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

Dear Sir/Madam,

Inquiry into an Australian Republic

I wish to make the following Submission to the Committee's Inquiry into an Australian Republic. (It is, of course, a personal submission.) Since I have dealt with many of the relevant issues at greater length in *The Resurrection of the Republic* (Canberra and Sydney, 2001), I have referred to that publication at several places below. I assume it will be most convenient for the Committee if I address the specific questions raised in their order in the Committee's *Discussion Paper*.

Question 1: No. Such a move would probably mean moving to a system, like that of the United States, based upon the separation of legislative and executive power. There is no evidence of significant support for such a change in the Australian community. Moreover, if the American system were introduced into the Australian political environment with its strong party system it would operate very differently from the American system, at least initially. See, further, *The Resurrection of the Republic*, above, pp. 6-7. Furthermore, a strong feature of our present parliamentary executive (or "Westminster") system is that the *de facto* head of state (the Governor-General) possesses "reserve powers" to ensure that the Government complies with fundamental constitutional principles, such as representative and responsible government and the rule of law. These would be lost if a separate head of state were dispensed with since it is difficult to see who else could exercise them effectively; certainly not the High Court.

Questions 2 and 3: Were one framing a republican Constitution from scratch, one might vest the Commonwealth's "executive power" conferred by s. 61 in the Government rather than in the Queen or the Governor-General (*cf.* Irish Constitution Art. 28.2) and leave selection of the Prime Minister to the House of Representatives. However, the present powers of the Governor-General – essentially those of the Queen in the United Kingdom – reflect our constitutional heritage, and there is little public support for reducing them.

Reflecting what the constitutional framers saw as the law of the British Constitution, executive powers were vested in the Queen, the Governor-General or the Governor-General in Council with the clear expectation that, with the exception of the "reserve powers", all such powers would be exercisable only in accordance with ministerial advice (whether given in the Federal Executive Council or otherwise). That expectation rested on a well-accepted constitutional "convention". However, since this convention and those governing the exercise of the reserve powers may be seen as conventions of the monarchy, rather than more generally conventions of Australian

government, a republican Constitution should expressly provide for these conventions to continue under a republic. For such a provision, see *Constitutional Alteration (Establishment of Republic)* 1999 ("1999 Republic Bill") clause 59 and Schedule 2, clause 7. A similar provision was s. 60A of the author's draft republican Constitution first published in *The Independent Monthly* (Sydney) in March 1992: see G. Winterton, "A Constitution for an Australia Republic", in G. Winterton (ed.), *We the People: Australian Republican Government* (Sydney, 1994), 1, 20.

If s. 61 were not amended to ensure that the Commonwealth's executive power (which is presently not a reserve power) was exercisable only on ministerial advice, the Australian system of government could mutate into one resembling the French, especially if the head of state were to be directly elected. Hence s. 61 of a republican Constitution should expressly provide for the Commonwealth's executive power to be exercisable only on ministerial advice: see 1999 Republic Bill clause 59; "A Constitution for an Australian Republic", above, s. 61 (p. 20). However, the 1999 Republic Bill clause 59 expressly exempted "a power that was a reserve power of the Governor-General" from the requirement that the President act on ministerial advice, but these powers were not identified. Such a provision is unsatisfactory, especially with a directly elected head of state. The preferable course is either to identify the reserve powers which are to be exempted from the general rule that the head of state must act in accordance with ministerial advice or state how each power is to be exercised.

Regarding the three reserve powers – to appoint the Prime Minister; to dismiss the Prime Minister; and to refuse to dissolve Parliament (or both Houses under s. 57 of the Constitution) – the Constitution should partially codify the conventions governing their exercise. The Republic Advisory Committee's draft partial code would be an appropriate model: see *An Australian Republic: The Options*, vol 1: The Report (1993), pp. 101-5. For further discussion regarding the head of state's powers, see *The Resurrection of the Republic*, above, pp. 16-19.

Question 4: Some financial assistance would be desirable to enable candidates with limited means to stand for election if direct election were adopted. However, this question should be dealt with in Commonwealth legislation, not in the Constitution.

Question 5: Political parties probably cannot effectively be prevented completely from providing assistance, which can always be directed through surrogates, as American campaign funding reform demonstrates. Nor should they be, since freedom of expression is desirable. However, legislation should impose funding limitations on parties and other groups. The Constitution should expressly authorize Parliament to pass such legislation to ensure that it is not held invalid as a constraint on freedom of political communication.

Question 6: The AEC would seem appropriate.

Question 7: I believe preferential voting would be the most appropriate in view of our long and successful experience with this method. However, it would be preferable (as enabling adaptation to changing circumstances) for the voting system to be prescribed by legislation, not by the Constitution, as is the case with election of members of the Commonwealth Parliament. To protect against parliamentary misuse of this power, it may be appropriate to require bipartisan approval to alter the method of election; in

other words, to require legislation on that subject to be approved by two-thirds majorities in each House.

Question 8: There certainly is a risk that a directly elected non-executive head of state could become a rival power centre. Providing that Commonwealth executive power is exercisable only in accordance with ministerial advice and partially codifying the conventions governing the exercise of the reserve powers will go far to lessen this risk, but such provisions cannot, for example, prevent speech-making or invitations to, or meetings with, people or groups which challenges Government policy. The key to lessening such conflict is to ensure that high quality candidates are nominated. We can trust the good judgement of the Australian people; they will elect good heads of state *provided that the Constitution enables such candidates to be nominated*. As Alexander Pope famously observed in *An Essay on Man*, "For forms of government let fools contest; Whate'er is best administered is best". High quality candidates will operate a poorly designed system well, while poor candidates will wreck the most beautifully crafted system. For my suggestions regarding nomination of candidates, see Question 9 below. For further details on how the dangers of direct election may be ameliorated, see *The Resurrection of the Republic*, above, pp. 7-19.

Question 9: The source of nominations depends on the method of election. If the head of state is to be chosen by the Prime Minister, Parliament or an Electoral College (including, say, Commonwealth and State parliamentarians, as in India and Germany), a mechanism similar to that envisaged for the 1999 model (see Presidential Nominations Committee Bill 1999) would be satisfactory; namely, a Nominations Committee including Commonwealth, State and Territory representatives together with community representatives, the latter perhaps directly elected (who could also participate in the election of their State's Governor). See, e.g., *The Resurrection of the Republic*, above, pp. 10-11.

However, despite its greater complexity, I believe that a more sophisticated means of nomination would be appropriate for a directly elected head of state, in order to ensure both nomination of high quality candidates from all parts of the Commonwealth and direct community imput. I suggest that there should be three avenues for nominations:

- One candidate should be nominated through a process analogous to that envisaged in the 1999 model; in other words, a Nominations Committee (as envisaged above) should call for nominations from the public and produce a short-list from which the Prime Minister and the Leader of the Opposition would select one candidate to be approved by a two-thirds majority of both Houses of the Commonwealth Parliament sitting jointly. (Provision might be made for the Prime Minister and Leader of the Opposition to select someone not on the Committee's short-list, in which case they must explain why it was necessary to go beyond that list.) Since the three principal parties will have endorsed this candidate, those parties are unlikely to nominate further candidates of their own.
- Any three States or Territories should be entitled jointly to nominate one candidate, with no State nominating more than one. This would ensure that worthy candidates from the less-populous States were not overlooked. Two nominees could, thus, derive from this source.
- A prescribed number of electors should be entitled to nominate a candidate. Electors should feel that they have a realistic prospect of real "input" in regard

to the choice of head of state; nominees should not be limited to those selected by Parliament or a Nominations Committee. This method is employed in Iceland and Portugal and was a feature of Bill Hayden's model at the 1998 Constitutional Convention (Republic Model E: *Discussion Paper*, p. 27). The required number of electors should be specified in legislation, not the Constitution. It should be sufficiently large to ensure that the nominee has some prospect of success and to prevent a tablecloth-sized ballot paper which would bring the electoral process into disrepute. Under Bill Hayden's model 1% of the electorate was the required number of electors, which is about 125,000 electors, which is rather large. Under the ARM's Model 4 the figure is 3,000 electors, with at least 100 in each State, which is too low. A more reasonable figure might be 50,000 electors, with at least 2,000 in each State and Territory. For further details, see *The Resurrection of the Republic*, above, pp. 10-12.

Question 10: No; a provision such as that proposed by Prime Minister Paul Keating, excluding parliamentarians and former parliamentarians unless five years had elapsed since their departure from Parliament (*An Australian Republic: the way forward* (1995), p. 13), should not be adopted. It unnecessarily denigrates our parliamentary representatives, denies the public freedom of choice, and would ultimately be ineffective in excluding "politicians" – although first-rank politicians are excluded, what prevents the election of second-rank politicians?

However, the Constitution should expressly prohibit the head of state from holding any other public office or belonging to a political party. *Cf.* the 1999 Republic Bill clause 60. However, the prohibition should apply at the time of entering upon the office, not at the time of selection or election.

Question 11: No.

Question 12: See Question 9 above.

Question 13: I personally prefer 'President', though I understand the argument in favour of retaining "Governor-General" both to highlight continuity with the present office and avoid confusion with the American executive presidency. As one of the movers of the Corowa Resolution of 2001 (Corowa Proposal A: *Discussion Paper*, p. 17), I believe that the Australian electors should choose the title in a plebiscite.

Question 14: The term should not be the same as that of the House of Representatives (to facilitate differentiation between the head of state and the Government). It should be long enough to provide some stability, but not so long as to diminish legitimacy. Five years, the usual term of the Governor-General and State Governors appears appropriate. (It is also the presidential term in Germany, India, Israel and Portugal.)

Questions 15 and 16: The head of state should be eligible for re-election/re-appointment. There are arguments for a limitation to two terms, especially with a directly elected head of state, essentially to prevent the office becoming too powerful. In general, however, I oppose limiting the public's freedom of choice and believe that the political process can be relied upon to deny re-election to an unworthy (corrupt, excessively interfering or incompetent) candidate.

Questions 17 and 18: A republic being a polity founded upon popular sovereignty, a republican head of state should be selected by a process involving popular approval, either directly (as in direct election) or indirectly (as in approval by a parliamentary super-majority). The head of state will, therefore, enjoy legitimacy derived from direct or indirect popular choice, which will be important in replacing a head of state (the monarch) whose office derives legitimacy from long tradition and the "majesty" of monarchy. Enjoying legitimacy derived from direct or indirect popular choice, the process for removing the head of state must, likewise, be based upon popular authority. The appropriate body to remove the head of state is the Commonwealth Parliament. As is noted below, removal should be on specified grounds, which can be judged by Parliament but not (even with a directly elected head of state) through a referendum, which would also be too slow for removing an errant head of state. To prevent a parliamentary minority from thwarting removal of a head of state who may have acted improperly by favouring them, a two-thirds majority should not be required; absolute majorities in each House should suffice.

Since the head of state will possess reserve powers enabling him or her to act as "ultimate constitutional guardian", the head of state should enjoy greater security of tenure than the Governor-General, who essentially holds office at the pleasure of the Prime Minister (a most unsatisfactory aspect of the 1999 model: see 1999 Republic Bill clause 62). The head of state should not be removable on purely political grounds, but solely for misconduct or incapacity. The formula for removal of federal judges – "proved misbehaviour or incapacity" (Constitution s. 72(ii)) – is appropriate, both because it enjoys long-standing recognition in our constitutional tradition, and because it has been the subject of considerable informed commentary, especially by the Lush Commission (1986). (See J. B. Thomas, *Judicial Ethics in Australia* (2d ed., 1997), 15-18. See also G. Lindell, "The Murphy Affair in Retrospect", in H. P. Lee and G. Winterton (eds.), *Australian Constitutional Landmarks* (Cambridge, 2003), 280, 287-90.)

Whether conduct constitutes "proved misbehaviour" should be judged dispassionately by persons with experience in evaluating evidence. Parliament should, therefore, be assisted by a Commission of retired judges, such as the Lush and Gibbs Commissions which were constituted to consider whether the allegations against Murphy J and Vasta J warranted removal. A finding by a Judicial Tribunal of conduct "capable of amounting to misbehaviour or incapacity warranting removal" was recommended by the Constitutional Commission as a necessary condition for parliamentary removal of judges (*Final Report* (1988), vol. 1, [6.180], [6.204]). However, contrary to that recommendation, the Judicial Tribunal or Commission should comprise *retired*, not serving, judges. See, further, G. Winterton, "Presidential Removal Under the Convention Model" (1999) 10 *Public Law Review* 58.

As with federal judges, it would not be possible to suspend the head of state pending consideration of possible removal unless the Constitution expressly provided for it: see J. Quick and R. R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 733. The "Hollingworth Affair" demonstrated the need for provision to be made allowing the Governor-General to stand aside (but not resign) pending inquiry into alleged misconduct or (in Hollingworth's case) the outcome of litigation: see G. Lindell, "The Hollingworth Affair: Implications for the

Future Appointment of Vice-regal Representatives" (2004) 6 *Constitutional Law and Policy Review* 73, 75ff. A similar provision should be made for a republican head of state. It appears that the Governor-General could be stood-aside involuntarily and an Administrator appointed by the Queen on the Prime Minister's advice (*ibid*, 77-8). A republican Constitution should, likewise, provide for the head of state to be stood-aside involuntarily pending the outcome of an inquiry into possible misbehaviour or incapacity, probably pursuant to a determination to this effect by the Judicial Commission or Tribunal: *cf*. *Judicial Officers Act* 1986 (NSW) s. 40.

Question 19: The present "casual vacancy" provision, whereby the longest-serving State Governor acts as Administrator of the Commonwealth when the Governor-General has died or been removed, is absent from Australia, incapacitated or otherwise "absents himself temporarily from office" (see *Letters Patent Relating to the Office of Governor-General…* (as amended in May 2003), clause III) works well and should continue under a republic. It should not matter whether or not that Governor represents the Queen in the State. Clause 63 of the 1999 Republic Bill is an appropriate precedent.

Question 20: A person should be eligible for election or appointment as head of state if he or she would be eligible for election to the Commonwealth Parliament – in the words of the 1999 Republic Bill "is qualified to be, and capable of being chosen as, a member of the House of Representatives" (clause 60). However, the ineligibility of persons who are "bankrupt or insolvent" (Constitution s. 44(iii)) might be queried: see G. Carney, *Members of Parliament: law and ethics* (Sydney, 2000), 51-55.

Question 21: The disqualifications of a member of Parliament (Commonwealth Constitution s. 45), should apply to the head of state, albeit with the possible exception of s. 45(ii) (see Question 20 above). Additionally the two further disqualifications in the 1999 Republic Bill (clause 60) should apply: membership of an Australian legislature or of a political party.

Question 22: Yes; following s. 72(i) and (ii) of the Constitution, these powers should be vested in the head of state in Council.

Question 23: The prerogative of mercy falls within the Commonwealth's executive power conferred by s. 61 of the Constitution. For its appropriate exercise in a republic, see Questions 2 and 3 above.

Question 24: It is inappropriate for the head of state to seek the advice of a serving judge and inappropriate for the latter to give it. In 1997 Brennan CJ intimated that High Court justices would not be willing to advise Governors-General: see G. Winterton, "1975: The Dismissal of the Whitlam Government", in *Australian Constitutional Landmarks*, above, 229, 248-50. However, an express constitutional prohibition to this effect would be inappropriate, especially since future exigencies cannot be foreseen.

Nevertheless, the head of state should be required to consult (but not necessarily to follow the advice of) a "Constitutional Council" of "constitutional experts" before exercising a reserve power without, or against, ministerial advice. (Models for such

Councils exist in Ireland and Portugal.) The Council might consist of between three and five members and, to ensure expertise and political neutrality, might be chosen by the State and Territory chief justices acting jointly: see, further, *The Resurrection of the Republic*, above, pp. 18-19.

Question 25: As the 1998 Constitutional Convention recommended, the States should be free to decide for themselves whether, when and with what form of government to follow the Commonwealth into severing links with the monarchy (see *Report of the Constitutional Convention* (1998), vol. 1, p. 43). This was reflected in the 1999 Republic Bill, Schedule 2, clause 5. (See also clause 6.) In 1999 the States had set in place the necessary procedures to enable a smooth transition to State republican governments had the Commonwealth electors decided on a Commonwealth republic. Exactly the same should occur when a Commonwealth republic is next contemplated. See, further, G. Winterton, *Monarchy to Republic: Australian Republican Government* (rev. ed., Melbourne, 1994), 103-5; G. Winterton, "An Australian Republic" (1988) 16 *Melbourne University Law Review* 467, 469-70.

Question 26: Since the Australian electors rejected an Australian republic in the November 1999 referendum, it would be appropriate to seek their approval through a plebiscite before expending substantial further resources on this question.

Question 27: The electors should also be consulted on the method of selecting a republican head of state and on that officer's title. I was a mover of the Corowa Resolution (Corowa Proposal A: *Discussion Paper*, p. 17) and strongly support the process recommended in that Resolution. In 1999 many electors resented the fact that, as they saw it, they were offered no choice among various models but at the referendum were presented with only one model on a "take it or leave it" basis. The popular sovereignty reflected in s. 128 of the Constitution should give the electors a real sense of "ownership" of the proposed constitutional alteration. This can best be accomplished by providing for the electors to determine in a plebiscite the basic features of the model to be further refined and ultimately presented to them in a binding s. 128 referendum.

It is important that all three plebiscite questions be asked *simultaneously* for several reasons:

- It is somewhat artificial to state whether one prefers a republic in abstract, since the true response must be that it all depends on what sort of republic is being referred to. As was seen in 1999, many direct-election republicans preferred the *status quo* to the 1999 model. Voting simultaneously on a particular republican model sets the context for, and gives specificity to, the initial general question.
- Some electors may fear that the Government will treat an affirmative answer to the initial question as a "blank cheque" and decline to consult the electors further. The electors must, of course, vote in a referendum before any constitutional alteration is made, but some electors may not realize this.
- Holding one plebiscite asking several questions would be much less costly than conducting several separate plebiscites.
- Holding one plebiscite asking several questions would not effectively "disenfranchise" monarchists, who would indicate which model they would

prefer were links with the monarchy to be severed. They would face exactly the same dilemma in choosing among republican models whether the questions were asked on the same or separate occasions.

If a plebiscite question asks electors to choose among (say) four models, as in the Corowa Resolution, an important question is whether the result should be determined by the "first past the post" method or by preferential voting. There is an argument here for first-past-the-post, *viz.* that the model put to referendum should be the one enjoying the strongest support, not that to which the electors object least. However, since the electors are used to preferential voting and would be suspicious of any departure from it, that method should probably be adopted. The method of voting should be "optional preferential" (in other words, electors can express up to four preferences but need not express more than one to cast a valid vote). However, if the first two preferences are rather close in result (say not more than 5% between them), it would be appropriate to leave the final choice between them to the elected Convention noted in Question 29 below.

Question 28: Compulsory. If a process, such as that adopted at Corowa, is proposed, the plebiscite will effectively close off options and thus determine the core features of the model eventually put to referendum. Hence, both the method of voting and the required majorities should be the same as those in a s. 128 referendum.

Question 29: As recommended at Corowa, a directly elected Convention should frame the details of the model adopted at the plebiscite, unless the electors at plebiscite choose Prime Ministerial appointment of the head of state, in which case a Commonwealth Parliament Joint Committee would probably be sufficient to determine the details. Such a Committee should, in any event, outline the core features of the models put to the plebiscite and prepare neutral information for the plebiscite.

Question 30: The Corowa Resolution of December 2001 (Corowa Proposal A).

Other issues: It is appropriate to note some of the additional issues which severance of monarchical links would entail:

- **Immunity from criminal and civil process:** An important issue overlooked by the 1998 Constitutional Convention (though I sought unsuccessfully to raise it there as an appointed delegate) was whether the head of state should enjoy any immunity from criminal and/or civil process while in office. For provisions dealing with this issue, see "A Constitution for an Australian Republic", above, s. 59(13) (p. 19). (This issue has in recent years arisen in the United States and (in respect of the Prime Minister) in Italy.)
- **Preamble:** The Preamble to the *Commonwealth of Australia Constitution Act* 1900 (UK) recites that the people of the Colonies had "agreed to unite in one indissoluble Federal Commonwealth *under the Crown of the United Kingdom*". One of the ludicrous features of the 1999 referendum was that, had it succeeded, Australia would have become a republic with that Preamble unaltered. Any future consideration of a republic must, at least, involve an addition to the present Preamble: see, e.g., "A

Constitution for an Australian Republic", above, p. 1. However, as the debate at the 1998 Convention demonstrated, there would be considerable public support for a more substantial revision of the Preamble: see *Report of the Constitutional Convention* (1998), vol. 1, pp. 46-7. For examples of some Preambles, see G. Winterton, "A New Constitutional Preamble" (1997) 8 *Public Law Review* 186.

Yours sincerely,
George Winterton