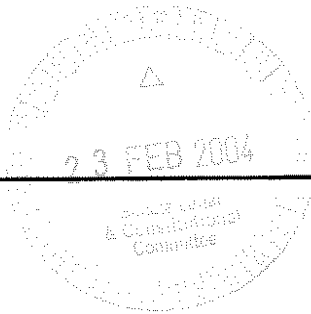


A I D C
Australians for an INFORMED Discussion on our Constitution
Reason before Passion



20 February 2004

The Secretariat
Senate Legal and Constitutional Committee
Room S1.61, Parliament House
Canberra, ACT 2600

SUBMISSION TO AN INQUIRY INTO AN AUSTRALIAN REPUBLIC

Term of reference (a)

The most appropriate process for moving towards the establishment of an Australian Republic by the removal of the Queen and her representative the Head of State of Australia is first for the electorate to have a clear understanding of the role of the Crown (i.e. The Queen of Australia and the Governor-General) in the Australian Constitution. That role is through representative of the Crown (i.e. the Queen). The Australian Head of State, The Governor-General, and State Governors – **to represent the people as an independent guardian – above politics – of our system of government against the seeking of power by, and the excesses of, politicians.** That being so the Inquiry – or republicans in general, will need to present an alternative system which ensures that we are protected against excesses of politicians in the same way as we are now.

AIDC fully supports the excellent outline by Senator Bolkus' republican colleague, Professor Cheryl Saunders, who says on page 206 'Constitutional Politics' University of Queensland Press 2002:

“if there is to be further consideration of a republic, there should be at least three elements of the information campaign. The first should explain the current arrangements and the implications of the move to a republic. The second should explain the proposed alternative. The third should be designed to deal with queries that arise during the campaign, before the vote takes place

AIDC particularly supports Professor Saunders' second element that it should explain the "PROPOSED ALTERNATIVE". This is absolutely essential.

It is not acceptable to any reasonable person to accept change of anything without knowing *what* the change is, particularly when we are discussing a document which underpins the whole of Australia's governance, our Constitution. This is particularly so when over 80% of Australians have no idea how and why our PRESENT system works – let alone a different system. Therefore, having Australia's best interests in mind, as we feel sure the Committee shares with us, we submit that any

consideration of a proposed Republican Constitution also take into consideration the following comments particularly because these sentiments are those of some of Australia's leading and respected Constitutional experts – who are republicans.

We note that respected republican Sir Gerard Brennan, former Chief Justice, said: -

- *“The model of a direct election could be adopted only at a price, namely, the virtual elimination of eminent, non-political citizens for the presidency.”*
- *“If the Constitution were to vest executive power in a Republican President, would the President be bound by a convention which is the cornerstone of constitutional monarchy?”*
- *“If Australia were to become a Republic, a President, especially an elected President, with a fixed term of office would feel less constrained than a Governor-General to act only on ministerial advice.”*
- *“But the principal objection to an elected Presidency is the risk – perhaps the likelihood – that the President, armed with the authority of a popular mandate, might exercise executive and, possibly, reserve power to frustrate the policies or impair the powers of the prime Minister and Government. There would be two hands on the tiller of national interest.”*
- *“If the presidential election were conducted on a platform of policy, would not the President have a mandate to implement the policy even if it were opposed by the Prime Minister.”*
(from his Fourth Geoffrey Sawer Lecture 18th July 2001)

We note that Australia's former Head of State and Governor-General, Sir Zelman Cowen – a republican – in his Williamson Lecture 31 May 1995 said:-

- *“I believe very strongly that such a mode of election (direct election) is unwise and inappropriate”* It poses *“a potential challenge to a Prime Minister who does not have such a base the direct election of a President would ensure political outcomes.”*

We note that respected republican constitutional expert and Professor of Law, Greg Craven said:-

- *“Australia's Constitution was excellent – not just very good, and none of the A.R.M.'s models was acceptable to conservative republicans.”* and *“All direct election models will fundamentally disturb the Constitution. It is futile to think a plebiscite will solve the problem.”* (The Australian Nov. 2002)

We note that respected republican Prof. John Hirst referred to our governance as:

- *“Among the oldest and most stable democracies in the world. The early Australian Governments were actually better than British.”*
- *“The Governor-General and Governors are the stabilisers and protectors of the system.”*(Discovering Democracy 1998)
- *“The Monarch remains the guardian of the Westminster system.”* (Quadrant December 1992).
- *“The republican direct election models turn the head of state into a political partisan”* (Weekend Australian 16-17 June 2001.) *“There is absolutely no prospect whatsoever of the Coalition supporting directly elected president any time soon, if ever – How does NEVER sound.”* (Malcolm Turnbull (Fighting for the Republic Hardie Grant books 1999 p190)

We note that republican The Hon. Paul Keating said of our system of governance:

- *“100 years of stable democratic government few countries can match.”* And *“A popularly elected president would constitute a very dramatic – and undesirable – change to a system which all of us agree has served us well.”*(His speech to Parliament June 1995)

We note republican Greg Barns referred to our system of governance as

- *"100 years of stable democratic government few countries can match."*

We note the late Richard McGarvie said in *The Australian* 1 May 1997:

- *"Australians have built one of the world's best democracies. That is our priceless possession."*

Republican Prof. Greg Craven, Centre for Independent Studies Spring 1992 "Policy" said:

- *"This article discusses not the merits of converting the Australian Commonwealth from a monarchy into a republic, but rather the constitutionality of such a step. The legal complexity involved can scarcely be overestimated; there are virtually no questions in Australian constitutional law and theory more complicated and perplexing than those that surround the process by which the monarchy might be abolished. Naturally enough, this fact has not been stressed by prominent republicans, but it will have to be squarely faced before Australians are persuaded to commit themselves irrevocably to what may well prove a constitutional quagmire."*

And because such constitutional experts are in such conflict with other republican constitutional experts we suggest an urgent need to encourage the electorate first to understand how our present system works. Because if we don't understand that, how can we ever be expected to know whether any alternative system is better, or more importantly, worse? So our top priority is for Australia-wide Civics Education. Otherwise electors are arguing in ignorance of facts.

We refer here to the NON-PARTISAN Constitution Education Fund-Australia initiative being launched during 2004, brief outline details follow:-

The Australian Constitution – a Shared Legacy

The Constitution belongs to all Australians. It is the foundation of our system of government, gives us our national unity and guarantees our freedoms. Yet very few of us know a lot about it

The Constitution Education Fund-Australia (CEF-A) has been established to help all Australians gain a better understanding of the Australian Constitution and the Constitutions of all the States of Australia. The specific objectives of the Fund are as follows:

1. To educate Australians of all ages about the workings of the Australian Constitution and the Australian system of government.
2. To develop books, videos and other material to support this educational process.
3. To train men and women all round Australia to act as spokespersons for the Constitution and to provide material to support their training.
4. To run appropriate advertising campaigns to encourage public interest in the Constitution and inform people of the purpose of the Fund.
5. To present educational seminars.
6. To provide educational materials in languages other than English.
7. To provide educational materials at no cost to schools and educational institutions that request them.
8. To develop educational material for use with computers and other new technological developments.
9. To maintain centres where educational material can be distributed to regional areas of Australia
10. To continue meeting the ongoing Constitutional educational needs of all Australians.

Pending availability of its planned web site www.cefa.org.au enquiries may be directed to The Secretary, CEF-A, GPO Box 64, Sydney, NSW 2001.

Terms of Reference (b) Alternative models for an Australian republic with specific reference to:

- (i) the functions and powers of the Head of State
- (ii) the method of selection and removal of the Head of State, and
- (iii) the relationship of the Head of State with the executive, the parliament and the judiciary.

(b) By all means submit alternative models to the electorate, but ultimately and inescapably ONE must be the one on which electors may be asked to vote as being better than our present system of government. So as ONE is unavoidably the one to be submitted to electors at a referendum, why not submit it before wasting time on very expensive canvassing by unknown numbers of Senate staff sent out across the whole of Australia but without a proposed alternative.

Reference (b i): The functions and powers of our Head of State are already spelled out in the Commonwealth Government Directory – The Official Guide – 22.12.95 as follows: (see attachments A1 & A2)

Functions: Under the Constitution, the Governor-General is the Queen's representative in the Commonwealth. He is the head of state in whom the executive power of the Commonwealth is vested. The Governor-General is also one of the three elements comprising of the Commonwealth Parliament. His powers include: Summoning, proroguing and dissolving Parliament; recommending appropriation; assenting to Bills; issuing writs for general elections; appointing and dismissing Ministers; submitting proposals for referendums; making proclamations and Regulations; and creating government departments and making statutory appointments.

Whilst reserve powers re not specifically mentioned, AIDC shares Mr. Keating's belief that these should remain.

Codification of reserve powers

There is however widespread and serious dissent among respected republican Constitutional experts on codification, and we attach our **Attachments B 1-8** "United in disunity" paper, outlining dramatically opposing views – strongly held – on codification. See Question 2 page 4. This adds to the need for a model preferred by a majority of those seeking such change to be presented for Australians to examine.

Reference (b ii): The method of selection and removal will naturally form part of any model finally agreed to, if agreement is attainable, and can then be examined. There is a plethora of republican Constitutional experts who could make a submission. here

Reference (b iii): As above in (b ii).

The Head of State referred to in (bi) (bii) and (biii) refers to a President. We point out that Australia already has a Head of State in the Governor-General – not the Queen, whose own web site refers to herself as Sovereign. See section of this paper headed "The Head of State of Australia is our Australian Governor-General."

Next: "The committee is also required to facilitate wide community participation in this inquiry by conducting public hearings throughout Australia, including in rural and regional areas."

AIDC asks the Inquiry: "What is an approximate estimate of the **cost** of this nationwide procedure, which sounds extraordinarily expensive? AIDC entreats the Senate Inquiry to give the public some such estimate – or is it to be open-ended and unrestricted? Electors can then decide whether they accept large amounts of taxpayers' money being spent on a proposal for change lacking any idea of what that change might be when matters of greater community concern are a priority eg Health, Education etc. It is totally unreasonable for those who oppose change to share in funding a change they oppose, especially whilst totally unaware of what the change to might be, and especially the 1999 referendum change having been so conclusively rejected.

Whilst rejected overwhelmingly, AIDC notes that 45% of votes voted for it. AIDC maintains that, had electors been made aware of the serious criticisms of it made by Australia's leading republicans and confirmed by Australia's leading Constitutional experts, republicans and anti-republicans alike (see **Attachments C1 & C2**) far less than 45% would have voted for it.

The Head of State of Australia is our Australian Governor-General

No case exists for a contrary argument as a reading of Sir David Smith's submission 20A to this Committee establishes beyond doubt. We note particularly his comment:-

"When designing the Australian Constitution, the founding fathers had before them the Canadian Constitution which describes the Queen as Canada's Head of State, and they drafted a Constitution for Australia which contained no such provision. Instead they gave us section 61, which as Lord Haldane, the Lord Chancellor, expressed it in two cases before the Privy Council in 1916 and 1922, *put the Sovereign in the position of having parted, so far as the affairs of the Commonwealth (of Australia) are concerned, with every shadow of active intervention in their affairs and handing them over, unlike the case of Canada, to the Governor-General.*" Therefore the description by republicans of the Queen of Australia as Head of State of Australia is proven as false and inaccurate.

ARM Misleading Australians on the Head of State issue

Regrettably we must record the fact that Ms. Allison Henry, Director of ARM, misleads us by saying that words of *her choosing* appear on the Queen's web site www.royal.gov.uk. She stated that that site said "*A Commonwealth is a Country where the Queen is Head of State.*" NO SUCH STATEMENT APPEARS ON THAT WEBSITE. This fabrication has since been confirmed by Buckingham Palace's Information Office, Miss Michele Edwards, who wrote on 17 December 2003 "Ms. Henry misquotes her own enclosure" clarifying what does appear on that site – namely: "*A Commonwealth is a country where the Queen is the Sovereign.*" (not the Head of State) AIDC deplores such blatant fabrication from the leader of a community organisation whose supporters are surely entitled to know that what she says is the truth.

AIDC asserts that unless republicans can present an official document from the Queen herself stating that she is Head of State of Australia, the unassailable truth is that the Governor-General is our Head of State. Whereas no such document describing the Queen as Australia's Head of State has yet been presented, the Commonwealth Government Directory, THE OFFICIAL GUIDE, States in 15 consecutive editions, the first published under the Prime Ministership of Paul Keating, the function of the Governor-General "He is the Head of State." See **Attachments A1 & A2**.

In spite of many requests spread over some years, the Federal Attorney-General's Department, including its Constitutional Policy Unit, has been unable to provide any official reference or document which describes the Queen as Head of State of Australia. Since this Department can be regarded as the official voice of the Attorney-General and in turn of the Government, it can now be stated that no such document exists.

Question: If the Australian Constitution does not state that the Queen is Head of State of Australia, and if the Queen herself does not state that she is Head of State of Australia, and if the Federal Attorney-General's Department can provide no legal evidence that the Queen is Head of State of Australia, AIDC asks what authority does any other person have to say she is? In the interests of an informed electorate AIDC would welcome any authoritative answer to this question.

The authoritative Commonwealth Government Directory – The Official Guide – described the Governor-General as “He is the head of state” in no less than 15 editions. This title was then mysteriously removed in March 1997 without any authority or stated reason, in spite of F.O.I. attempts to identify them. The unauthorised removal remains an unsolved mystery. Unless an official explanation of why those words were removed and on whose authority, AIDC asserts they must be reinstated immediately.

PLEBISCITES

(Two plebiscites are proposed by the ALP/ARM)

A Do you want an Australian Head of State?

B. Do you want a republic?

A has been dealt with above. We already have one.

So far as the question B “*Do you want a republic?*” is concerned, AIDC asks how can electors be expected to answer that question in all reasonableness and in an informed way when they are quite unaware of which model is supported by the majority of those seeking change. We understand that 4 – 7 draft models are discussed as options and these are not even fully detailed – as they must be to allow proper examination. In a matter of such importance for present Australians and, more importantly for future generations, FULL details are needed. General concepts are not acceptable.

For example the 1999 referendum model dealt only with a FEDERAL REPUBLIC and ignored totally the need for our 6 independent sovereign States to be involved and included. Such vital details must be comprehensively addressed, including how to cope with the real possibility of one or more States – notably Queensland and Western Australia where 93% of electorates in each State voted NO to becoming State republics, thus involving a serious reluctance to be willing to change their present constitutional arrangements to becoming “The Republic of Western Australia” and “The Republic of Queensland.”

“The mere abolition of the monarchy in the Commonwealth sphere would have no affect whatsoever on the position of the Crown in the States.” Professor Greg Craven C.I.S. Spring 1992. “Section 128 permits an amendment only of the Commonwealth, and not the State Constitutions.”

Proof of the fact that the 6 States were excluded totally in the 1999 referendum is attached – **Attachments C1 & C2** – Criticisms No. 38 and 46 by republicans Prof. John Williams and the late Richard McGarvie.

'Criticisms' of Plebiscites by Republicans

1. By Republican Hon. Tim Fischer: "*A Plebiscite would have no power to change anything and would be absolutely no guarantee of a successful republican end process*" The Age 20.11.01
2. By Republican Hon. Amanda Vanstone: A plebiscite is "*an abrogation of responsibility.*"
3. By Republican Prof. Greg Craven: "*It is futile to think a plebiscite will solve the problem.*"
4. By republican, former MP Andrew Thompson: "*It is crystal clear that a Beazley Government, if elected, will splurge taxpayer's funds on a meaningless national plebiscite in an attempt to revive the debate about Australia's constitutional arrangements. This would be a scandalous waste of money.*" "*If governments resort to half baked mechanisms not contemplated by the constitution to push ideas, the public fast loses confidence in how we are being governed.*" "*It's time to put plebiscites beyond the reach of politicians.*" His Media Release 14 Feb. 2001.

On a lighter, but highly relevant note – if a person having left a marital relationship was asked “do you want to change to a new spouse?” – wouldn't he/she be entitled, if not to examine a proposed new spouse at least to SEE him/her? Naturally no one would expect them to make a decision sight unseen, and no one should be expected to answer such an unconstitutional and legally meaningless question in relation to the Constitutional future of this great country.

Should someone voting “blind”: answer YES to the republican plebiscite question and subsequently discover that the model presented to the electors was – as was the 1999 referendum model – “flawed and unworkable” (**C1 criticism 15**) “a weak model with serious deficiencies” (**C1 criticism 31**) had “vital structural weaknesses” was “an affront to republican principles” (**C2 criticism 47**) – would the elector argue that he/she had voted in Australia's best interests?

It is therefore essential to be informed in advance and in full detail about what type of proposed change electors are being asked to consider. After all, we expect absolutely to know the detailed policies of the political party for which we vote at each Federal and State Election – why not in the more fundamentally important matter of our Australian Constitution?

So again it is unreasonable for those who voted so conclusively NO to be expected to pay (or have the taxpayers pay) the cost of a plebiscite contrary to their convincing vote against it, especially whilst totally unaware of what they might be voting for. See our paper “What is a plebiscite?” (**Attachments D1 & D2**)

The illogicality of seeking those who voted NO to vote blindly for a republican concept lacking one iota of knowledge of what they are voting for is even more significant when one observes the almost unanimous dissent even among republican supporters on its detail. (**Attachments B 1-8**)

A Plebiscite – a good use for one

AIDC suggests there is an appropriate use for a plebiscite and that is this: that those who support changing our system of government conduct an internal plebiscite to determine which of the various models on offer they are united upon putting to the electorate. This should indicate which model is supported by the majority of those seeking change. Such plebiscite to be at their own expense - because the 1999 referendum established that a convincing 55% majority of electors; all 6 States and the N.T.; 72% of all electorates and 63.6% of ALP/Democrats voted NO.

This confirms once more the need for:-

Those seeking change to **present a model** representing the aspirations of a demonstrable majority of them (preferably by internal plebiscite or other democratic method) for examination and debate by the Australian community – without deadlines. Remembering that our existing Constitution, which has served Australians faultlessly for over 100 years, took 10 years of debate.

During an attempt to produce a model which is better than our present one (and is there any point in it being inferior or the same?) those who seek change should be mindful of the words of the late Richard McGarvie, former Supreme Court Judge and Governor of Victoria, ALP Member 1944-76 and universally respected Constitutional expert: "*Australians are constitutionally a wise people IF GIVEN THE INFORMATION*" (Letter 28 February 1998) Hence the obvious need for non-partisan Civics Education.

Non-Partisan Civics Education

Mr. McGarvie was (and is) correct. Paul Keating's Government survey in 1995 found that 82% of us have little or no idea how and why our system of government works; that we have a Constitution – or what is in it. The fact that it is supported by republican Constitutional experts as well as supporters of our Constitution is evidenced by:-

- "*No one has a contribution to the working and preservation of our democracy which is more important than that of our teachers in primary, secondary and tertiary education.*" The late. Richard McGarvie p.80 'Constitutional Politics' (Warhurst & Mackerras University of Queensland Press 2002)
- "*Encouraging greater understanding of Australia's Constitution and the system of government.*" Quote from current ARM brochure listing aims of ARM.
- "*I believe that any money spent informing Australians about their Constitution and their system of government is money well spent.*" Page VIII of Malcolm Turnbull's book 'Fighting for the Republic' (Hardie Grant Books 1999). Further quotes supporting Civics Education are found throughout his book.
- "*The fault lies with governments that over many years have failed to educate Australians from an early age about how our system of government works.*" Former ARM Chair, Greg Barns, The Australian 10 July 2000.

How can Australian electors be expected to know whether any proposed change is a change for the better if they don't firstly understand how and why our **present** system works?

Summary

AIDC rejects the Inquiry as, unless a detailed proposed Republican Constitution is put to Australians as outlined by Republican Constitutional expert Prof. Cheryl Saunders (see page 1 of this submission), it is a total waste of time. Taxpayers funds would be vastly more effectively spent investing in a non-partisan Civics Education programme teaching the 82% who lack an understanding about our present system.

AIDC congratulates Prof. Saunders on her first proposal i.e. that it "should explain the current arrangements." Since 82% of electors are wholly or partially unaware of how and why our system of

government works, Civics Education about how and why should be first priority as otherwise if we are unaware of that, how can we ever know whether an alternative system is better? Such education is non-partisan as shown above and is supported by Senator Bolkus' republican colleagues, as shown above.

So, instead of "*conducting public hearings throughout Australia including rural and regional areas*" to an electorate virtually totally inexperienced in constitutional design, such design should be left to those with constitutional expertise, of which republicans have ample numbers. An excellent and preferred move is for a bi-partisan Senate group to go to "rural and regional areas" teaching our fellow Australians about how and why our system of government and Constitution works. Nothing could do more to encourage an informed electorate at any future discussion on any proposed change – Don't we all agree the desirability of that?



S, Morgan,
Hon. Sec.AIDC

"No one should consider changing something they don't fully understand"

Andrew Imlach, Editor The Parliamentarian Magazine

AIDC REPEATS ITS REQUEST FOR THE INQUIRY'S RESPONSE TO SIR DAVID SMITH'S SUBMISSION 20A RE HEAD OF STATE.