

Senate Legal and Constitutional References Committee Inquiry into an Australian Republic 2004

31 March 2004

Submission by Glenn Patmore, Senior Lecturer in Law, Law School, The University of Melbourne

Question 2:

What powers should be conferred on the Head of State?

Question 3:

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

The Head of State as the Guarantor of Democratic Government¹

Response:

Part of my submission pertains to part (b) of the Committee's terms of reference: alternative models for an Australian republic, particularly the functions of the Head of State.

Although none of the questions asked in the Senate Discussion paper explicitly refer to the word “functions”, my submission might usefully be considered under Questions 2 or 3. In answer to these questions, I have provided a paper for the consideration of the committee.

Questions 2 and 3: Abstract of the Paper

The Head of State as the Guarantor of Democratic Government

In this paper, I anticipate some of the potential pitfalls of a republican system of government, considering the Head of State's role in maintaining political stability – under both the current monarchical system and within a hypothetical republic. The chapter examines constitutional mechanisms for dealing with potential abuses of power by the Prime Minister and Head of State. Attention is paid to the significance of the Head of State's mode of appointment. In considering abuses of power, it is not only necessary to consider the legality of individual acts, that is whether they comply with constitutional provisions or conventions. It is also crucial to consider the democratic legitimacy of actors – especially the way in which popular participation in their appointment operates to justify their actions. If we refrain from making any other changes to our Westminster system, popular election may provide too strong a justification for presidential action while parliamentary appointment may provide too weak a justification. Something else is required.

The solution proposed in this paper reconceptualises the function of the President as the guarantor of democratic government in such a way that our current system is better preserved. This constitutional guarantor function provides a community standard by which to measure the conduct of the President and the Prime Minister, and gives guidance to the occupants of high political office, providing a straightforward, but limited, justification for political action. It is important to note that this is not an alternative republican 'model' per se, but is rather a presidential job description. It provides a role for the Head of State, which the public can understand and champion in times of crisis.

The Head of State as the Guarantor of Democratic Government¹

I Introduction

Most Australians see it as inevitable that Australia will become a republic. They believe that we should retain our current system of parliamentary government but that an Australian citizen should replace the Queen as head of state. To appreciate proposals for a republic, it is worth dwelling briefly on the operation of our government under the present system. (For an analysis of the relevant statistical data see Winterton 2001, pp. 2–4.)

Under our current system, power is divided between the head of state – the Queen (whose representative in Australia is the Governor-General) – and the head of government (the Prime Minister) (Australian Constitution sections 1 and 2). The Prime Minister leads the political party that gains the majority of seats in the House of Representatives, and bears ultimate responsibility to Parliament for all government actions. The Prime Minister is responsible for developing the government's legislative program and having it approved by Parliament, and for formulating government policy and advising the head of state on formal matters. (For a general discussion of the principles of responsible government see Emy & Hughes 1991, p. 336 ff.)

The Governor-General is appointed and removed by the Queen acting on the advice of the Prime Minister (Australian Constitution section 2). As a matter of constitutional practice, the powers of the Governor-General are exercised only upon the advice of the Prime Minister and/or Ministers (Hanks & Cass 1999, p. 442). For example, the requirement for the Governor-General to assent to legislation is purely formal. However, in acting on advice, the Governor-General retains the power to counsel, advise and warn (Bagehot 1963, p. 11). This in itself denies Ministers absolute power. While these powers appear to be a built-in check in the system of government, the Governor-General has little effective power. The head of state must ultimately yield and accept the advice of the Prime Minister or Ministers (Winterton 1993, p. 47).

The so-called 'reserve powers' are an important exception to this rule. The reserve powers confer on the Governor-General a very substantial constitutional role in our political system. These consist of the power to dissolve the House of Representatives (Australian Constitution section 5), to call a double dissolution of both Houses of Parliament (Australian Constitution section 57) and to appoint and dismiss the Prime Minister and hence the government. These are important governmental powers which the Governor-General may exercise without, or contrary to, ministerial advice. Historically, however, this has caused great controversy (Hanks & Cass 1999, p. 447–57).

The role of the Governor-General as the representative of the Queen provides little guidance for the way he/she should perform this function. This is because the office of Governor-General belongs to a bygone age, when the role of representing the monarch was of more importance. Some might argue that the Governor-General has developed into our de facto head of state, but there is uncertainty, conjecture and ambiguity surrounding this understanding of the Governor-General's role. Many of the Governor-General's vestigial vice-regal powers are purely formal, as the actual exercise of these powers would be unpalatable in a democratic society. Our ideas about the head of state's role have not kept pace with history. We have a viceroy without a clear function.

Republicans are currently debating models for an Australian republic. Key elements include the mode of appointment and the powers of the head of state.² In this paper I wish to explore the implications that the mode of presidential appointment will have for the maintenance of political stability in Australia. I will hypothesise the likely constitutional

responses to potential abuses of power by Prime Ministers and heads of state. I will assume as per the 1999 referendum model that the future president would retain the current powers of the Governor-General. (For a description of the 1999 model see Australian Electoral Commission 1999; Australian Constitutional Convention 1998; Constitution Alteration (Establishment of Republic) Bill 1999 (Cth).)

While I believe that the best way to appoint the head of state is through some form of election, we also need to focus our thinking about the role of the future president. It is time to develop a new way of understanding the Australian head of state's role, one which is more practical, and more relevant to the functioning of our political system. We can do so by conceiving of the head of state as the guarantor of democratic government.

Prior to advancing this new function, it is necessary to consider the legality and legitimacy of the head of state, and its effect on political stability.

II Implications for political stability of the appointment of the head of state

A The concept of political stability

Political stability is a fundamental element of all functioning democracies. It refers to the orderly transfer from one government to another, and to the ongoing maintenance of the structures of democratic government. However, the possibility for political instability exists in every political system. This may occur when those in power seek to perpetuate their own position. In the middle of last century, for example, fascist dictators grabbed power in Italy and Germany. More recently, there have been two coups in Fiji. These historical moments highlight how such instability imperils democratic government. Contemporary Western democracies are not immune from this concern, even where there is an established pattern of periodic elections, or a constitutional requirement for them (see Patmore & Whyte 1997, p. 189).

In Australia, instances of political instability have typically arisen in the context of a conflict between the head of government and the head of state – between the Governor-General and the Prime Minister, or between the Governor and the State Premier (see Galligan 1991, pp. 85–97). Where there have been constitutional crises, such as the dismissal of the federal Whitlam government in 1975 and the dismissal of the NSW Lang government, they have ultimately been resolved in a democratic manner: for example, through an election (Hanks & Cass 1999, pp. 442–57). However, they still demonstrate the fragile nature of democratic government.

In resolving a constitutional dispute the head of state is typically charged with deciding either whom to invite to form a government, or to dissolve Parliament and allow a fresh election. The instances in which these independent judgments are called for are likely to become more frequent as 'interest-based' politics grows, party loyalties weaken, and multi-party Parliaments become more common. In fact, in recent history, the close results in Victorian (1999) and Tasmanian (1989) elections produced minority governments. In these circumstances, the power to select who should govern, and whether those already in power should continue to govern, is critical.

Accordingly, I want to outline how two kinds of action or inaction on the part of the head of state could lead to political instability, under both the current system and in a republic. They are as follows:

1 Abuse of power by the Prime Minister

The Prime Minister and Cabinet might seek to continue to govern or to prevent any other leader being given a chance to govern (see the discussion of the actions of Sir Joh Bjelke-

Petersen in Galligan 1991, pp. 85–92). The Prime Minister might claim an indefinite term in office and resist the intervention of the head of state to call a general election, engaging in a campaign of disparagement of the president’s legitimacy. He/she might cast doubt on the president’s political even-handedness, or on the right of the president to intrude into the continued working of a ‘popularly elected’ government. Concerns over such disparagement and over the possibility that the president’s orders would be ignored by political leaders are, admittedly, concerns about extreme political situations: they contemplate a Prime Minister who refuses to submit to the direction of the head of state, which would amount to a revolutionary moment (see Patmore & Whyte 1997, p. 189).

2 Aggrandisement by the president

The president might be tempted to exercise the powers of office for his/her benefit, or may even attempt to arrogate additional powers to him or herself. For instance, the president could abandon any deference to the advice of the elected ministry in relation to say, the dissolution of Parliament, or attempt to exercise independent judgment where his/her role as Governor-General today would simply be formal. He/she may, for example, refuse to sign executive orders in relation to legislation. The ‘potential would exist for the representative and democratically elected parliamentary chambers to be gradually diminished, while the embodiment of the nation and increased powers would be vested in one person’ (see Galligan 1993, p. 57).³

It is to precisely such potential crises that constitutional safeguards should be directed. Most of the attempts to restrain the actions of the head of government and the head of state have focused on the legality of the actions of both office-holders. It is my argument, however, that an equally crucial consideration is the legitimacy of their actions. I will now outline the concepts of legality and legitimacy and discuss the implications of each of these for the role of the head of state in a future republic.

B Legality

The actions of the Governor-General or president fulfil the requirements of legality if they adhere to the terms of the Constitution and comply with established constitutional practice. (For a general discussion of the current legal and constitutional responsibilities of the head of state see Evatt 1967; Forsey 1990; Hanks & Cass 1999, pp. 447–57.) The powers of the head of state will be important in resolving a constitutional crisis, but as I will explain, they are not necessarily altered by the shift from a monarchy to a republic. Assuming that the reserve powers of the president will be the same as those of the Governor-General, instances of abuse of power or aggrandisement would infringe the same constitutional principles, whether they were the result of presidential or gubernatorial action. Perpetuating the government’s term in office would infringe section 28 of the Constitution. Attempts at aggrandisement contrary to ministerial advice would constitute a breach of a constitutional convention. Therefore, identifying the breaches of legal principles advances the analysis of the problem only to a limited extent. The legitimacy of the actions of the office-holders also needs to be taken into account.

C Legitimacy

Legitimacy refers to the proper justifications for political action. The justifications offered may differ based on the source of authority of an office-holder. (For theoretical discussion of legitimacy see Lipset 1960, Weber 1968; Habermas 1975, Beetham, 1991) Under the current arrangements, the sources of authority of the Governor-General and the Prime

Minister differ. The Prime Minister has a popular constituency (based on election) while the Governor-General, as an appointee of the Prime Minister, has no popular mandate. Instead, the head of state carries an ancient and, in a sense, patriarchal responsibility for preserving the peace, and for orderly public authority. In addition, the Governor-General's duty derives from being a representative of the monarch, who has hereditary legitimacy, and from the monarch's special position within the established legal–constitutional order. With the transition to a republic, the president, whether elected directly by the people or by the Parliament, would become the people's representative.

Democratic legitimacy, based as it is on citizens' participation in the selection of office-holders, and office-holders' dependence on ongoing public support, operates to justify political action. Political action can be used for both proper and improper purposes. An elected president would offer different justifications and excuses for breaching key constitutional principles from those offered by a Governor-General. Presidents, whether elected by Parliament or by the people, might rely on a populist mandate and republican reasoning to justify their breaches.

The proposed change in the mode of appointment of the head of state will therefore result in different justifications for constitutional breaches and, hence, bring about an important change in the justificatory operation of democratic legitimacy. I now consider the various modes of appointment and the implications these modes have for the two constitutional crises outlined earlier.

1 An appointed Governor-General

Appointed Governors-General have very little democratic legitimacy, because they are not elected and are not answerable to the people for their actions. The democratic legitimacy of the Governor-General to dismiss the Prime Minister and compel a general election is very weak, especially since growing republican sentiment has eroded the monarchical basis of authority in Australia. Thus the dismissal of Prime Minister Gough Whitlam and the subsequent dissolution of Parliament by Governor-General John Kerr in 1975 were enormously controversial. Despite John Kerr claiming that he had acted legally, his political legitimacy to act as he did was seen as highly questionable.

2 A president who is elected by the Parliament

A president elected by Parliament enjoys a moderate level of democratic support. The president's democratic legitimacy is enhanced if he/she is elected by a parliamentary supermajority – for example, a two-thirds majority of parliamentary representatives. This mode of appointment would provide the president with a stronger mandate to intervene in politics in times of constitutional crisis, such as in order to prevent an abuse by the Prime Minister of his/her powers.

However, it is arguable that the electorate may view such a president as a mere puppet of Parliament and not the direct representative of the people. The president may not exercise independent political judgment, or may fail to restrain prime ministerial abuses of power. On the other hand, the parliamentary mode of appointment restricts the president's democratic mandate, attenuating any purported justifications of attempts to aggrandise his/her position.

3 A president who is directly elected by the people

A directly elected president enjoys a substantial democratic legitimacy and, as the only directly elected officer in the system, would have a much stronger basis for intervening

against a Prime Minister who was acting unconstitutionally. The Prime Minister could not argue that the president's mandate was purely formal.

Nonetheless, it is possible that a president with a popular mandate may attempt to aggrandise his/her position based on that mandate. The president could be subjected to constituent and party pressure to renew his/her term or to intervene in parliamentary affairs. It has been observed that a system of popular election suggests that the president should have large powers – at least in reserve – and that he/she would be justified in exercising such powers.

To summarise, then: the different modes of electing the head of state may provide either too strong or too weak a justification for political action by the head of state. Paradoxically, it is important that democratic legitimacy not be used to justify corrupting our fundamental democratic structures. Democratic legitimacy is central to the continuity of our system of government, but it can also undermine it. The president should have a limited mandate, to preserve the democratic process. Such a mandate would command near-unanimous support.

Some people might argue that it is possible to confine this mandate appropriately by codifying the powers of the head of state, in particular by prescribing what actions a head of state may take where the Prime Minister has apparently breached a constitutional provision (see, for example, Republican Advisory Council 1993, pp. 97–116). A code would offer useful guidance. However, there will inevitably be ambiguities, omissions and discretionary space. Within this discretionary space, questions of democratic legitimacy will arise. In a time of crisis, in fact, the public will be concerned principally with the preservation of democratic government, not with the technicalities of such a code. What we need is a straightforward guiding concept, providing justification for political action – a concept against which political actors can be judged and, where necessary, criticised.

III Proposal for a 'new republic'

A The head of state as guarantor of democratic government

Given the problems with the current system and codification of the reserve powers, I want to offer an alternative solution that creates a new role for a republican head of state. The new function would be informed by notions of the legitimacy of the office, the legal specification of the presidential powers and the constitutional conventions that would surround it. I am not proposing a new, comprehensive form of legal–constitutional architecture. This is not a 'model' that would sit alongside other models as a discrete alternative, but a presidential function which other models could easily adopt.

My proposal entails re-envisioning the political relationship between the head of state and the Prime Minister. The head of state would be designated as the guarantor of democratic government, never as the provider of good government (for an earlier discussion of this conception see Patmore & Whyte 1997, pp. 198–200).⁴

The president's role as constitutional guarantor can be explained by way of analogy with a contractual guarantor. A guarantor gives a personal undertaking to remedy any default by a particular contractual party. The role of a guarantor is not to ensure that the contract between the parties is performed well or performed effectively; rather, it is a personal undertaking that in the case of default by one of the parties, he/she will discharge the core obligations of the contract.

The constitutional guarantor undertakes to act when the head of government acts in such a way as to imperil the continuity of democratic government. In reality, such action would only be permissible in very limited circumstances. The only area in which the Governor-General can now act independently is in the exercise of the reserve powers. It is

in this area that a new President would act as the guarantor.⁵ For instance, the Head of State would be empowered to dismiss a Prime Minister or dissolve the Parliament and call a general election where a Prime Minister insists on ignoring a vote of no-confidence or contravenes a fundamental constitutional provision (despite a High Court decision confirming such infringement)⁶ or does not heed requests to desist by the Head of State if the matter is non-justiciable. (see Winterton 1993, pp. 49–53).⁷ In such circumstances, the actions of the Prime Minister would amount to a breach of the political contract that exists between the head of government and the people, a compact which requires the Prime Minister to act constitutionally and not to abuse the powers of his/her office.

Accordingly, the only powers that the president would be permitted to exercise in the time of a crisis are the reserve powers to remove the constitutional threat in the immediate term, discharging his/her personal undertaking. The matter could be put to the people at the earliest opportunity, through an election. Alternatively, the president may put the matter before Parliament for its consideration.

This proposed concept has a number of advantages. The concept of constitutional guarantor is easily accessible to members of the community. The guarantee provides the community with standards by which to judge the conduct of the president and the Prime Minister. It would enable the people to assess and if necessary to find the conduct of the political actors wanting. It also gives guidance to the occupants of high political office so that they act responsibly. This concept, if widely disseminated and generally understood, will help generate and maintain appropriate political standards in the minds of Australians. In this way, most crucially, it will strengthen political stability and enhance the democratic legitimacy of our system of government.

B Application of the proposed model to two constitutional crises

It is now appropriate to consider how the notion of a constitutional guarantor would operate in relation to the two crises mentioned earlier.

1 Abuse of power by the Prime Minister

The president would only be permitted to intervene if the head of government threatened the continuity of democratic government. Under the terms of the political contract, the president would be justified in calling an election if the Prime Minister extended the government's term in office contrary to section 28 of the Constitution. The democratic legitimacy of the president would be sufficient to vindicate such an action, because his/her express function is to ensure the continuity of democratic government. Even if the president's conduct still attracted some criticism, the president's expressly stated guarantor function would operate to justify his/her actions.

2 Aggrandisement

An express statement of the president's guarantor function would also discourage a president from attempting to usurp the governing role. If the president purported to refuse assent to legislation, or to unjustifiably exercise the reserve powers, this would be immediately recognisable as a contravention of the president's constitutional function, and would expose the president to public criticism and censure. In an extreme situation the Prime Minister could then initiate procedures to remove the president.

C Writing the guarantor function into the Constitution

It is important to consider how the guarantor function could be written into the Australian Constitution. There are three possibilities. First, a new and fairly brief section could be

written into the Constitution defining the function of the head of state as the guarantor of democratic government. It would provide a new political justification for action or inaction on the part of the president. Furthermore, the new function of the president would be enhanced if the democratic legitimacy of the position is clearly expressed in the Constitution by prescribing the mode of election. This would occur if the head of state were to be elected either by the people or by the Parliament. The inclusion of such a section would bear upon the legitimacy of the actions of the head of state.

Secondly, the guarantor function could provide a framework for redefining the powers of a future president. (Patmore & Whyte 1997, p. 198 - 200). In this way the guarantor function would operate in the realms of both legality and legitimacy. The Constitution could contain a set of limited powers for the head of state. Failure to comply with these provisions would result in an illegal exercise of power. In addition, the list of powers would also provide a justification for legitimate action by the head of state.

Thirdly, the role of the guarantor could be written into the presidential oath of office, which could in turn be included in the Constitution, as per the current oath for Members of Parliament. While it seems appropriate that a president should be obliged to swear an oath of allegiance to the nation, a failure to adhere to the oath need not be subject to review by a court. It could, however, aid in understanding the appropriate use of reserve powers. Thus the concept would operate primarily in the realm of legitimacy, not of legality.

IV Conclusion

A politically stable form of government requires that due checks be placed on the head of state and the head of government. The creation of a presidential office (vested with the current reserve powers of the Governor-General) will not itself suffice to prevent or resolve any constitutional crises. Such a resolution does not merely consist of compliance with the legal requirements of the reserve powers, which in any event are unenforceable. I wish to emphasise that the concept of legitimacy plays a vital role in both controlling and justifying the powers and actions of an elected president. I believe that the notion of the head of state as the guarantor of democratic government is a most efficacious means of controlling the president's actions. The guarantor notion both empowers the president to restrain an abuse of power by a Prime Minister and limits the president's capacity to usurp a governing role. By clearly defining the president's role we can allay many fears, strengthen the democratic safeguards built into our Constitution and build a solid republican consensus. I commend the concept of the head of state as the guarantor of democratic government to fellow republicans.

Endnotes

1. This paper is a revised version of an earlier book chapter: G Patmore (ed), *"The Big Makeover; A New Australian Constitution": Labor Essays 2002* (Pluto Press Australia, 2001). 174-186. It also draws on a previous co-written work, see Patmore, G. and Whyte, J. (1997) 'Imagining Constitutional Crises: Power and (Mis)behaviour in Republican Australia,' *Federal Law Review*, Vol. 25(1), p. 181
2. Although the method of dismissing the head of state will be important in resolving any constitutional crisis, I have not considered it in this chapter because I am focusing on the role of the head of state in terms of democratic legitimacy, rather than providing an exhaustive discussion of all elements of the presidential model. For a consideration of the issues raised by the mode of dismissal, see Patmore and Whyte 1997, p. 185.

- 3 To some, the term ‘aggrandisement’ may seem imprecise and unclear. However, I have provided examples to give content to this concept. Most importantly, the term serves another important function, which is to describe a kind of political experience and to enhance our political vocabulary.
- 4 While the guarantor notion is a useful analogy to explain the function of the head of state in the current system of government, it is neither stated expressly in the Constitution nor is it an established unwritten convention. It is therefore arguable that the Governor-General has no such role at present. The republican debate and the proposals for a republican head of state provide a pertinent opportunity to define the role of a future president.
- 5 The Constitution is breached regularly, as evidenced by all the cases: see Hanks and Cass! A critical question is, which actions are mere breaches and which are truly imperilling? I explain below instances in which the continuity of democratic government is imperilled. Interestingly, the codes proposed by the Republican Advisory Committee (1993) provide a procedure for the head of state to dismiss a Prime Minister for breaching a fundamental constitutional provision but do not define the meaning of the term ‘fundamental’.
6. It is important to note that the Governor-General must act on the advice of his or her Ministers. Hence the Governor-General is not free to act on legal advice to refuse assent to an executive order or an Act of Parliament. In other words, the Governor-General does not make these decisions. The legality of the executive’s actions (eg, those of the Prime Minister) or the validity of legislation is a question for the courts.
7. Where a matter is non-justifiable, the High Court cannot review the matter. The failure of the Head of State or Prime Minister to follow constitutional procedures is likely to be subject to judicial review. In *Cormack v Cope* (1974) 131 CLR 432, the High Court held that it could intervene in the legislative process to ensure compliance with the procedures in s 57, but refrained from doing so. In the *PMA* case (1975) 134 CLR 81 at 155, Gibbs CJ dealt with circumstances where the Court may intervene. Nonetheless, these procedures could be made non-justiciable by recourse to Professor Winterton's proposal.

Bibliography

- Australian Constitution 1901
- Australian Constitutional Convention (1998) ‘Constitutional Convention Communiqué,’ 13 February, see <http://www.statusquo.org/communique.htm>
- Australian Electoral Commission (1999) *1999 Referendum Yes/No Case Pamphlet*, Commonwealth of Australia
- Bagehot, W. (1963) *The English Constitution*, Fontana
- Beetham D. (1991) *The Legitimation of Power*, Macmillan Education
- Constitution Alteration (Establishment of Republic) Bill 1999 (Cth)
- Emy, H. and Hughes, O. (1991) *Australian Politics: Realities in Conflict*, Macmillan
- Evatt, H.V. (1967) *The King and His Dominion Governors*, Cheshire
- Forsey, E. (1990) ‘The Present Position of the Reserve Powers of the Crown’, in Evatt, H.V., *Evatt and Forsey on the Reserve Powers*, Legal Books
- Galligan, B. (1993) ‘Regularising the Australian Republic,’ *Australian Journal of Political Science*, Vol. 28, p. 56
- Galligan, B. (1991) ‘The Vice-Regal Office in Australia’, in Butler, D. and Low, D. (eds), *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth*, MacMillan, p. 61

- Habermas, J. (1975) *Legitimation Crisis*, Beacon Press
- Hanks, P. and Cass, D. (1999) *Australian Constitutional Law: Materials and Commentary*, Butterworths
- Lipset, S.M. (1960) *Political Man: The Social Bases of Politics*, Doubleday
- Patmore, G. and Whyte, J. (1997) 'Imagining Constitutional Crises: Power and (Mis)behaviour in Republican Australia,' *Federal Law Review*, Vol. 25(1), p. 181
- Republican Advisory Council (1993), *An Australian Republic: The Options: Vol 1*, Australian Government Publishing Service
- Weber, M. (1968) *Economy and Society: An Outline of Interpretive Sociology*, Bedminster Press
- Winterton, G. (2001) *The Resurrection of the Republic*, Federation Press
- Winterton, G. (1993) 'Presidential Power in Republican Australia,' *Australian Journal of Political Science*, Vol. 24, p. 40

Senate Legal and Constitutional References Committee Inquiry into an Australian Republic 2004

31 March 2004

Submission by Glenn Patmore, Senior Lecturer in Law, Law School,
The University of Melbourne

Question 24:

Should the Head of State be free to seek constitutional advice from the judiciary and, if so, under what circumstances?

It is not necessary for the Governor-General to seek legal advice when exercising the non-reserve powers. This is because under the convention of responsible government the Governor-General is required to act on the advice of the Prime Minister and Ministry. Therefore, the Head of State does not have a power to refuse assent to a Bill or an executive order on the basis that it is illegal. The legality of the executive's actions (eg, those of the Prime Minister) or the validity of legislation is a question for the courts.

A Governor-General can only act independently in the exercise of the reserve powers. When exercising the reserve powers, it has been suggested that the Head of State should be permitted to consult the Chief Justice. There is no formal mechanism for the Governor-General to seek legal advice from the Chief Justice of the High Court. Whether a Governor-General should consult the Chief Justice under these circumstances is highly questionable. There is a real risk that the matter may come before the High Court or that the Chief Justice will be seen as a partisan figure.

It has been suggested that a Council of Advisors be established to provide advice to the Head of State. The proposed Council of Advisors could consist of former High Court Justices and former Heads of State. With such a council, there will always be a risk that advice will be tendered in private, leaving open the opportunity for clandestine activities. The Council might also call into question the role of the Governor-General.

In my view, both the proposed Council of Advisors and consultation with the Chief Justice provide rival sources of advice to the Prime Minister and Ministry. Hence the Head of State is no longer responsible to Parliament, undermining the principle of responsible

government.

If the Head of State is to consult the Chief Justice then it must only be done with the express permission of the Prime Minister, as occurred once before in 1914. In these circumstances, the advice will be sought in accordance with the principle of responsible government and the advice can be scrutinised by the Prime Minister.

It would also be open to the Head of State in a time of political crisis to convene a meeting between the Prime Minister, the Leader of the Opposition and other relevant Members of Parliament. During such a meeting, the Head of State would have the opportunity to gain further information and he or she could also attempt to negotiate a settlement or encourage the parties to resolve the dispute themselves.

It has been proposed that the Governor-General have the power to refer matters of illegality to the High Court for its determination. Any reference power would call into question the conduct of government. Hence, the Head of State would be taking on an overtly political role. This would increase the likelihood of conflict between the Head of State and the Prime Minister. This proposed reference power would also be a radical departure from our system of responsible government and the principle that the High Court cannot deliver advisory opinions (*In re Judiciary and Navigation Acts* (1921) 29 CLR 257).

In short, in my view, the head of state should only seek advice consistently with the principle of responsible government. All information and advice should be sought from the democratically-elected Members of Parliament.