SUBMISSION

to the

AUSTRALIAN SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

INQUIRY INTO AN AUSTRALIAN REPUBLIC

by

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Components of this submission:

Part 1: Introduction – An Elected, Non-Partisan Head of State for Australia
Part 2: Responses to Discussion Paper Questions
Part 3: A Citizen Jury Model for an Elected Non-Partisan Head of State
Part 4: Discussion Paper on Constitutional Reform, incorporating suggested constitutional amendments

PART 1: INTRODUCTION – AN ELECTED, NON-PARTISAN HEAD OF STATE FOR AUSTRALIA

The choice facing Australians is a simple one: become a republic or remain a monarchy. It is not a choice between "republic" and "no republic" as some would portray it. It is a choice with only one possible result that is consistent with our deeply held democratic values. Australia must become a republic – a nation in which all our political institutions and public offices reflect the will of the people – and we should become a republic as soon as possible.

The crucial question then becomes the role and selection method for the Head of State who is to fill the position currently occupied, in practical terms at least, by the Governor-General. The simplest solution, taking into account the difficulty of achieving even minimal constitutional reform, would be to continue the office of Governor-General but convert it to elected form. This of course raises the spectre of a political contest for the office of Governor-General/President. It is suggested that this can be avoided, and the non-partisan nature of the office maintained, by the careful design of the shortlisting process that will produce a list of candidates for popular election.

Part 3 of this submission provides details of a proposal involving the use of randomly-selected citizen juries in each federal electorate, to sift through nominations and produce a list of six candidates for a presidential election. This part of the submission has been based on a proposal to the Australian Republican Movement, seeking to add this model to the "Six Models" discussion paper currently being revised by the ARM.

Part 4 provides as background a discussion paper by the author, exploring the issues in greater detail and also proposing a similar citizen-jury process to examine proposals for constitutional reform. The result would be a citizen-initiative avenue for reform of the Constitution under section 128, in addition to the parliamentary-initiative avenue used for the last 103 years. Although this will be seen by many as a side issue, it is suggested that the power of the people over the process of constitutional reform is just as important as the power of the people over the selection of our head of state.

PART 2: RESPONSES TO QUESTIONS IN THE DISCUSSION PAPER

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

No. Most Australians have an instinctive distrust of this kind of concentration of power, whatever the theoretical advantages may be. There would be considerable advantages, and considerable public support, in continuing the present system in which the Prime Minister and Governor-General each have some power to curb any excesses on the part of the other. At present, of course, the balance is tilted strongly in favour of the Prime Minister, but the existence of an elected but non-partisan head of state could provide a more appropriate balance of power.

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

The powers should be identical to those of the Governor-General. Of course, the real issue revolves around the conventions and controls regarding the exercise of those powers.

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

No powers should be codified at this stage. If the issue of codification were to be tackled before the resolution of the threshold issue of the republic, the resulting bickering and complexity could delay any result for decades. It would be much better to retain the existing office of Governor-General together with its existing powers and conventions, but convert it to a popularly-elected form. Once we have become a republic with an elected head of state, there will inevitably be further consideration of the issue of codification of powers.

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

The election campaign for an elected non-partisan President should be radically different from the type of campaign we are used to for parliamentary elections. Campaigning should be funded totally by the government and controlled closely by the Electoral Commission, using information supplied by candidates.

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

There should be a constitutional prohibition, backed up by appropriate legislative sanctions, to ensure that political parties and other organisations cannot expend funds in campaigning on behalf of nominees or candidates.

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 to be directly elected, what method of voting should be used?*

The well-established and well-understood preferential system should be used.

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?*

The President does not have to become a rival centre of power to the government. Continuation of the office of Governor-General in elected form could retain a non-partisan head of state who acts as a figurehead and constitutional guardian, not a wielder of real government power. Careful design of the selection process is the key to achieving the goal of an elected non-partisan head of state retaining the positive aspects of the existing system.

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

The head of state should and will be elected. Nomination should be reasonably open – for example, by petition of 100 electors. A shortlisting process would then be required to produce a small number of candidates for popular election. Such a process should be transparent, democratic, and immune from political interference.

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

To protect the non-partisan nature of the office of Governor-General, current members of parliament should be ineligible for nomination. However, more stringent barriers would form an intolerable restriction on the right of the Australian people to elect who they want.

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

A sensible shortlisting process such as that suggested in this submission, involving citizen juries, would result in a constitutionally specified number of candidates. Six is suggested as an appropriate number, but anything from four to ten would be workable.

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

Yes, there should be a minimum number of nominators, albeit relatively low, to help keep out the raving loonies and others with no chance at all. One hundred is suggested as an appropriate number.

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

All of the above. To minimise the number of unnecessary constitutional changes and emphasise continuity, the title of Governor-General should be retained, but "President" and "Head of State" should be specified as alternative titles. It is reasonable to expect that "President" would become the commonly-used title, "Head of State" would be more of a role description, and "Governor-General" would remain as the prime legal and constitutional designation.

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

Five years, in accordance with the current convention. However, there could be some serious advantages in giving the parliament the power (by a bipartisan majority) to extend the term to a maximum of say eight years. For one thing, this could ensure that presidential elections could be kept well separated from parliamentary elections.

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

No. The Head of State should be a full-time servant of the people and should not spend the last year or two of his or her term running for re-election. Surely there are enough talented and distinguished Australians so that we would never have to re-use someone who has already had a go.

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

Yes! One term is quite sufficient (see above).

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

In theory, a head of state elected by the people should only be removed by the people, but there are practical difficulties involved in this. To cover every conceivable but unlikely eventuality involving improper or irrational behaviour on the part of a head of state, it is

suggested that the Prime Minister should have the power to suspend the head of state from office, but removal should only be possible through a bipartisan majority, say three-quarters, in both houses of 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?*

The grounds should not be spelt out. To do so would make such removal justiciable and this would definitely be undesirable. If a head of state were to lose the confidence of three-quarters of the parliament, removal would be appropriate and should not be challengeable in the courts.

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

By the senior state governor, in accordance with the existing convention.

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

Eligibility requirements should be the same as for election to the parliament.

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

Grounds for disqualification should be minimal; for example, a criminal record that was not divulged at the time of nomination. In general, the people should be allowed to elect whomever they want, provided they are given all the relevant information.

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

For now, the existing convention should be maintained, and such appointment or removal should be in accordance with the advice of the government. In the longer term, there may be merit in giving the head of state some power over such appointments, and thereby enhancing the separation of powers.

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

See question 22.

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

The head of state should be free to seek constitutional advice from the judiciary or from the gardener at Yarralumla, if he or she wishes. The occupant of the nation's highest office should at least be granted this small degree of independence.

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

The best way is to leave the position of the states to the states. This is an issue that has been explored to death over the last few years, and nobody has been able to put forward a good legal reason why, in the worst-case scenario, a republican Commonwealth could not contain monarchist states. It would of course be offensive to commonsense and would present a problem for the monarch, so the situation would probably sort itself out fairly quickly.

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

There should be an initial plebiscite to decide whether Australia should become a republic, but it should be held in conjunction with a plebiscite to gauge public support for the general categories of republican models.

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

Initially there should be two concurrent plebiscites as set out above. It seems very likely that this would put beyond doubt the people's desire for a republic with an elected head of state. A later plebiscite would be necessary to pin down the details of the method of election.

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

Voting should be voluntary, but the initial plebiscites at least should be held in conjunction with a federal election, to minimise cost and maximise turnout.

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?*

A Constitutional Council of experts, appointed by a bipartisan vote of parliament, meeting over a period of several months, and guided by public hearings, public meetings, and a second plebiscite to narrow down the details of the broad preferred model emerging from the first plebiscites.

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

Step 1: The work of this Senate committee.

Step 2: The two initial plebiscites as suggested above, with an adequate lead-up period of public debate and consultation.

Step 3: Appointment by parliament of the Constitutional Council of experts. Public consultation to formulate detailed options conforming to the results of the first plebiscites.

Step 4: An additional plebiscite to choose between the detailed options.

Step 5: Formulation by the Constitutional Council of a detailed referendum proposal, in consultation with government, parliament and public.

Step 6: A successful referendum.

PART 3: A CITIZEN JURY MODEL FOR AN ELECTED NON-PARTISAN HEAD OF STATE

"People elect from citizen juries' shortlist"

Introduction

In this open direct election model, the office of Governor General would continue, with its existing powers and conventions being preserved. Codification of reserve powers would be postponed. A representative sample of the voting population, organised as citizen juries of 12 jurors in each federal electorate, would consider all nominations and select six candidates for popular election.

Summary

Style of Presidency	Non-executive
Presidential Powers	Same as Governor General
Appointment of the President	Direct election by the people
Eligibility	Australian citizen not an MP at time of nomination
Nomination	Requires 100 nominators; citizen juries then select 6 candidates
Removal of the President	By resolution of both Houses with at least 75% overall majority
Term	Five years, extendable to maximum 8 years
Casual Vacancy	Senior State Governor

Stages of the selection process:

People
People nominate potential candidates for Governor General/President.
Potential candidates must have 100 signatures.
|
|
V
Citizen Juries
Citizen juries in each electorate consider all nominations, then all jurors vote by secret ballot to select six candidates.
|
|
V
People
People elect one of six candidates by secret preferential vote.
|
|

V

Governor General/President

Five-year term that can be extended to a maximum of eight years
by special majority vote of Parliament.
Current powers and conventions continue unchanged.
Can only be dismissed by special majority vote of Parliament.

Further Details

Eligibility
Every Australian citizen qualified to be a member of the Commonwealth Parliament would be eligible for nomination, provided that he or she is not a member of the Commonwealth Parliament or a State or Territory Parliament at the time of nomination.

Nomination
A potential candidate must have no less than 100 nominators.
A deliberative poll, consisting of a citizen jury of 12 electors in each House of Representatives electorate, voting by secret ballot, will select six candidates for an election of the Head of State by the people of Australia.

Election
The people of Australia voting directly by secret ballot with preferential voting by means of a single transferable vote.

Tenure
Five year term of office with no re-election, but possible extension to a maximum of eight years by resolutions of both Houses of the Parliament, with at least a 75% overall majority.

Removal
The President may be temporarily suspended by the Prime Minister, but may only be removed from office by resolutions of both Houses of the Parliament, with at least a 75% overall majority.

Casual vacancy
A casual vacancy shall be filled temporarily by the most senior state governor.

Non-reserve powers
The existing practice that non-reserve powers should be exercised only in accordance with the advice of the Government would continue, and should be stated in the Head of State's oath of office.

Reserve powers
Existing conventions concerning the reserve powers of the Governor General would continue, pending careful consideration of further constitutional reform in this area.

Comments

This model makes a serious attempt to satisfy the aspirations of a great many Australians for an **elected, non-partisan Head of State**. It could be seen as radical in its insistence

on a transparent and democratic process for electing the Head of State, but conservative in its continuation of the existing non-partisan office of Governor General.

Continuity in the position of Governor General would be emphasised by having the incumbent continue in office at the establishment of the Republic, serving out his or her term, but being given the additional title of President. This continuity would also minimise the number of sections of the Constitution requiring alteration. The first "presidential" election would therefore be held some time after Australia became a republic.

In comparison to the ARM's Model 4, which provides an initial "screening" process by requiring nomination by at least 3000 electors, or the committee's Republic Model E with its much larger requirement of one per cent of voters, this model aims for greater openness, requiring nomination by only 100 electors.

A potentially large number of nominees would be reduced to six candidates through a nationwide **deliberative poll**, using a **citizen jury** of 12 randomly-selected voters in each federal electorate. In a process that would be strictly controlled by the Electoral Commission, jurors would meet in their electorates for one full day to consider information about all nominees, before voting by secret ballot for up to six nominees. The six who achieved the greatest number of votes would become candidates for the presidential election. It seems very unlikely that any of them would be political-party candidates. To provide additional guidance to jurors, the Constitution should spell out the people's desire that candidates should not owe undue allegiance to political or other groups.

Unlike Republic Model D in the committee's Discussion Paper, or the ARM's Model 5, this model gives politicians no role in the shortlisting process; however it offers the Parliament an enhanced role in the procedures for dismissal of a Head of State and the possible extension of his or her term, to a maximum of eight years. Both procedures would require a bipartisan majority of 75% of MP's and Senators. These provisions, together with the power of the Prime Minister to suspend but not dismiss the Head of State, would aim to improve the balance of powers between the Head of State, the Prime Minister and the Parliament.

It is suggested that the question of codification of the Head of State's powers should be postponed; the people should not be expected to consider the powers of an elected President in the abstract, until we actually have one. For the first few years, we could rely on the existing conventions concerning the Governor General, and also consider other strategies to minimise the possibility of the inappropriate exercise of reserve powers. These strategies could be placed in two categories:

1. Non-constitutional strategies: *Example:* Federal Parliament should complete a process that was commenced with some success at the 1983 Constitutional Convention in Adelaide. This process would result in a comprehensive but non-binding statement of the conventions regarding the exercise of the Governor General's powers, along with other accepted practices in our system of government.
2. Constitutional strategies: *Example:* As a temporary measure, the Constitution could specify that any exercise of the reserve powers (ie. powers not exercised on Government advice) must be approved within three months by either a plebiscite of voters or a special majority of Parliament. Failing such approval, the position of Head of State would become vacant.

Even though this model would continue the existing position of Governor General, together with its current conventions, it cannot be denied that popular election of a Head of State who is seen to be “above politics” would result in an office carrying far greater prestige and authority than is presently the case. As in other direct-election models, this carries some risk of conflict with the elected government. However, it seems likely that most Australians would not be unhappy with such a development of our nation’s highest office.

Pluses:

- This process offers direct popular election from a sensible number of candidates, with the likelihood (or rather, the near certainty) that political parties will not be involved.
- The use of a representative sample of the population results in a transparent and democratic shortlisting process, which ordinary Australians are more likely to accept than would be the case with a more “managed” process involving the Parliament or a government-appointed committee.

Minuses:

- Some people of the calibre of former Governors General may not be prepared to stand for election, given the traditionally adversarial nature of election campaigns.
- Candidates – even if they are not politicians – may be tempted to campaign inappropriately on the political issues of the day.

PART 4: DISCUSSION PAPER ON CONSTITUTIONAL REFORM

Using citizen juries to remove constitutional roadblocks

Contrary to the conventional wisdom of the republican establishment, a popularly-elected, non-partisan Head of State for Australia is not only possible, but essential if the currently-stalled process of constitutional reform is to be advanced. A desirable way of achieving this outcome is by combining the concepts of citizen juries *and* deliberative polling *to produce a workable and democratic process for shortlisting candidates, prior to a popular vote. The same general process, using citizen juries as a "middle way" between representative democracy and direct democracy, could be used in the process of initiating referenda to amend the Constitution, thus helping to overcome the biggest roadblock of all on the path to a more appropriate Constitution for Australia.*

The current situation: constitutional progress held hostage to party politics

In the wake of the failed 1999 referendum on the republic, the situation of constitutional reform in this country can be characterised as a standoff between the political parties and the Australian people. The people have spoken clearly and have shown that only a credible proposal involving direct election of our Head of State has any chance of success. The major parties, fearful of any perceived threat to their stranglehold on our system of government, refuse to countenance such a proposal. The entire mess has become a roadblock on Constitution Avenue, making it unlikely that any other proposal for reform will be considered until the Head of State issue is resolved.

What went wrong in '99? As well as the politicians' compulsion to turn any referendum into a political contest, and the widespread popular desire to elect the President, the glaring conceptual flaws in the proposal must be acknowledged. The "minimalist" proposal that tried so hard to change as little as possible in matters of substance, was far from minimal in form and concept, with its creation of a new office of President to replace both Queen and Governor-General, and its huge list of textual amendments to the Constitution, carrying obvious risks of unintended consequences.

In order to kickstart constitutional reform and remove the initial roadblock, we should adopt the opposite strategy, and maintain the existing office of Governor-General in a proposal that is minimal in form but not in substance. The last appointed Governor-General should continue in office until his or her term expires, say a couple of years into the Republic, when the first "presidential" election would be held. As far as terminology is concerned, the Constitution could simply specify "President" as an alternative title, instead of amending every occurrence of "Governor-General". In any case, continued use of the traditional term, with its connotations of subservience, may not be entirely inappropriate, as the Governor-General would now be appointed by, and act on behalf of, the Australian people instead of a distant foreign monarch.

When it comes to selecting a President, the current thinking of the republican establishment is best represented by the Australian Republican Movement's "Six Models" discussion paper (online at www.republic.org.au). Of the six, the three "direct-election" models consist of:

- one that allows the people a choice from a shortlist approved by Parliament (the "Claytons direct-election model"),
- one that allows "open" nomination with 3000 signatures required (the "open to political parties" model), and
- one that provides for a US-style executive presidency (the Really Scary model, for many Australians).

Only an open, democratic, workable and non-manipulative system that explicitly transfers power from the politicians to the people will have any chance of success. These criteria eliminate all of the ARM's six models. Some new thinking is required – and contrary to conventional wisdom (so-called), it is not difficult to design a model offering what most Australians want, but what the politicians claim is impossible: an elected, non-partisan Head of State. The central problem – determining which names appear on the ballot paper – can be solved by an open and transparent shortlisting process involving a vote by a representative sample of the population.

Citizen juries and deliberative polling: a democratic "middle way"

One of the most exciting recent innovations in democratic practice is the citizen jury, originating in the USA (see www.jefferson-center.org) although the general concept dates from the democratic city-state of ancient Athens. In its most usual form, a randomly-selected jury of 18 people hears "evidence" for four or five days on a particular topic of public policy, with the aim of "allowing decision-makers and the public to hear from citizens who are both informed and representative".

A closely-related concept is deliberative polling (see www.la.utexas.edu/research/delpol). Two deliberative polling sessions, each with 350 participants, have been held in Canberra in recent years to make recommendations on the issues of the republic and reconciliation. Unfortunately, the outcome of the 1999 session on the republic has led some in the republican movement to regard deliberative polling as a mechanism for *altering public opinion*, instead of the more valid purpose of *ascertaining informed public opinion*.

These two concepts can help reconcile the basic and sometimes conflicting forms of democratic practice: representative democracy and direct democracy. In Australia and overseas, we see increasing dissatisfaction with the institutions of representative democracy. Yet in spite of the significant popular appeal of aspects of direct democracy such as citizen-initiated referenda, "town meetings", and voter recall, practical difficulties and political resistance have combined to prevent progress in this direction.

Citizen juries and deliberative polls can provide a "middle way" by allowing the voice of the people to be heard, without the obvious difficulties of involving the entire voting population in the lengthy deliberations necessary for an informed choice to be made. The concepts seem to be tailor-made for the two tasks proposed here: shortlisting candidates for a presidential election, and filtering proposals for reform of the Constitution.

A citizen jury model for election of a non-partisan Governor-General

A fully democratic system for election of the Governor-General/President, with the smallest chance of being perverted by the party power-brokers, would need the following basic elements:

1. An open nomination process that doesn't demand a large financial or time commitment in collection of signatures. Nomination by 100 electors should be a reasonable requirement.
2. A shortlisting process using a vote by ordinary Australians in all parts of the country, to reduce the number of nominations to a workable number of candidates for a general election.

3. An election process that excludes party politics and money politics, by prohibiting paid advertising. It is likely that there would be broad community support for such a provision, apart from the potentially ferocious resistance of political parties and media proprietors.

The citizen jury and deliberative polling concepts point the way to a logical and reliable shortlisting process. Twelve electors could be selected at random from each of Australia's 150 House of Representatives electorates, amounting to a deliberative poll of 1800 people – a statistically reliable sample of the Australian population. The use of 150 separate juries would help to overcome one of the criticisms of citizen juries and deliberative polling: the possibility of dominating, dogmatic individuals having an inappropriately large effect on the outcome.

On "selection day" the jurors would meet at appropriate locations throughout the country, linked by computer and video facilities. The day's program could be structured by the Electoral Commission so that nominees could initially give short presentations, of equal length. Detailed biographical information would be accessible to jurors on a secure Internet site, and there would be time for discussion among the members of each jury. At the end of the day, each of the jurors would vote by secret ballot for, say, six nominees. The six nominees receiving the greatest number of votes would become candidates for the general election.

As in a court case, jurors would be voting as a sample of the population, and not as delegates of the electors in a particular area. They would not be required to consult with the wider community, as they would be voting after receiving a far greater amount of information than it would be feasible for 13 million electors Australia-wide to be given, about a potentially large number of nominees.

Directing the Citizen Juries

Given current community distrust of politicians, it seems unlikely that a citizen-jury shortlisting process would result in a contest between political parties for the office of Governor-General. To make sure of this, the Constitution should contain an explicit provision crystallising the people's desire for a non-partisan Head of State, and enforcing a process whereby jurors are directed along these lines. One possibility would be for the Chief Justice of the High Court to be required to advise jurors of their responsibility to select non-partisan candidates capable of representing the entire nation, and not owing undue allegiance to any sectional political, economic or social group.

Importantly, such a provision would impose a responsibility on the Chief Justice, not on the jurors. They would still be free to vote for whomever they please, without any danger of legal challenge to the result of their voting. Although this provision could be seen as an exercise of non-judicial power by the Chief Justice, the clearly limited nature of the task should allow us to tolerate this slight blurring of the separation of powers.

Election campaigns don't have to be circuses

The key to a fair and democratic presidential election process is the prohibition of paid advertising promoting any candidate, with the exception of a constitutionally mandated official campaign. The Australian Electoral Commission would be charged with the responsibility of collecting information from candidates and producing a scrupulously fair, publicly-funded information campaign in the mass media, as well as mailing a small information booklet to each elector. To avoid any possibility of constitutional challenge to such a prohibition, it would be best to incorporate it into the Constitution by referendum, and not merely leave it to legislation.

Those who complain that this would be a departure from our traditions of free speech, particularly with regard to elections, would be missing the point. Such a provision would serve to reinforce the

message that the election for Head of State should be radically different from elections for Members of Parliament, because the positions are radically different. In fact, there may be merit in stating explicitly in the Constitution that the office of Governor-General is a non-partisan one, whose occupant must not be a member of a political party and does not vote in elections, thus entrenching the existing convention.

Codifying the Governor-General's powers

Another aspect of the conventional wisdom is that the powers of an elected Head of State must be codified – that is, spelt out in detail – in order to avoid conflict with the powers of the Government. Such an attempt at codification would be a can of worms, or a minefield; choose your preferred metaphor. If we are serious about achieving constitutional reform within our lifetimes, and not merely talking about it forever, we must find other ways of ensuring the Governor-General cannot become a dictator. Significantly, the 1999 proposal did not attempt to codify the President's powers, but simply transferred the existing conventions concerning the Governor-General, over to the new office of President. Many observers questioned the logic of attempting to incorporate unwritten conventions "by reference" into a written constitution.

If the question of codification is to be postponed, we should consider interim measures to maintain or improve the balance of powers between the Head of State and the Government. One obvious mechanism, to limit what seem superficially to be the virtually unlimited powers of the Governor-General, is to specify that under normal circumstances the Governor-General cannot exercise executive power alone. A countersignature should be required, usually that of the Prime Minister, but possibly of the Speaker of the House of Representatives, to cover the hypothetical situation in which a Prime Minister loses the confidence of the House but refuses to resign.

It has also been suggested that voters may be willing, at a referendum, to give the Parliament the power to codify the Head of State's powers by legislation. This seems unlikely, and is undesirable in that it would effectively give Parliament the ability to amend a constitutional power. However, it suggests an alternative approach similar to what was done with a measure of success by parliamentarians from both sides of politics, and from Federal and State Parliaments, at the 1983 Constitutional Convention. A Declaration of Constitutional Practices spelling out the accepted conventions, although not legally binding, could act as a powerful disincentive for an elected Head of State to act in an unconventional manner, particularly if the Parliament making such a Declaration had the power (by a special majority, eg. 75%) to dismiss the Head of State.

Regarding the difficult issue of the reserve powers (which have been exercised on only a few occasions in the last hundred years), an obvious and undeniably democratic solution is to let the people pass judgement. The Governor-General should be free to act alone in an extreme situation, but should then be required to explain the situation to the people and put his or her job on the line, through a requirement for voters to approve the use of the reserve powers. In the absence of such approval, the Governor-General should be required to resign. What better way is there to eliminate any chance of the reckless and capricious use of these powers? Admittedly, there may be reservations about this type of "direct democracy", and in some hypothetical situations it might be inappropriate, so the Constitution could offer an alternative process involving approval by a special majority of Parliament.

In the long run, the President's powers should be codified – but as part of a long-overdue renovation of the Constitution and of the system of government it purports to describe. Why spend a huge amount of time and energy attempting – probably unsuccessfully – to spell out the 20th Century conventions, when we may well create a somewhat different system, with different roles and powers, to suit the 21st Century?

Citizen Juries and the process of constitutional reform

The citizen jury/deliberative polling approach is also worth considering, as a possible solution to the fundamental constitutional challenge of our era: achieving worthwhile constitutional reform in a politicised environment in which any attempt at reform inevitably becomes a political football. At present, Section 128 gives the Parliament (that is, the Government) a monopoly on the initiation of proposals for constitutional change. It is long overdue for this failed representative-democracy avenue to be supplemented by a direct-democracy avenue.

However, the threshold requirement for a citizen-initiated referendum has been a subject of debate. Figures from 1% to 5% of the voting population have been proposed, for the number of signatures required on an initiation petition. As with direct election of the Head of State, the use of citizen juries could allow a drastic lowering of the threshold. Even 1% of voters would amount to about 130,000, but in combination with approval by citizen juries a much smaller number of signatures could be required – say 10,000. The result would be a much more open initiation process, less reliant upon the blessing of large organisations or the mass media.

How could it work? A deliberative polling exercise using a citizen jury in each electorate could be held once a year, if any valid petitions containing proposals for constitutional change had been submitted to the Governor-General during the preceding twelve months. Juries would hear arguments for and against the proposed change or changes, and could call upon the opinions of experts in constitutional law and government, before voting on the proposal. An affirmative vote would trigger a referendum. The results would probably contain a small bias in favour of a "yes" vote, with some jurors reasoning that they should just "let the people decide", so it would be safe to say that if a proposal for reform did not clear this hurdle, it would have no chance in a referendum.

Such a process should not be limited to the Commonwealth Constitution. Although some State politicians will no doubt disagree, it seems eminently desirable for the Commonwealth Constitution to specify that the people of a State have the right to amend their State Constitution through the same procedure.

Clearing the first roadblock

In the current environment, the central problem is getting a winnable proposal for a "direct-election republic" through the Parliament, and in front of the voters in the polling booths. As for the likely result, a detailed analysis of the largest opinion poll held at the time of the last referendum, by John Pyke at ozconstinfo.freehomepage.com, shows convincingly that a direct-election proposal should have been carried easily. Of course, the obvious question is "which direct-election proposal?", and one can never under-estimate the forces that would be arrayed in opposition.

To be sure of gaining majority support, a proposal should not only allow the people to vote to elect the Head of State, but must ensure that ordinary people, not politicians, drive every stage of the process. It should also explicitly assert the people's ownership of the Constitution, and remove any doubts about its legitimacy and authority – for such doubts exist, in the minds of an increasing number of Australians. And what if a significant number of people actually read the Constitution, and decide they don't want to own it? This is a rarely-discussed aspect of the defeated 1999 referendum on the preamble, whose approval would have amounted to popular approval of the entire Constitution – approval by stealth, according to some opponents.

Concerns about the dysfunctional nature of the Constitution, with its serious gaps and its many outdated provisions, must be addressed. The need for its wholesale renovation, or complete

replacement by a new Constitution, must surely be beyond argument. This must be done properly, in a wide-ranging debate involving all Australians, including the conservative minority who will refuse to be involved while Australia remains a monarchy. The centrepiece of such a debate should be an elected Constitutional Convention, meeting in several sessions over a period of perhaps a year. It is unrealistic to expect that such a Convention could function effectively in the current environment of disagreement over the threshold issue of the monarchy. What we need now is minimal change that takes us over this threshold while being fully consistent with the democratic aspirations of the Australian people, and with proper regard for constitutional checks and balances.

The issues of popular election of the Head of State, and the creation of a more open and democratic process for amendment of the Constitution, should hang together and act to reinforce and validate one another in the minds of most voters. Together with the deletion of sections entrenching the monarchy, and the disgraceful Section 25 ("Provisions as to races disqualified from voting"), this would result in an integrated proposal involving the alteration of about 21 out of the 128 sections of the Constitution, compared with 46 sections for the "minimalist" 1999 proposal. For the sake of simplicity, updating or deletion of other spent sections should be left to later referenda.

Such a proposal could with complete honesty be represented as an assertion of the sovereignty of the Australian people over this country and its system of government, in a safe and workable manner. If such a proposal were to fail, perhaps an appropriate response would be to forget the whole thing, ask the UK Parliament to revoke the Commonwealth of Australia Constitution Act of 1900, and go back to being six British colonies.

Appendix: A Draft Transitional Constitution for Australia

To be taken seriously, any proposals for constitutional reform should spell out, at least in general terms, the textual changes that are actually being proposed. Obviously the proposed alterations shown here are merely an illustration of the changes that could be submitted to the people following the appropriate drafting and checking.

Changes compared to the current Constitution:

- Insertion of an Introduction
- Deletion of 7 sections (2, 3, 4, 25, 59, 60, 74)
- Very minor amendments to 10 sections (1, 44, 57, 64, 66, 68, 106, 117, 122, 126)
- Significant amendments to 4 sections (58, 61, 63, 128) and the Schedule.

The "covering clauses" of the British Act of 1900 have sometimes been seen as a problem, as they are effectively part of our Constitution but cannot be amended by the people through a referendum. The new introduction would make it clear that they are no longer part of our Constitution, so that they do not need to be amended or explicitly removed; they would simply be ignored.

Introduction

Sovereignty over the Commonwealth of Australia, formerly vested in the Monarch of the United Kingdom, now belongs to the people of Australia. The Constitution of the Commonwealth, consisting of this Introduction, Chapters 1 to 8, and the Schedule, is the fundamental expression of the people's sovereignty and the basic law of Australia, and can only be altered by the people, in accordance with Section 128. This Constitution and all laws made under it by the Parliament are binding on the courts, judges, and people of every State and every part of the Commonwealth.

Sections:

1. Delete "the Queen"
2. Delete all
3. Delete all
4. Delete all
25. Delete all
44. Delete section (iv) and final paragraph
57. Delete "the Queen's"

Assent to Bills. *(based on 1999 proposal but tightened up)*
58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for assent, the Governor-General shall assent or withhold assent.

Recommendations by Governor-General.
The Governor-General may return to the house in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.

When a proposed law is again presented to the Governor-General by both Houses for assent, in the same form as it has previously been so presented, the Governor-General shall assent, unless advised to the contrary by the Federal Executive Council.

59. Delete all
60. Delete all

Executive power
61. The executive power of the Commonwealth is exercisable by the Governor-General, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth. Any instrument by which the Governor-General exercises this executive power must:
(a) be signed by the Prime Minister or, if unavailable, the Deputy Prime Minister, or in the case of the death, resignation or incapacity of both, then the longest-serving Minister capable of signing; or
(b) be signed by the Speaker of the House of Representatives, who will act specifically in accordance with a resolution of the House of Representatives; or
(c) be signed only by the Governor-General, in which case this will be deemed to be an exercise of the reserve powers.

Reserve powers: On every occasion when the Governor-General exercises the reserve powers, the Commonwealth will organise a plebiscite at which the electors of Australia will, within three months, be asked the question "Do you approve the exercise by the Governor-General of the reserve powers on *….(insert date)..*?", unless the Governor-General has resigned or at least three-quarters of the members of the Parliament have supported a resolution approving the exercise of the reserve powers. If the number of electors voting "No" in the plebiscite is greater than the number voting "Yes", the Governor-General's term of office will finish upon the official declaration of the result.

The Governor-General:
63. The Governor-General may be referred to as the "Head of State" or "President" of the Commonwealth of Australia. A person shall not exercise any of the powers or functions of the Governor-General unless the person has made and subscribed, before a Justice of the High Court, the Governor-General's oath or affirmation of office in the form set forth in the Schedule to this Constitution. The name of the Governor-General will be removed from all electoral rolls for the duration of his or her term of office.

The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

Election
Upon the occurrence or impending occurrence of a vacancy in the office of Governor-General, nominations will be called for a period of not less than three weeks. Any person who is qualified to be elected to the House of Representatives, and who is not a member of the Parliament or a State Parliament, or of any political party, may be nominated in writing by not less than one hundred persons properly enrolled to vote at Commonwealth elections.

Not less than three weeks after the close of nominations, the Electoral Commission or its successor will oversee a fair and democratic process by which a jury of twelve randomly selected electors in each electorate of the House of Representatives will give adequate consideration to all nominees, and will vote by secret ballot to produce a list of candidates for a general election. Each juror will vote for up to six nominees, and the six nominees achieving the highest number of votes will become candidates for election, provided that the number of candidates for election may be increased as appropriate, if nominees achieve equal numbers of votes.

Before the commencement of the juries' deliberations, and again immediately prior to

their voting, the Chief Justice of the High Court, using appropriate technology and in

language of his or her choosing, will advise jurors of their responsibility to select non-partisan candidates capable of representing the entire nation, and not owing undue allegiance to any sectional political, economic or social group.

Not less than four weeks after the conclusion of the shortlisting process, a general election for the position of Governor-General will be held, but this election will not be held at the same time as an election for the Parliament. The optional preferential (single transferable vote) method of voting will be used.

During the period between the opening of nominations, and the close of polling on election day, paid public advertising on behalf of nominees or candidates will be prohibited, except for advertising by the Commonwealth under this Section. Any nominee or candidate who causes or knowingly allows the appearance of any print or electronic material promoting his or her candidacy in exchange for any consideration whether monetary or otherwise, will be disqualified. The Commonwealth will undertake a fair and comprehensive information campaign in order to allow electors to choose between candidates. During the period of polling, the soliciting of votes for or against any candidate within one hundred metres of the entrance to any polling place will be an offence punishable by fine or imprisonment.

Term of Office
The Governor-General holds office for a term of five years. No person may serve more than one term as Governor-General, but the term of office of a person elected under the provisions of this Section may be extended, to a maximum of eight years, by a resolution or resolutions supported by at least three-quarters of the members of the Parliament.

The Governor-General may resign by signed notice delivered to the Prime Minister.

The Prime Minister may, by signed instrument, suspend the Governor-General from office with effect immediately. A Governor-General so suspended will be restored to office within thirty days, unless within that period
(a) the Governor-General dies or resigns from office, or
(b) the Governor-General is removed from office by a resolution supported by at least three-quarters of the members of the Parliament.

Acting Governor-General ***(based on 1999 proposal)***
The longest serving State Governor available shall act as Governor-General if the office of Governor-General falls vacant, if the Governor-General is suspended, or if the Governor-General is incapacitated and has not appointed a deputy. A State Governor is not available if the Governor has been suspended (as acting Governor-General) by the current Prime Minister. Should no serving State Governor be available, the most recently retired former State Governor available shall act as Governor-General.
The provisions of this Constitution relating to the powers and functions of the Governor-General extend and apply to any person acting as Governor-General.

64. Delete "Queen's"
66. Delete "to the Queen"
68. Delete "as the Queen's representative"
74. Delete all
106. Add "or by democratic vote of the people of the State".
117. Commence with the words "A resident of any State shall not...." and delete "a subject of the Queen"
122. Delete "by the Queen".
126. Delete "to Her Majesty to authorise" and substitute "of" in the title
Delete "Queen may authorise the"
Delete "to" and substitute "may"
Delete "subject to any limitations expressed or directions given by the Queen"

Mode of altering the Constitution.
128. This Constitution shall not be altered except in the following manner:-
Either:
The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.
Or:

The proposed law for the alteration thereof must be submitted to the Governor-General by petition signed by at least 10,000 electors enrolled to vote at Commonwealth elections, and not more than twelve months thereafter, the proposed law shall be submitted for consideration by a citizen jury of twelve randomly selected electors in each electorate of the House of Representatives. The process of such consideration will be devised and controlled by the Electoral Commission or its successor. If approved by a majority of jurors voting by secret ballot, the proposed law shall be submitted, not less than two nor more than six months after such approval, to the electors qualified to vote for the election of members of the House of Representatives.
Subsequent paragraphs: no change except delete "the Queen's".

Add before the final paragraph of the Section: The Constitution of a State or Territory may be altered by this citizen-initiative process, provided that at least 10,000 of the petitioners are enrolled within that State or Territory, and the proposed law is approved by a vote of the citizen jurors drawn from that State or Territory, and the proposed law is submitted to the electors of that State for their approval or rejection.

Ross Garrad

This paper in its present form was completed in June 2003, though it is a development of a paper commenced at the time of the 1997 Constitutional Convention elections. Some ideas from earlier versions have been retained, but most of the work is new.

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Further information on this proposal is available on the Internet, at ausconstitution.info
Responses to this paper are invited; please e-mail to feedback@ausconstitution.info
Responses will be published on the above website unless requested otherwise.