

GUMDALE QLD

30 March 2004

The Secretary
Senate Legal and Constitutional
References Committee
Parliament House
CANBERRA ACT 2600

Dear Sir or Madam

Re Inquiry into an Australian Republic – Discussion Paper

I refer to the above inquiry and would like to offer the attached comments and observations in response to the questions contained in the discussion paper.

I trust that the information provided will assist the committee in its deliberations.

Yours faithfully

Don Willis

Senate Legal and Constitutional References Commission

An Inquiry into an Australian Republic

Response by Don Willis

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

In consideration of the principles of constitutionalism it is essential that power be dispersed and that it not be solely vested in one person, office or institution. Furthermore, in Australia's system of democracy it is axiomatic that what is needed is an independent, constitutional arbiter who is above party politics. It is generally accepted and considered desirable that the Head of State fulfil this role.¹ While under the Westminster system the Head of State generally acts on the advice of the executive government, the Head of State is also recognised to possess "the right to be consulted, to encourage and to warn".² By convention, such rights have extended to the role of Governor-General as the Sovereign's representative in Australia.³ That the Head of State is entitled to be consulted, to encourage and to warn acts as a check on the exercise of power by the executive and prevents potential abuse. If the roles of Head of State and Head of Government were combined it would necessarily result in a diminution of the checks and balances on the executive.

On the other hand, if the roles were combined it would be necessary for Australia to have constitutionally protected accountability mechanisms, such as a "Bill of Rights", to ensure a person in the new role did not misuse their powers to infringe the rights and liberties of individual citizens. However, given Australia's record with referendums it is doubtful whether a Bill of Rights would ever be enacted, particularly since the concept would doubtless be argued to be contrary to Australia's historical traditions.⁴ In the absence of a constitutional Bill of Rights, or some other appropriate and constitutionally protected accountability mechanism, it is highly questionable whether any proposal for a combined Head of State and Head of Government should be pursued.

Questions 2 and 3**What powers should be conferred on the head of state?****What powers (if any) should be codified beyond those currently specified in the Constitution?**

¹ Synonymous with a Head of State, a State Governor "*is said to be the ultimate guardian of the State's constitution and its laws*". (Queensland Constitutional Review Commission Report, February 2000, p. 52)

² As stated by Bagehot (cited by the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament, Report No 36, August 2002, p. 13)

³ Refer to the Queensland Constitutional Review Commission Issues Paper, July 1999, p. 607

⁴ On this point it has been noted, "*The lack of an Australian Bill of Rights reflects the views of the framers of the Australian Constitution expressed in the 1890s that Australia did not need a Bill of Rights because basic freedoms were adequately protected by the common law and by our elected representatives*" (Williams, G. 2000, *A Bill of Rights for Australia*, Frontlines, UNSW Press, Sydney, pp. 12, 36)

A fundamental premise of the Rule of Law is that citizens should be certain of what is legally required of them. It is therefore anomalous that the reserve powers of the current Head of State are not prescribed. While there is a need to have an independent, constitutional arbiter it is still important that everyone know the rules by which the arbiter will operate. Permitting the current situation to continue in which there is ambiguity about the extent of the reserve powers will only foster uncertainty and political second guessing which is not conducive to a strong and healthy democracy. The discussion paper puts the argument that the current lack of definition is advantageous because it allows for situations that cannot be anticipated. However, this is a rather weak good argument for persisting with such ambiguity, particularly since it is contrary to the principles of the Rule of Law. Therefore, the reserve powers of the Head of State should be agreed upon and codified, together with the non-reserve powers. Any codification of the power to dismiss a Prime Minister should detail the grounds for dismissal. Any codification of the Head of State's powers should be provided for in the Constitution rather than a normal Act of Parliament.

Question 4

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

The answer to this question is dependant on the method for choosing an occupant to the office of Head of State. If the office is to be filled by someone who is appointed by the Prime Minister, there is not likely to be any need for campaign assistance to be considered. On the other hand if the office is to be filled by popular election, then consideration should be given to provision of campaign funding to candidates. In this regard, campaign assistance could be provided on a similar basis to that for party political candidates. Provided a candidate received a certain percentage of votes they would be entitled to receive the appropriate amount of public funding.

Question 5

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

No. However, since it is accepted in our constitutional system that the person occupying the role of Head of State should be neutral and independent of party politics the Constitution would need to be amended to require a nominee/candidate, if he or she were appointed/elected to the office of Head of State, to resign/dissociate themselves from the political party that supported their candidacy during the period of office. Ideally, such dissociation should continue for a period of time after the person left office (say, two years). This is to avoid any appearance of conflict of interests. Such requirements will also ensure that only those nominees/candidates who are serious about being neutral and independent in the role will make themselves available for selection/election.

Question 6

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

If the office of the Head of State were to be filled by popular vote, a public body such as the Australian Electoral Commission (AEC) should be responsible for administering the provision of public funding to Head of State candidates in the same way that the AEC administers public funding for other election candidates.

Question 7

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

This question presupposes that the office of Head of State should be directly elected. It is curious as to why the question did not ask about methods for indirect selection. The issue of selection of the Head of State (either by direct or indirect means) is very important and the wider community must be engaged in its consideration. In fact, the question of whether or not Australia ever (formally) becomes a republic depends almost solely on this issue (as the experience with the 1999 Republic Referendum demonstrated). Nevertheless, retention of the current system, whereby it is the Prime Minister's sole prerogative to effectively appoint the Governor-General, is not an acceptable indirect selection option because it lacks transparency and is non-inclusive. The problems resulting from the Prime Ministerial selection of Australia's 23rd Governor-General are testament to the inadequacy of this model of indirect selection. If the selection process had been more inclusive it is probable that the problems experienced would never have eventuated.

For the purpose of responding to question 7, while voters are used to preferential voting⁵ at this stage I am inclined to suggest that if it is decided for the Head of State to be chosen by direct election then the first-past-the-post (FPTP) voting system should be used. The problem with using the preferential voting system for the Head of State is the competitive nature of the concept. If the preferential voting system were to be used to select the Head of State it would give rise to the question: on what basis would candidates be competing? What would candidates vying for election to a (presumably) non-executive office be able to offer voters that would warrant their preferential selection? Granted, some candidates may be able to offer more experience than others and voters should be able to select the best possible candidate. On the other hand, the best candidate in terms of qualities and experience could also be eliminated by this approach because of not being "popular enough" (which is almost an argument against direct election of the Head of State). Therefore, in keeping with the non-executive, non-partisan and politically independent nature of the office, the FPTP voting system should be considered for use if the direct election method of selection were adopted.

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?

⁵ Although for Queensland elections optional preferential voting is used which is almost like FPTP.

As indicated in my response to question 1, a popularly elected Head of State would need to be distinct and separate from the Head of Government. But this does not mean that a person in the office of Head of State would have to be silent. When Sir William Deane was Governor-General he made many important contributions to Australian society through his public comments. Sometimes, his comments may have made the Government uncomfortable. But what is wrong with that? As the recognised constitutional arbiter, a person in this role should not have to remain mute if they are able to make a positive contribution. In Sir William's case, most Australians would have applauded him for his contributions. Even so, in any Australian republic it would be necessary for the powers of the Head of State to be clearly defined so as to distinguish the accountabilities of the office from those of the Head of Government. At the moment the reserve powers of the Governor-General are not specified. This could easily lead to rivalries between a Governor-General and a Prime Minister (and in fact, this is what did occur in 1975). Definition of the Head of State's powers is essential in order to introduce certainty into Australia's constitutional and political system. Definition of such powers will minimise any potential for rivalry between respective office holders.

Question 9

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

As indicated in the response to question 7, the current system whereby the Prime Minister is solely responsible for the effective appointment of the Governor-General is most unsatisfactory. Because the holder of this office needs to be independent of party politics it is essential that his or her appointment/selection is not the prerogative of one politician (that is, the Prime Minister). To ensure that such appointments are not politically motivated or manipulated it is necessary for a broader range of people to have input into the selection of this person. For this reason, wider community involvement in the Head of State nomination process should be facilitated. For an appointed Head of State, the following is a suggested approach:

- The Constitution should be amended to require that a Head of State Nominations Committee be established by an Act of Parliament.
- The committee would be required to be broadly representative of the community in its composition. Committee membership would need to be periodically reviewed by the Parliament and when necessary updated (between five and seven years) to ensure that it continued to meet community standards and expectations.
- The committee would be required to especially encourage and consider nominations from the general public but it would also be able to consider nominations from any other source.
- Information regarding the office of Head of State (detailing such matters as the qualifications/expectations for an appointee to the position) would need to be produced by the committee and be widely distributed to assist those wishing to make a nomination to the committee.
- The committee would produce a short list of Head of State nominees for the consideration of the government.

- The government would be required to have due regard to the committee's nominations in consultation with all the political parties/independents represented in the Parliament. The Premiers/Chief Ministers and Opposition Leaders of the States/Territories would also need to be consulted on a proposed Head of State candidate prior to the final step in the process.
- A government would be able to ask the committee for names of further nominees if a reason existed for doing so (such as adverse information about a short listed nominee that was not available to the committee).
- The Head of State would be required to be appointed by two-thirds majority of a joint sitting of the Houses of Parliament upon the motion of the Prime Minister and seconded by the Leader of the Opposition.

For a popularly elected Head of State, any citizen who met the current eligibility criteria for election to public office should be able to nominate.

Question 10

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

Refer to response to question 5.

Question 11

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

If a Head of State office holder was to be selected by popular vote, no. If a Head of State office holder were to be appointed by the Parliament, the above suggested Head of State Nominations Committee would produce a short list of nominees for consideration.

Question 12

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

No. Any provision of public funding to assist with the campaigns of Head of State candidates would only become an issue in the event candidates received a certain percentage of the total vote. Anything less than that and candidates would not be entitled to receive public assistance.

Question 13

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

If Australia were to become a republic it would be counter-productive to retain monarchical terms such as "Governor-General". The title of a republican Head of State clearly needs to reflect the country's republican status. The term "President" is well known as the title of a republican Head of State and is used in some of the great

republican democracies of the West (such as the United States and France). However, at this stage I am uncertain whether this is a good enough reason for Australia's Head of State to also be known as "President". Part of my uncertainty results from the fact that in some democracies (such as the United States) the "President" fulfils an executive role whereas in others (such as Ireland) the "President" acts almost in an entirely ceremonial role. Because of the different meanings/roles associated with the title "President" I think more thought should be given to what we want our Head of State to be called. What the Head of State's title should be would largely depend on the role to be performed by that position (executive/non-executive). Consequently, more public consultation and debate needs to be undertaken on this issue before a final decision is made.

Question 14

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

No public official should be in office for too long, including a person holding the office of Head of State. Therefore, the length of the term of the Head of State should be for no longer than four years.

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 Head of State should serve no longer than two consecutive terms. This should apply irrespective of whether the Head of State was elected or appointed. A limit on terms is necessary to ensure that a person who is supposed to be the neutral constitutional arbiter and be independent of party politics does not become too comfortable or familiar with those in government.

Question 17

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

For the removal of a Head of State, the following is a suggested approach:

- A Head of State of an Australian republic should be able to remain in office unless it was necessary for the Head of State to be removed in the event of any of the following circumstances—

- reasons of proven illegality; or
 - if he or she has been proven to have engaged in conduct that is detrimental to the national best interest.
- A Head of State who is charged with any illegality or is alleged to have engaged in conduct that is detrimental to the national best interest during the term of his or her appointment would be required to stand aside from office, on full entitlements, following a resolution (passed by two-thirds majority) of a joint sitting of the Houses of Parliament but only after the Head of State had first been accorded the opportunity to address the joint sitting in relation to the standing aside motion.
 - A Head of State who is convicted of any illegality or is proven to have engaged in conduct that is detrimental to the national best interest during his or her term should only be able to be removed following a resolution (passed by two-thirds majority) of a joint sitting of the Houses of Parliament but only after the Head of State had first been accorded the opportunity to address the joint sitting in relation to the removal motion.
 - A resolution by a joint parliamentary sitting to stand aside or remove a Head of State should be given legal effect by a special Act of Parliament.
 - Where a Head of State is stood aside or removed upon resolution of a joint parliamentary sitting the most senior State Governor (or equivalent, assuming that such an office would still exist in an Australian republic) should automatically assume the office of Head of State in an acting capacity pending finalisation of judicial proceedings or the nomination and selection process for a new Head of State as the case may be.
 - The acting Head of State's first task should be to endorse⁶ the Act of Parliament standing aside or removing the Head of State from office as the case may be.

Question 18

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

The present situation where the grounds for removal of a Governor-General are not specified is not acceptable. This should not be repeated in relation to the Head of State of an Australian republic. In my response to question 17, I proposed that a Head of State of an Australian republic could be removed from office on the grounds of proven illegality or proven engagement in conduct that is detrimental to the national best interest. I do not agree with the proposal of the 1993 Republic Advisory Committee that a prescribed number of members of Parliament in a joint sitting could merely resolve that a Head of State should cease to hold office without any need for proof of misbehaviour or incapacity on the part of the Head of State. This would be contrary to the principles of the Rule of Law where it is necessary for citizens (including any Head of State) to be aware of what is legally required of them. The Republic Advisory Committee's proposal could result in a Head of State being removed unjustly. This would be most unsatisfactory situation and could result in civil disharmony and international criticism. Therefore, it is necessary for the

⁶ Monarchical expressions such as "giving assent to" an Act of Parliament would need to be updated if Australia became a republic.

grounds upon which a Head of State could be removed to be specified in the Constitution.

Question 19

How should a casual vacancy be filled?

The most senior State Governor (or equivalent, assuming that such an office would still exist in an Australian republic) should automatically assume the office of Head of State in an acting capacity in the event of a casual vacancy. Of course, if the casual vacancy arose from the death of the Head of State, the acting Head of State would only hold the position for as long as it took for the office of Head of State to be filled. If popular election were the method for choosing the Head of State it would be necessary for an election to be held at the earliest opportunity (say, within five weeks of the office becoming vacant).

Question 20

What should the eligibility requirements be for the head of state?

Eligibility requirements should be clearly specified in the Constitution and be the same as for any other public office. However, the eligibility requirements should also include that a candidate for Head of State must undertake to not be affiliated with or be a member of any political party or association if elected/appointed.

Question 21

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

Disqualification grounds should be clearly specified in the Constitution and be the same as for any other public office. The disqualification grounds should also include that a candidate for Head of State would be prevented from taking office if they had not fulfilled the undertaking proposed in the response to question 20.

Question 22

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

The judiciary is an important element in the concept of the separation of powers. If everyone is subject to the Rule of Law, judges should only be able to be appointed and removed in accordance with the law and not by arbitrary whim. Provided the law specifies the grounds and process (including procedural fairness) for the appointment and removal of judges then the separation of powers concept is not contravened if the Head of State was responsible for such matters.

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

The concept of the “Presidential Pardon” is known in some Western democratic republics such as the United States, where it has been used in relation to people such as former President Richard Nixon. However, in the Australian context the prerogative of mercy is a monarchical concept that when (or if) exercised by a Governor or Governor-General is mostly on the basis of advice from the executive government. Accordingly, it is questionable whether the prerogative should continue to exist. In any event, the concept seems to be at odds with the principle of the Rule of Law. There are already numerous appeal mechanisms within Australia’s various legal jurisdictions with the High Court being the highest court of appeal in the land. Thus on what reasonable basis could a convicted person appeal to the Head of State to effectively overturn the findings made in relation to them by every judicial appeal mechanism that has been established in accordance with the law? Furthermore, as far as I am aware there are no established and legally binding guidelines regarding how the royal prerogative of mercy is to be exercised. This being the case, there is potential for the prerogative to be exercised unfairly and inconsistently. Again, this would be contrary to the Rule of Law. On this basis, I would suggest that the concept of the prerogative of mercy should not be vested in the person of the Head of State. On the contrary, the judicial appeal process should be made more robust and more accessible so that there would not be any need for a Head of State to possess or exercise such a prerogative.

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

A Head of State being able to seek constitutional advice independent of the executive government would appear to be contrary to the concept of responsible government which underpins the Australian Constitution.⁷ One of the conventions of responsible government is that the Governor or Governor-General as head of the executive is to act on the advice of his ministers.⁸ If a Head of State was free to obtain advice independent of the executive government, serious repercussions could result such as uncertainty with respect to governmental administration. For this reason the executive government should be constitutionally recognised as the primary source of advice for a Head of State. If a Head of State did wish to obtain further advice external to the executive government, the Head of State should be required to advise the government of the intention to do so and to provide the government with the opportunity to comment on any advice received prior to it being acted upon.

Question 25

⁷ That the concept of responsible government underpins the Constitution was intended by the its original framers and has also been judicially recognised as such (Hanks, P. 1996, *Constitutional Law in Australia*, Second Edition, Butterworths, Sydney, pp. 194 – 197)

⁸ Jaensch, D 1991, *Parliament, Parties and People*, Longman Cheshire Ltd, Melbourne, p. 248

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

The States and Territories, as well as their people, must be involved in the process from the outset.⁹ Any perception of the change being driven from the top down could result in it being rejected by the people. The benefits of becoming a republic would need to be clearly articulated to show that they outweigh the advantages of retaining the status quo. Popular grassroots movements will need to be cultivated and encouraged if interest in the concept is to catch on. Once the benefits of change are realised and accepted there would be greater popular interest in the move to become a republic at the State/Territory level. Thus, the question of how “to deal with the position of the states” will be resolved if this grassroots approach is taken and encouraged. While politicians cannot be seen to be dictating the move to a republic, it will be necessary that there be no disagreement about the overall concept. Such division occurred in 1999 and this contributed to the defeat of the republic referendum.

Question 26

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

Opinion polls constantly indicate that more people now favour Australia becoming a republic than previously was the case.¹⁰ While some politicians may choose to ignore such poll results, they would be less likely to ignore the results of a national plebiscite. Accordingly, it is essential that a plebiscite be held to formally establish the views of the people on Australia becoming a republic. However, because the word “republic” can mean different things to different people it would be necessary that the plebiscite question be clear on what is meant by the term. The question could be worded: “Do you support Australia becoming a republic, with an Australian as the Head of State rather than Queen Elizabeth or any of her heirs or successors?”. It would also need to be made clear to voters that if the question was supported then a further plebiscite/s would need to be held about the type/model of republic that should be established (that is, whether the Head of State would be popularly elected or appointed). Doing so would avoid confusion about what is meant by the term “republic” and what would be intended about the type/model of republic Australia would have.

Question 27

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

I have partly responded to this question under question 26. It is important that the initial plebiscite solely deals with whether people support the principle of Australia becoming a republic and leave the details about models to a subsequent plebiscite/s.

⁹ Local government would also have a very important role to play in facilitating public interest and discussion in the process and should also be included at an early stage.

¹⁰ One recent poll indicated that fewer than one in three people want the Queen to be the nation’s Head of State (Brisbane Sunday Mail 25 January 2004, *Keep our flag flying – poll*, p. 13)

In order to avoid confusion a later plebiscite relating to possible models should not offer too many choices to voters. At the most, three or four models should be proposed for people to select from. This will mean that extensive negotiation and consultation will need to have occurred prior to the plebiscite to settle on the proposed models.

Question 28

Should voting for a plebiscite be voluntary or compulsory?

In view of the importance of the issue voting should be compulsory. If it is not compulsory, some politicians could choose to ignore the results.

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?

Regardless of the mechanism chosen, care must be taken to ensure it is not, or does not appear to be, elitist or separate from the community. People should have opportunity to participate in the process as much as possible. Any mechanism chosen will need to be publicised widely so that people are aware of its existence. Change to a republic will only be successful if the process of change is as inclusive as possible.

Corowa Proposal C is more in keeping with the concept of encouraging and facilitating popular, grassroots interest in and support for a move to become a republic. However, it could be combined with elements of Proposal B, as well as other elements, to be even more inclusive. Each stage of the process would be dependent on the previous step being successful. The combined approach would be as follows:

1. The government should build on the interest in the republic already evident in the community by partnering with relevant community groups, or facilitate the creation of such groups, to generate even wider community interest and support for the proposal.
2. National compulsory plebiscite – should Australia become a republic, with an Australian as the Head of State rather than Queen Elizabeth or any of her heirs or successors?
3. Multi-party committees of each State/Territory parliament would hold widespread public inquiries into the best republic model for application at Federal/State/Territory level.¹¹
4. Multi-party committee of the Federal Parliament would report on State/Territory reports.
5. Elected Constitutional Convention would consider issues, options and propose models for application at Federal/State/Territory levels.
6. National plebiscite – which model/s should be submitted for determination at a referendum.

¹¹ Local government could be brought in at this point.

7. Referendum.

The time frame for this approach could be quite lengthy, which may not appeal to some people, but given the public reaction against the perceived haste towards a republic in 1999¹² it may be advisable in the long run for a more restrained yet inclusive approach to be adopted.

Question 30

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

Any successful change is underpinned by a clear change management strategy. For example, using Kotter's model of successful change management,¹³ for Australia to become a republic it will be necessary to:

1. Establish a sense of urgency (that is, identify why it is important for Australia to become a republic and the benefits that will flow from such a move as opposed to what we will have if the status quo remained).
2. Form powerful guiding coalitions to facilitate and focus widespread community discussion and debate to generate interest and a desire for resolution.
3. Create a vision, in order to help direct the change effort as well as strategies for achieving that vision.
4. Communicate the vision by every possible means so that the vision becomes shared.
5. Empower the community to act on the vision.
6. Plan for and create short-term wins.
7. Consolidate gains.

Kotter's is not the only model and any other change management approach could also be used. The point is that any change process is challenging and there will always be resistance. Nevertheless, if the process is as inclusive as possible and the benefits of the change are clearly explained and understood, the need for change will be accepted and most people will respond accordingly.

¹² Haste has been recognised as a factor in the defeat of the 1999 republic referendum (Wicks, B. 2000, *Understanding the Australian Constitution – The Plain Words*, 2nd Edition, Libra Books Pty Ltd, Sandy Bay, Australia, p. 94).

¹³ Kotter, J. P. 1996, *Leading Change*, Harvard Business School Press, Boston.