30 March 2004

Chair and Members
Senate LCRC Inquiry into an Australian Republic
Parliament House
Canberra ACT

Submission by John Pyke, QUT Law School

Not at all confidential - authorise publication as you please!

Honourable Senators,

I will not address the issues quite in the order in which you have posed the questions. Instead I will first pick out the main issues, with a few additional headings thrown in to fill the gaps in your questions, and will consign some of the more trivial questions of detail to the later pages..

I would be happy to discuss this further with you at one of your public hearings - though I note with surprise that you have not scheduled any for Brisbane. There are a lot of people with opinions on a monarchy or republic in South-East Queensland, and having your Queensland hearing in Townsville is not a lot of use to us – indeed, Parramatta is closer. May I respectfully suggest that you add a Brisbane hearing to your schedule?

At places below I will refer to things I have already written and placed on the Web, on my site at http://ozconstinfo.freehomepage.com/republic/ I commend *all* of it to your attention, whether or not I refer to every point on every page in the submissions below.

The Bigger Questions First

"Issue 0" (Discussion Paper, p 6) – Who is the Current Head of State?

This is not really the most relevant question, but some leading monarchists have raised it – to the alarm, I imagine, of their followers who think the Queen still has all the powers of Henry VIII – so it ought to be addressed. It is certainly true that the Governor-General is to a large degree the *de facto* head of state of Australia, but he is appointed by the Queen of another country (even if she does it in her capacity as "Queen of Australia"), he *represents* the Queen, and when she tours her remote realm of Australia he stands aside and lets her carry out her functions personally. The Constitution is full of references to powers supposedly exercised by the Queen – in theory she is part of the Parliament, in theory she assigns specific powers and functions to the Governor-General, executive power is theoretically vested in her, and rights under s 117 are defined in terms of being a "subject of the Queen" rather than being a citizen. Practice and judicial interpretation now tell us otherwise, but the Constitution still tells a story that is quite out of touch with Australia's current status – this is

proof that it is "broke". The Governor-General is, except when the Queen is visiting, a *de facto* head of state, but in *de jure* terms he is only a ***deputy*** head of state and the Queen is the only person who can be referred to as the head of state.

But then if we amended the Constitution simply to reflect the monarchists' view – that the Queen appoints the Governor-General and then stands aside as the Governor-General acts fully as the head of state – it would still look pretty ridiculous: here would be an independent nation whose head of state was appointed by the hereditary head of state of a foreign nation! Some independent nation!

The issue you didn't ask directly – Should Australia Become a Republic?

Since your terms of reference only ask you to report on the most appropriate *process* for moving towards a republic, I suppose it is strictly correct for you not to ask the "should" question. However, not to ask it makes the Discussion Paper appear to beg the main question – I'll bet it's the first thing all the monarchist submissions are whinging about! My answer is of course "Yes", not only for Mr Keating's reason that it will show our independence of the United Kingdom, but also because it is totally un-Australian to have any hereditary element in our system of government. When Mr Wentworth suggested a hereditary upper house for New South Wales, the idea was laughed out of court (laughed out of the Victoria Theatre, to be precise), when Daniel Deniehy ridiculed the "bunyip aristocracy", "the dukes in blossom and the marquises in bud" – see http://www.aph.gov.au/Senate/pubs/pops/pop33/c06.pdf , p 6. The idea that our head of state, or even the person who appoints our *de facto* head of state, should hold that office by birth is just as absurd, in a modern democracy, as a hereditary upper house. It is high time that we had an Australian head of state, chosen not for life but for a fixed term, by a democratic process. [As to what process, see Question 8, below.]

Question 1 – should we have a head of state who is also head of government?

NO!!! Firstly, this would be a huge change from our present system. Secondly, I do not believe that it produces better government. The glib way of explaining this is to say that the opposite of responsible government is *irresponsible* government, and that the Nixon Presidency proved that. The longer explanation is that, although a more complete separation of powers as in the United States may have a benefit in that it frees the passage of legislation from control by the executive (example – their early adoption of Freedom of Information legislation), it has a much larger disadvantage in making the day-to-day conduct of the executive much less susceptible to scrutiny by the elected representatives. The US system may have some advantages in time when everything is running smoothly, but it copes less well with a major political crisis. If a "Watergate" scandal blew up in Australia, the governing party would quickly realise that the leader was an embarrassment and replace him or her – compare the replacement of Bjelke-Petersen when it was feared he was about to nobble the Fitzgerald Inquiry – whereas under the US Presidential system it takes weeks of congressional hearings, totally distracting everyone from the longer-term business of the Congress and the nation. There are some very good things in the US system - but Presidential government is not one of them. Cabinet government is government, as Bagehot said, by a committee of Parliament, and despite all the jokes about committees I suggest that that is safer than government by one man or woman.

I note that even that most-passionate American republican Bill Everdell concludes, in *The*

End of Kings, that while America built its republic on theory the English "stumbled upon" the "parliamentary republic" by pragmatic tinkering - and that the latter works much better (pp 309-14). Even the US Army recognised that fact, when they were making not-so-subtle "suggestions" to the Germans about the drafting of their post-war constitution. New republics all over Europe have considered the American and English models and have followed the English one, simply substituting a President for the hereditary monarch. So should we.

Question 2 – What powers should be conferred on the President, and Q 3 – should they be codified?

The President should have the powers that a ***non-executive*** President of a republic normally has, and the Constitution should state this *accurately*. Much confusion has been caused in the Australian debate by the assumption that the way to make minimal changes in the constitutional ***system*** is to make minimal changes in the constitutional ***text***. So we have seen a series of drafts presented by the A.R.M., in which the text of the existing s 61 of the Constitution is copied with minimal amendment and you end up with "executive power is vested in the President". Now if we want to set up a republic with a ***non***-executive President, as I argued under question 1, this is just a ***stupid and mentally lazy*** thing to put in the Constitution. [I have recently been told that Malcolm Turnbull himself dashed off the 6 alternatives that the A.R.M. has on its web site. This resolves something that had been puzzling me this because I know a couple of the current leaders of the A.R.M. well, and I am aware that the Chair and Deputy Chair of your Committee are on the executive too, and I am sure *they* are not stupid or mentally lazy – though they (including you, dear Senators) have previously allowed themselves to be dominated too readily by Turnbull.] It is this sort of silly drafting that fuels the fears, discussed further under Question 8, that there will be a tussle for power between a directly elected President and the Prime Minister.

In a *sensibly* drafted republican Constitution we would not even lump the President in with the executive government in the same Chapter – even New Zealand does not do that in the recent half-codified Constitution, the *Constitution Act 1986*. What we need to say about the powers of the President and the executive government, in *separate* chapters, is roughly:

- That the President has the following powers and functions:
    - to appoint and, when necessary, dismiss the Ministers, according to the conventions of responsible government;
    - to dissolve the House of Representatives or both Houses, also according to those conventions;
    - to "assent" to legislation, or more accurately to certify that it appears to have been properly enacted;
    - to preside over (but not vote at) meetings of the Executive Council, and to give formal effect to certain decisions of that Council by signing those documents (proclamations, statutory instruments, notices of appointment, etc) that law or custom require to be signed by the President;

(ie, that the President has a special kind of *supervisory* power, that (as New Zealand's and Portugal's Constitutions acknowledge) does not quite fit into the traditional 3 "branches" of government); and

- That the actual *executive power* of the Commonwealth is exercised by the Executive Council, by individual Ministers, or by members of the public service and other

public authorities as prescribed by law.

Where a power is clearly to be exercised on the Governor's own discretion (ie, the "reserve" powers), the Constitution should vest it in the Governor, but should refer, as in the first two dot points above, to the requirement that the discretion should be guided by the conventions of responsible government. For formal powers that are expected to be exercised on "advice", currently vested in the "Governor-General in Council", I suggest that there is no point in inventing some new quaint phrase such as "President in Council". The Constitution should simply attribute those decisions to the Executive Council. Where the President is expected to sign the final formal document, as in the appointment of judges (see Q 22), the Constitution should say "appointed by the President on the recommendation of the Executive Council". Let us have more plain speaking, and less traditional and obscure quaintness in our constitutional drafting.

Note that although I submit that the conventions of responsible government should be explicitly *referred to* in the Constitution, I am not suggesting a full attempt to codify the conventions of responsible government. Perhaps the *principal* convention – the *core* of all of the conventions – should be spelled out**;** the section on the Executive Council and Ministers should say that the President should appoint those who have, or appear most likely to have, the support of the majority of members of the House of Representatives. However, there is really no need for a book of rules for the Governor-General as to the subsidiary conventions – what s/he should do when an election result is inconclusive, or when a no-confidence motion is passed, and so on. If there are "rules" for these situations, they necessarily leave some discretion to the Governor-General and in the end everything gets resolved by a vote in the House.

You have mentioned the republic of Ireland in your Appendix B, but there are in fact 4 models of stable republics in Europe with directly elected, non-executive Presidents and parliamentary governments – Iceland, Austria and Portugal, as well as Ireland. [And, though I know less about their constitutions, I understand most of the former Soviet republics and Soviet satellites have adopted similar structures in the last 14 years.] I have included references to the way the four "precedent countries" organise things on my "Thinking About the Drafting" page on my web site - http://ozconstinfo.freehomepage.com/republic/drafting.html . I commend it to your attention.

Question 8 – is Direct Election Scary?

On scare tactics in general

As noted above, much of the fear about direct election is fuelled by the silly suggestion that we might adopt a silly constitution that says executive power is vested in the President. We can reduce that element of the fear by drafting amendments that accurately describe what power is vested in the President and what power is vested in the executive government. The other source of the fear is the habit of Australians to resort to "would-y" (pronounced "woody") arguments, based on totally hypothetical assumptions, an assumption of the worst about their fellow citizens, and a total ignorance of the way things work elsewhere – "if we had a directly elected president, he *would* want to take power from the Prime Minister", "if politicians chose the President, they *would* choose a politician", and so on. Living at the far

end of the world (substitute Mr Keating's phrase if you like) is no excuse for knowing nothing about the systems of government that have been adopted, *and that work*, in other countries, and for falling back on *a priori* (ie, *ignorant*) arguments of the "if we did so-and-so, something scary *would* happen" variety.

On the two main ways of electing a President

As I have argued in the past (see my Chapter in *The Case for Yes*, edited by John Uhr, 1999), other democratic countries have demonstrated that stability, democracy and the rule of law can be maintained in a republic with a "parliamentary", or responsible, government, with *either* a President chosen by the members of Parliament *or* a directly elected President. I have quoted the countries that have a directly-elected President above. Those where the President is chosen by the parliament (or by an electoral college representing both central and provincial legislatures) are Greece, Israel, Malta, Germany and Italy. They *all* have working democracies, despite the fact that the democratic tradition has not been established in them for as long as it has in Australia. Either system would work here. All three sides of the debate shamelessly perpetrated "would-y" arguments in the lead-up to the previous referendum. They should ***stop*** it, and I hope your report will do something to promote more well-informed argument.

Why direct election is now the only choice

As noted above, a system where the MPs chose a President (with a requirement for some sort of super-majority such as 2/3 or 4/5) would *work*, just as a system with a directly-elected President would. However, the majority of the people of Australia rejected that in 1999, and have consistently indicated to opinion pollsters that they want to elect their own President. In particular, the major survey done immediately after the referendum by Gow, Bean and McAllister (which, unlike most of the simplistic first-preference polls reported in the papers, asked for both first and second preferences) has four things to teach us - see my analysis of their results on http://ozconstinfo.freehomepage.com/republic/survey.html:

1. that of the 45% of the population who voted "Yes", only 20% actually *wanted* the republic that was on offer as their first choice, and the other 25% were "Reluctant Yes"es who *really* would have preferred direct election but accepted the model on offer as better than nothing. [The total numbers in the survey expressing these two views corresponded amazing closely with the number who had voted "Yes" in the referendum, giving me some confidence in the reliability of the survey.] It *might* be possible to increase the total number voting for a parliamentary-selection model by modifying the 1999 model, but it is clear that if some such model were ever to be accepted it would only be because even more people who didn't *really* like it had been induced to accept it because nothing better was being offered – it would still not be a willing choice of the majority of Australians. This is clearly ***not*** the way to go.

2. that of the 20% who really want to leave the selection of the President to Parliament, 15% would accept direct election as second best rather than retain the monarchy, and only 3% expressly said "my model or no change at all" (and 2% expressed no second preference). Those leaders of the A.R.M. who would not support direct election in 1998-9, and those who will *still* not support it because it scares them, are a part of this *tiny*, but disproportionately vocal, minority of the population, and do not speak at all for the greater Australian republican movement, with a small "r" and a small "m".

3. that ***a clear majority*** (55%) wanted a republic with a directly elected President, and that when you add the 15% (above) for whom it is an acceptable second choice, a sensibly-drafted model proposing a directly elected President should attract the support of something approaching 70% of the voters – 55% willingly and 15% with varying degrees of grudgingness.

4. That contrary to the propaganda of those like Greg Craven who said that monarchists had better vote "Yes" this time in case they were offered something even worse next time, most ordinary monarchists (as opposed to their hysterical leaders) think a republic with direct election would be ***less*** objectionable than one with parliamentary selection - among the 24% who supported the monarchy (or simply saw no need for change), 15% thought direct election would be second-best, and only 9% either ranked parliamentary selection as their second best or gave no second preference. It seems that most ordinary monarchists think that, if we do give up the monarchy, we should go *all the way* to democracy.

Why has the A.R.M. been so slow to pick up on this, and to declare its support for direct election? Well, people tend to think "everybody thinks like me" and not to believe opinion polls unless they reflect their own opinion; and on this issue this phenomenon seems to apply particularly to the elitists who have run, and who still inhibit, the A.R.M. [When I say "elitists", I do not want it thought that I am damning everybody with above-average education who drinks chardonnay – I have a few Uni degrees myself and love a good drop of cabernet sauvignon (though I can take chardonnay or leave it) – I mean those who are not only *of* the elite but have an elitist *attitude*, who do not trust the common people to vote sensibly, and therefore either discount the poll results, or say "Damn them – they're not getting what they want. We know what's best for them".] I have been told that about 6 of the 17 members of the executive would probably resign if the Movement committed itself to direct election, which is why the others keep pussy-footing around, offering votes on 6 models (all defective) and suggesting endless plebiscites to establish what social researchers have told us already, for fear of provoking a split. But let them all be aware – unless they can decide to support direct election soon, others – realistic parliamentarians or another popular movement – will have to take the lead. The A.R.M. will be seen as part of the problem, not as part of the solution. It would be a pity if Australia should achieve a change to a republic *despite* the A.R.M. rather than because of it, but it may happen if its executive cannot accept reality!

I suggest that on this issue it is time that participants in the debate, especially A.R.M. leaders and politicians, started to accept the results of objectively-conducted polls and surveys, to ***stop*** trying to ram something down the throats of the people that they have shown they don't want, and to offer the people what the majority of them have shown they *do* want – since it is something, as overseas experience shows, that can work perfectly well.

Questions 26-30 – The Process

Question 26 – A Plebiscite

I really think, given the established facts about public opinion that I have quoted above, that a plebiscite is unnecessary. If only the government and Parliament would formulate some *sensibly-drafted* amendments to provide for a directly-elected President, and then mount a campaign in which they explained the effect of those amendments honestly and clearly, a majority of 65% or more could be expected to vote "Yes". Some of my friends dispute this, on the grounds that the opponents would only have to run a scare campaign and the poor idiot voters would be frightened into voting "No" – but these people are, sadly, elitists who are scared of direct election and therefore, on the "everyone thinks like me" principle, assume that the majority could be persuaded to be scared too. But just think of the paradox – trying to run a scare campaign to persuade *the people* that *they* are too stupid to vote for a President and that they should be scared of giving more power to – *themselves*! It would be like Mr Playford campaigning in the mid-60s against the proposal that South Australia should have a State Lottery, arguing that it would be like putting dynamite (or was it guns?) in the hands of young children. Those whom he was equating with children took offence – every time his remark was repeated, it persuaded more voters to vote "Yes".

However, given the reluctance of many people – including, on this issue, many members of Parliament – to believe that direct election is what the people want, perhaps there would be benefit in holding a plebiscite. If it confirmed the results of the Gow/Bean/McAllister survey, then "parliamentary selection or nothing" elitists and monarchists would have to accept that they were in the minority. We could get on with drafting amendments without them (see below); they would retain their right to vote "No", and their right to run a scare campaign, but everyone else would realise how unrepresentative they were and could ignore them.

Question 27 – How Many Plebiscites or Questions?

Both the A.L.P. and the A.R.M. have floated proposals that we should first have a plebiscite on the general "do you want a republic?" question, and *then*, assuming a "yes" majority at the first, a second one asking what kind of republic. What a waste of time and money! If there is one electorate in the world that is quite used to expressing a first choice and a second choice on the one ballot paper it is the Australian electorate. Let us have one plebiscite in which, like the Gow/Bean/McAllister survey, the people are asked for their first choice and, if they have one, their second choice, and, where it is relevant, even a third choice. Then the total of those who say "first choice – direct election" and those who say "first choice – parliamentary selection; second choice – direct election" will give a pretty good estimate of how many will vote for a well-drafted Constitution Alteration, and we can get on with the job of drafting it (see Question 29).

However, the alternatives will need to be clearly spelled out to the voters. Though the majority of people seem to know what they want, there is certainly some confusion about the details, perhaps especially among those who were too young to vote in 1999. Even among second-year law students, I have found that when I ask "should we have a republic where the people directly elect the President?" they are some who ask "You mean, like George Bush in the United States?" So I propose that we should *spell out* the alternatives something like I

have done below, and advise voters to vote for their first preference and as many further preferences as they want to.

The alternatives:

- Retain a constitutional monarchy with a Governor-General appointed by the Queen, in which real executive decisions are made by Ministers responsible to Parliament

- Change to a republic, with a President, chosen by a 2/3 majority of a joint sitting of the Houses of the Parliament, who performs the same functions as the Governor-General, and with real executive decisions still made by Ministers responsible to Parliament – like Greece, Israel or Malta.

- Change to a republic, with a President, directly elected by the people, who performs the same functions as the Governor-General and with real executive decisions still made by Ministers responsible to Parliament – like Austria, Iceland, Ireland or Portugal.

- Change to a republic, with a President, directly elected by the people, who exercises executive power himself with the help of Ministers appointed by him – something like the United States of America

Of course, I presume the government would run an educational campaign before the date of the plebiscite, explaining the proposals clearly and objectively. Among other things, it would explain that the "something like" is because the voters in the USA only indirectly elect the President, and we certainly do *not* want to copy their electoral college! I suggest that this alternative should be included just so that those who support it can see how few others support it. Indeed, the whole point of a plebiscite would be so that those who support all except the third alternative above can see how few others share their view, so that they can then either shut up or start contributing positive suggestions to the detailed drafting of the necessary Constitution Alteration.

Question 28 – should voting be compulsory?

Attendance at a polling booth, or recording of a special vote, should be compulsory – but we should take the opportunity to change the unnecessarily directive words that traditionally appear at the top of ballot papers, telling people they "must" do certain things. The instructions should say something like "You are *requested* to express your first preference, if you have one, from among the following choices, by writing 1 in the square opposite that choice, and further preferences, if any, by writing 2 or 3 in the relevant squares".

Question 29 – drafting the details

An elected convention sounds very democratic, and was appropriate for the original drafting of the Constitution, but it only worked on that occasion because all the delegates wanted to form a federation and merely disagreed on details, like the distribution of powers between Commonwealth and States and between the House of Representatives and the Senate. Here there is disagreement, and will still be disagreement even after a plebiscite, as to the basic direction that we want to move in. Assuming that you arrange for a plebiscite first, and assuming that the vote goes the way I predict, the job will be to draft a set of alterations that

reflect the majority will. There will be no room for recalcitrant monarchists or parliamentary-selection republicans in the drafting process – at a convention that represented all points of view there would be a temptation for them to keep raising issues that had really been disposed of by the plebiscite. So I recommend that the drafting be assigned to a panel of constitutional experts, known to have general sympathy for the type of republic chosen by the majority vote at the plebiscite. It is the *final approval by referendum* that is the vital democratic feature – drafting by an elected constitution is a nice democratic "extra" when it will produce a workable document, but it is not essential to democratic legitimacy.

One thing that is worth copying from the 1897-8 process, however, is the deliberate pause in the middle of proceedings. No first draft – not even one done by myself! – is likely to be incapable of improvement. Since federation, when governments have put a Constitution Alteration Bill through Parliament, they seem, having read s 128, to have thought "There's no time for second thoughts. We must put *this* Bill to the vote in between 2 and 6 months from its passage through Parliament." Of course, it is likely that one or both Houses will refer the Bill to a committee and that it will call for public submissions, but I remind you of another possibility – even *after* it has been passed by both Houses, its details should be publicised and is possible that sensible suggestions, which will improve it and/or make it more likely to receive a "Yes" vote, will surface. In that case, the government and Parliament should be ready to start the passage all over again and start the 2-6 months period running again. [I think Cheryl Saunders made a similar comment after the futile 1999 referendum.] Before an irrevocable commitment has been made to the referendum process, we should be sure that what is being voted on is something that deserves, and should expect to receive, wide support.

Question 30 – "preferred process"

I presume that here you mean "other aspects of the preferred process", as the vital ones are covered in the previous 4 questions. I can suggest two.

First, it appals me that so little is known or reported about the Presidential election processes in the other republics from which we might have something to learn. As I said above, so much of the debate is in hypothetical "would-y" terms as if, from our big island at a certain end of the world, there is nothing to be learned from constitutional systems in other countries and how they work, and all we can do is guess. Often, the guesses are based on assuming the worst about our voters and our politicians. As the voters and politicians in those other countries belong to the same species as *our* voters and politicians, there is a lot to learn from studying the foreign systems, about how similar systems might work in Australia. This year, there are going to be Presidential elections in Austria (direct election) and Malta (by parliament) in April (yes, *next month*!), in Iceland (direct election) in June, and in Ireland (direct election) in October. I suggest that your committee should be considering:

- whether you can attend as observers yourselves or send observers on your behalf (yes, I know that as elected representatives travelling overseas in October might be difficult for yourselves),
- encouraging the Australian media to take more interest in these overseas elections and to report and explain the process and the issues to the people, and
- encouraging prominent demophobes (ie, those who are fearful of direct election) like, for example, Prof Greg Craven, some of the A.R.M. executive and State convenors, and a number of your colleagues in the Commonwealth Parliament, to observe these elections, talk to candidates and voters, and to be reassured that democracy and the

rule of law somehow survive even though power to elect the President is given to the people.

Secondly, unless the executive of the A.R.M. indicates, within the next year or so, that it now realises that a republic with direct election is the only republic that Australians will accept, keep it ***out*** of the process as much as possible.

Issues of detail

Question 5 – political parties

To ban nomination or campaigning by political parties is quite pointless. Nobody is apolitical – indeed, those who proclaim most loudly that they are, are often authoritarian, sexist and racist throwbacks to the 19th century, who assume that everybody else thinks like them! ["I'm totally apolitical. Bring back the lash." "You can't trust politicians of either side. We'd have no unemployment problem if only women would stop competing in the workforce and would go back to being full-time housewives. It's only common sense. What, you disagree with me? Are you some sort of a commo or pinko feminist?"] Better to have party allegiances out in the open. We can learn two things from Iceland, Ireland, Austria and Portugal. The first is that, yes, indeed, as the parliamentary-selection advocates warn, direct election means that the presidential candidates are usually supported by the major political parties. The other thing is that ***it doesn't matter*** – the parties are not stupid enough to endorse their most rabidly one-eyed and combative members as presidential candidates, and those who have filled the office in those countries have quickly shucked off their former allegiances and performed it with about the same amount of neutrality as the monarchs since Queen Victoria have done in the United Kingdom and Governor-Generals have done in Australia – indeed, as *former politicians* like Sir William McKell, Lord Casey and Bill Hayden have done here.

Questions 4 and 7 – financial assistance for campaigns

Constitutional and procedural provisions about Presidential campaigns should encourage them to be fairly low-key affairs with enough publicity so that voters know something about the candidates, but nowhere near the passion and negative campaigning that occurs in ordinary elections. Given the inevitability of the involvement of parties, I doubt that financial assistance is necessary. Instead, a ***cap*** on spending for any campaign should be imposed.

Question 7 – voting method

The obvious method is optional preferential. To not allow someone who has voted for a minor candidate to make a second, or third, choice is an interference with the voter's right to choose freely, and so, equally, is a rule that we will not count a person's vote *at all* unless s/he fills in all squares. Parties often favour or oppose optional preferences according to calculations as to whether it will promote their own interests (though short-term calculations are often belied by medium-term changes in voters' behaviour) – but optional preference voting is justified, as against both first-past-the-post voting (a.k.a. the voting system for idiots) and compulsory preferences, as a matter of democratic *principle*.

However, I would like to draw the committee's attention to another alternative – "approval voting". See http://bcn.boulder.co.us/government/approvalvote/center.html for more details of this system and propaganda in its favour. It seem to me that it is particularly appropriate where, as with a Presidential election, the idea is to choose someone who can be accepted as a neutral "umpire" by both sides of politics and the middle as well.

Questions 9. 10 and 12 – nominations

I answer this only as to direct election – an "appointed" head of state is no longer seriously on the agenda. There should be a variety of methods of nomination, and no absolute limit on the number of candidates, but each of them should require enough nominators so that a huge number of candidates is unlikely. On my "Thinking About the Drafting" page I have suggested the following:

- any number over one-third of the members of the two Houses of the federal Parliament (ie, one-third rounded up, or one-third plus one, if one-third is a whole number) – ie, there *could* be 2 candidates nominated by federal Parliament, but if one attracted 2/3 support that would rule any more out (a challenge, honourable Senators – could you and the members of the other place agree to give bipartisan support to someone?)
- nomination by some number (say 200) of members of the State Parliaments or
- by say 1000 local councillors, or perhaps by vote of 200 local councils (out of 717 on the present count), or
- by nomination petition signed by 10,000 enrolled voters.

I have set the numbers in the latter 3 dot points fairly high, to try to keep the number of candidates manageable, and perhaps to discourage but not absolutely forbid nominations by these methods if the members of federal Parliament should negotiate bipartisan support for someone. However, they are very much a first draft and there may well be arguments for other numbers.

I know some generally reasonable people who believe that anyone should be entitled to nominate him- or herself, and there are certainly arguments of democratic principle supporting this. But if we had say 1000 self-nominations, some elimination process would be necessary before we could run a manageable ballot, so I suggest it is better that would-be candidates demonstrate that they have reasonably wide-spread support before they can get onto the ballot paper.

Question 13 – title?

President – unless our Indigenous citizens can suggest a word that means something like "mediator" or "umpire" or "person who supervises without intervening too much" in a wide range of Indigenous languages (or if there is such a word with slight variations across language groups, a representative version of that word). If there *is* such a word, that would be perfect – a word as Australian as the sound of the didgeridoo, for an Australian institution.

Question 14 – term and eligibility for re-election

I have no firm opinion here - among other countries, terms of 4, 5, 6 or even 7 years are given, and usually a serving President may stand for re-election once but must then stand down, at least for one term. There seemed to be a consensus among republicans in 1999 that either a 4- or 5-year term would be appropriate, and that the "re-elect once only" rule was a good idea. I would go along with the majority here.

Questions 17-18 – removal

I suppose this had better be drafted carefully, but it is an unlikely eventuality. As far as I am aware, no President has had to be removed from office in 60 years or so in Ireland, Austria or Iceland, or in the 25 years of Portuguese democracy. The "what if the President goes mad?" question raised at the 1998 Convention was a malicious distraction – the sort of person who stands for, and is elected to, a non-executive Presidency is much more likely to be balanced than the sort who seeks to become, and does become, an executive President, Prime Minister or Premier. But I suppose we need some such provisions, just in case. There are obvious precedents in the provisions for removal of judges dating back to the Bill of Rights, perhaps informed by some of the recent debate on the need to update those provisions (see Geoff Lindell's article in Lee and Winterton, *Australian Constitutional Landmarks*, at 303-4) – removal for incapacity or misconduct (as long as relevant to the continued holding of the office), by vote of both Houses, perhaps after a finding by a judicial inquiry.

(and a Deputy President)

While under investigation (or at least once a complaint had been shown not to be trivial or vexatious), the President should stand aside, which raises another issue. I submit that we should also create an office of Deputy President, the holder of which could be assigned specific tasks by the President, when the President was unable to perform them, and who would automatically become the Acting President when the President was incapacitated or under suspension, or on the death or dismissal of the President. If the State governments feel that their State Governors would be able to fulfil the role without detracting from their duties to the State, then the Governors could be eligible for selection to this post, but it should be borne in mind that in case of sudden death or resignation of the President the Deputy may find him- or herself Acting President for some time, and a rare case of removal proceedings could leave someone Acting President for even longer. A State may not want to "lend" its Governor to the Commonwealth for such a long period.

I envisage the Deputy President as not receiving a salary, and certainly not having an official residence, but s/he should receive an hourly or a daily allowance when called on to perform any duties. Perhaps the Deputy could be elected with the President, but I should think it would be satisfactory for this person (who would be, after all, only a backstop) to be elected by a large majority of members of both Houses of Parliament – thus partly satisfying members and Senators who want a role in the selection of the President.

Question 19 - Casual vacancies...

should of course be permanently filled by a fresh election. The term should start again on the election of the new President, or if we adopt a fixed date for the Presidential elections, at some anniversary of the date of the previous election. The existence of a Deputy President to automatically assume the duties of Acting President would mean that the transitional period should present no problems and there should be no need for any undue haste about the election – but neither, of course, should there be undue delay.

Question 20 - Eligibility requirements

Any adult Australian citizen should be eligible, except for someone serving a term of imprisonment or of "unsound mind" – if that has a clear meaning. As argued above, membership or support of a political party should not be a disqualification, but of course once elected the successful candidate should resign from any political party before assuming office. Of course the more important thing is something that will have to be a matter of the President's character – once in office the President will be expected to act without any sign of previous political allegiances. The Presidents of the "precedent States" seem, by and large to have managed this (as Governors-General McKell, Casey and Hayden have also done) – there are certain expectations generated by taking on the role, which anyone with respect for democratic institutions should find hard to ignore. (I note again that we would not expect the parties to nominate their most combative and partisan members as candidates.)

As to membership of a parliament, there have been some suggestions that nobody should be eligible to stand if they have been a member of a parliament within the previous year or two. I can understand the reasons for this, but how far should it extend? Logically it should also extend to local government councillors and mayors, and then you might wonder about membership of trade unions, employer groups, and so on. All in all, I submit that even *current* membership of a parliament (or a local government body) should not disqualify a person from standing, but of course the previous position should automatically be vacated when the person is declared elected.

As to the traditional disqualification for bankrupts, I have always regarded this as harsh even for those seeking to become members of Parliament. I have the impression (though I have not fully researched it) that the nineteenth-century restrictions on persons "who have taken advantage of the laws of bankruptcy" were largely because the modern bankruptcy laws were a recent parliamentary invention, and for parliamentarians to benefit from them seemed to raise a conflict of interest. If the people want to elect a bankrupt to parliamentary ***or*** Presidential office, why shouldn't they, as long as the candidate has disclosed the facts on nomination? Non-disclosure should disqualify, but not simply *being* bankrupt.

Question 22 – should the President have the power to appoint judges?

Of course not – not if that means the President personally! Minimal change to our institutions would mean that the appointment of judges would be vested in the Executive Council, but that the President would formally sign the document of appointment on their recommendation. [Note my comments above under Q 2.] What should be considered is whether at the same time we should pursue further reforms such as appointment by a judicial commission (as currently proposed in the *Constitutional Reform Bill* even in England, the

source of our quaintest customs).

Question 23 – the prerogative of mercy

Quaint old customs raise their heads again! The prerogative of mercy and the granting of pardons date back to a time when the law administered by courts was harsh and judicial procedure was inflexible, and the executive sometimes needed to step in to relieve injustice. Courts give verdicts and sentences after public hearings, and if new evidence arises, findings of guilt and sentences ought to be varied only after public hearings, not decided *in camera* by the Executive Council. If there is evidence that a conviction was unfair, many jurisdictions now provide for a *judicial* process for quashing the conviction, and those that don't should follow suit. [To say simply that someone was found guilty but "pardoned" makes it sound as if they really were guilty but someone felt sorry for them.]

As to sentences, we have appellate courts and parole boards, and no jurisdiction retains the death penalty – the main reason for the invocation of the prerogative of mercy in older days – so there is no need for some "kingly" overriding power to be given to the Executive Council or the President. [Just to be sure, those drafting the Constitution Alterations ought to consult with the Law Reform Commission to ensure that the statutory provisions for review of conviction and sentence are effective enough so that no discretionary powers to grant mercy or pardons are needed.]

Question 24 – constitutional advice from the judiciary?

No, if the question means that the President should be able to seek such advice informally! Nor should the sole source of constitutional advice be the Prime Minister. The President should be entitled to get advice on legal issues from a lawyer if necessary, but ***not*** to have private consultations with a Judge, who may perhaps have been in the same branch of the same political party years before – ***and*** Judges should know better than to give it. The Legal Constitutional and Administrative Review Committee of the Queensland Parliament recently considered whether the Governor should be able to ask the Supreme Court for a declaration – in open court proceedings, not over coffee or a wee dram with a judge – as to the legality of government action, and recommended against the idea. I agree as to most circumstances – in most cases where illegal or improper conduct is alleged the Governor should wait until a court action is successful or not.

However, there is one kind of dispute about legality that is particularly relevant to the convention of responsible government. That is disputes over the propriety of particular government spending – ie, whether it is in accordance with an appropriation. As there may be no person who is willing or has standing to challenge unauthorised spending (though it *has* happened, as in the *Auckland Harbour Board case*, [1924] AC 318 and the *Australian Assistance Plan case*), there is a theoretical case for the Governor or President to be able to ask for a declaration whether spending is properly authorised or not, and for the jurisdiction to be granted to the High Court – but if such a power was given to the President I doubt that it would be used often.

Question 25 – the States

I must confess a liking for Article 4, section 4, of the United States Constitution – "The United States shall guarantee to every State in this Union a Republican form of government", but, really, once the Commonwealth becomes a republic it will be inevitable that each of the States should amend its Constitution likewise. If some states are slow, the anomaly created won't be the first anomaly to exist in a federation. Eventually, all will fall into line.

If there is any need for provisions overriding State Constitutions to be inserted in the Commonwealth Constitution, the need is for provisions guaranteeing democracy and the rule of law – one vote, one value, the independence of the judiciary and the force of "manner and form" provisions, and so on – rather than any provisions guaranteeing republicanism.

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Please feel free to contact me if you feel the need to discuss any of these matters further – and I look forward to being able to speak at a public hearing *in Brisbane*.

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