 'checks and balances' theory. Quite simply, despite the cynical use of federalist rhetoric (states' rights) by state politicians, the old colonies transmuted into states no longer provide any checks or balances and cannot in the future. However, the elevation of local or regional government into the role may fulfil that purpose. Discussion about the abolition of the states, then, properly should proceed in the context of the republican debate, in particular advocacy of a head of state elected directly by the people.

As an afterthought, one may ask how can we retain a Senate if we abolish the states? Allowing that the Senate may have evolved into a role as a 'house of review', it remains constitutionally the states' house. The answer given by a classical republican theorist would be that the main purpose of an upper house is to provide a countervailing weight to the lower house. A bicameral legislature is needed to prevent abuse of power. How the constituency of the upper house is defined is not material. From a democratic perspective it would be elected by proportional representation (as at present) and on the basis of 'one vote, one value'. State boundaries become irrelevant.

As with a head of state elected directly by the people, a Senate elected on those principles would acquire a status and prestige that it is unable to command at present. Most certainly the Senate does not have to be 'states-based' to have a guaranteed future. If for no other reason, the construction of the Australian parliament has ensured that we will retain a bicameral system. We merely need to put it on sound foundations.

Any referendum about the Australian republic with a popularly elected head of state should therefore proceed with a proposal to abolish the states.

Questions 26 – 30. Corowa Proposal C.

Conclusion

My model for an Australian republic is a variation of Model E – or Direct Election Model B (the Hayden model) but in terms of finalising a model to put to a vote in a single referendum I support Corowa Proposal C.

My main concern (apart from canvassing the other option of restoring to the Parliament the power to amend the constitution through legislation without the need for referendums) is to affirm the importance of linking the move towards directly electing an Australian head of state with the abolition of the states. This is the area of constitutional reform that would have the most immediate practical benefit to the Australian community, ahead of electing our own President.

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