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Senate Legal & Constitutional References Committee
Parliament House
Canberra ACT 2600

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Dear Committee members,

Inquiry to an Australian Republic

I am responding to your discussion paper dated December 2003 requesting submissions on the establishment of an Australian Republic with particular focus on 25 key questions. Attached below are my thoughts and suggestions on the matter which in combination could loosely be referred to as a “federation” model. This reflects the underlying state-based election method, which I think is necessary to ensure “buy-in” throughout the country and prevent Sydney and Melbourne dominating the election process.

Is a separate head of state needed?

In my opinion, one of the major roles of the head of state is to be the moral backbone of the nation and bring the people together – and Sir William Deane, provided an excellent example of how this should be done. This role can be contrasted with that of the Prime Minister who is responsible for managing the day-to-day activities of the nation. The Prime Minister is required to make decisions, which may on occasion be politically expedient, whereas the Governor-General is supposed to be above politics and therefore combining the role of head of state with the head of government is inappropriate. In some senses this can be considered analogous to the current corporate governance debate where separation of the roles of Chairman/woman (Governor-General) and Chief Executive Officer (Prime Minister) is considered best practice. Given that the governance of a nation is possible one of the most important items for a country, it is essential in structuring our constitutional arrangements that we adopt best practice and keep the roles separate.

Question 1 *Should Australia consider moving towards having a head of state who is also the head of government?* **No**

Powers of the head of state

The major discussion surrounding the powers of the head of state in Australia appears to focus on the power to dismiss a prime minister or government. As under the “federation” model, the head of state is directly elected it is necessary to prevent a political feud developing between the head of state and the prime minister. Therefore, any decision to remove a prime minister and install a caretaker government requires the consent of a so-

called “Council of Governors”, which is based on the concept of a “constitutional council” as discussed in the McGarvie model. This prevents the head of state acting as a “one man band”. The Council of Governors would comprise the three most senior governors of the states of the Commonwealth of Australia. Where a Governor of the Council is on holidays or interstate, then the fourth most senior governor would form part of the Council of Governors. Apart from the codification of the dismissal power, no further codification should occur as this could significantly reduce the flexibility of present arrangements to cover unforeseen circumstances.

Question 2 <i>What powers should be conferred on the head of state?</i>	No change
Question 3 <i>What powers (if any) should be codified beyond those currently specified in the Constitution?</i>	Power to dismiss the Prime Minister/Government requires approval of the Council of Governors

Selection

The selection of the head of state must be decided by direct election. This was the “make or break” decision that resulted in me voting no to the republic referendum last time and surveys have indicated that this was the case for many other Australians. As the “federation model” is expected to involve 4 or 5 candidates, the election should be decided by preference vote.

One of the keys to keeping the role of the head of state apolitical will be running the election in a different manner to that of parliamentary elections. This could be achieved by:

- holding the head of state election on a fixed date – eg the first Monday in June every fifth year. (Thereby ensuring we still have a public holiday in lieu of the Queen’s Birthday!)
- prohibiting the holding of any parliamentary elections within a month either side of the head of state election date
- requiring the Australian Electoral Commission (“AEC”) to conduct all advertising and publicity with equal information provided about each candidate – similar in manner to how the AEC provides information about the “yes” and “no” case for each referendum. The AEC would fund all promotion of candidates and the election. Media would be banned from accepting advertising from anyone apart from the AEC.
- fining any organisation and banning any political party from future parliamentary elections for funding or organising any campaigns. Any person distributing how to vote cards would be subject to fines or imprisonment.
- restricting candidates to one presentation/campaign speech of equal time to be telecast simultaneously on all media. No members of the public would attend the speeches.

Whilst some of these measures may seem harsh, their purpose is to reinforce the concept that this election is different from a parliamentary election. This also helps ensure that the Australian people view the roles of head of state and head of government as quite separate, which is important to help prevent the head of state becoming a rival centre of power to the head of Government. The relative ease of removal of the head of state (see below) also serves as a mitigating factor on the development of the head of state as a rival centre of power. If the removal process is difficult, the potential for conflict is significantly higher. The retention of the term “Governor-General” would also reinforce this. This is important as public perceptions of a president’s powers may be influenced by media coverage of the role and powers of the President of the United States. The final element in ensuring that the head of state is apolitical is in the design of the nomination process and eligibility criteria (see below).

Question 4 <i>Should some form of campaign assistance be available to nominees, and if so, what assistance would be reasonable?</i>	Publicity and advice campaign managed by AEC
Question 5 <i>Should/Can political parties be prevented from assisting or campaigning on behalf of nominees? If so, how?</i>	Yes. Fines and bans on political parties from participation in elections. AEC
Question 6 <i>If assistance is to be given, should this be administered by the Australian Electoral Commission or some other public body?</i>	AEC
Question 7 <i>If the Australian head of state is to be directly elected, what method of voting should be used?</i>	Preferential
Question 8 <i>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?</i>	Extremely unlikely but possible. Dispute resolution process required involving State governors – see commentary.

Nomination

In the same way that the Senate equally represents each State, each State should have the opportunity to provide the head of state. This is essential to obtain buy-in of people throughout Australia and prevent the role being dominated by representatives of Sydney and Melbourne.

Consistent with this concept, the State from which the incumbent comes and the State of the previous head of state, would not be eligible to nominate candidates. The remaining States would nominate a candidate that must be approved by two thirds of the combined Houses of Parliament of the relevant state. (ie If the current head of State is Victorian and the previous from Tasmania then only NSW, Qld, WA and SA would provide nominations). The incumbent may nominate himself or herself to continue in the role. The temporary exclusion of States that have previously provided candidates is to ensure that an “election battle” between the States does not develop as one State (or two States if the incumbent does not want to stand for re-election) will not have a local candidate for whom to vote.

Candidates should not be a member of a political party or member of parliament for the last 5 years. These requirements are designed to encourage the perception that the head of state is an apolitical role, whilst at the same time not prohibiting a former political from ever having the opportunity to be head of state.

The requirement for each nomination to be approved by a two thirds majority of the combined Houses of Parliament for a State is also another element in trying to ensure that candidates remain apolitical. It is proposed that there be no codification as to how a State parliament determines its nomination. This allows for a variety of different nomination methods to be tried by different States, so that the best method for Australia can be identified over time. Because of the two thirds majority approval requirement this does not create a significant risk of a political candidate emerging.

Question 9 <i>Who should be eligible to put forward nominations for an appointed head of state? For an elected head of state?</i>	Nominations to be made by a two-thirds majority of State parliaments.
Question 10 <i>Should there be any barriers to nomination, such as nominations from political parties, or candidates being current or former members of parliament?</i>	Cannot be a member of a political party or parliament for last 5 years.
Question 11 <i>Should there be a maximum and/or minimum number of candidates?</i>	5 including incumbent – see detail.
Question 12 <i>Should there be a minimum number of nominators required for a nominee to become a candidate?</i>	Not applicable.

Title of the head of state

Given the potential arguments over what the title should be I think a list of alternatives (Governor-General, Grand Dame/Knight, President, Chancellor, King/Queen, Aboriginal word for wise elder, etc) should be put to a preference vote of the Australian people along with the plebiscite to become a republic.

In the event that the title is not considered important enough for the people to decide, I would prefer the phrase “Governor-General”. The title “President” is used everyday to refer to the President of the United States and therefore the expectations of a President of Australia will be coloured by media reports on the US president, who obviously has an executive role. This contrasts to the term “Governor-General” which does not have an executive role and therefore the risk of a conflict of between the Prime Minister and the head of state is reduced because of lower expectations as to what a head of state should and can do.

Question 13 <i>What should the head of state be called, Governor-General, President of the Commonwealth of Australia, or some other title?</i>	If not decided by plebiscite, Governor-General.
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Term of office

The term of the head of state should be dissimilar to that of the Parliament and I propose 5 years on the basis that it is consistent with the current terms of Governors-General and provides sufficient time for a person to grow into the job. As the incumbent will be subject to re-election by the Australian people, it is really the responsibility of the Australian people to determine whether the incumbent is still the most appropriate person to fulfil the role and therefore no term limit is necessary. This can be contrasted to the US President, who has executive powers. If an Australian head of state were to be the head of the government then I believe it would appropriate to place a 10 year limit on the role.

Question 14 <i>What should be the length of a term of office for head of state?</i>	5 years
Question 15 <i>Should a head of state be eligible for re-appointment/reelection?</i>	Yes
Question 16 <i>Should there be a limit on the number of terms an individual may serve as head of state?</i>	No

Removal

As Parliament does not sit 365 days per year and the removal situations may require prompt action (eg a car accident places the head of state in a terminal coma) then involvement of the Parliament, whether through ratification or otherwise, is unlikely to be an effective process. Placing all the responsibility with one person is also inappropriate, especially if there is some degree of judgement involved or potential political ramifications. Therefore using the concept of a constitutional council as discussed in the McGarvie model has merit. However to avoid the need to determine membership of this body, it is proposed that the three most senior State governors be used as the “council” with any request from the Prime Minister for removal being subject to the “Council of Governors” approval before it takes effect.

The problem with codifying a basis for removing a head of state is that it potentially increases the risk of constitutional conflicts as a removed head of status may challenge the legality or validity of an assessment that he or she is no longer “competent”. Therefore the ability to remove the head of state without spelling out the grounds is important. As a result, the current lack of grounds method is the preferred approach.

Question 17 <i>Who or what body should have the authority to remove the head of state from office?</i>	Prime minister with consent of the Council of Governors.
Question 18 <i>On what grounds should the removal from office of the head of state be justified? Should those grounds be spelt out?</i>	No guidelines required.

Casual vacancy

As the preferential voting method has been used to determine the head of state, the next preference of the Australian people should be used to fill any casual vacancy, subject to the

candidate still being interested. In the event that no candidates are still available a separate election would be held with the complete nomination process adopted.

Question 19 <i>How should a casual vacancy be filled?</i>	Second place getter in election.
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Eligibility/disqualification

As a nation of immigrants, there should be no requirements that candidates be born in Australia. Provided an individual has been an Australian citizen for at least 5 years and is eligible to vote then he or she should be eligible to be a candidate. As noted in the nomination section, a candidate should not have been a member of a political party or a member of parliament in the previous 5 years. Similarly, the head of state should be prohibited from standing for parliament or being member of a political party within 5 years of retiring from office.

In order to emphasise the apolitical role of the head of state, an additional potential eligibility criteria could be considered, whereby the individual must have demonstrated community service – this is because the head of state is responsible for bringing the Australian community together and provides a moral backbone to Australia. To provide an objective test for this, each candidate must have received an Australian honour for community service efforts.

Question 20 <i>What should the eligibility requirements be for the head of state?</i>	Candidates must be Australian citizens for 5 years and possibly have received an honour for community service.
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Question 21 <i>On what grounds should a person be disqualified from becoming of head of state?</i>	Refer nomination section.
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Relationship of head of state with executive, parliament and judiciary

The head of state should replace the Queen in terms of relationship with the executive, parliament and judiciary. The independence of the judiciary should be strengthened by requiring the appointment and removal of judges to be only on the recommendation of Parliament. There is the potential at some point that the head of state may need legal advice on interpreting the Constitution. As the Council of Governors (refer earlier) are unlikely to have sufficient experience in interpreting the Constitution it should be possible for the head of state to seek legal advice from the judiciary, except where it relates to the removal of a prime minister or government (as this is the function of the Council of Governors).

Question 22 <i>Should the head of state have power to appoint and remove federal judges?</i>	Only on recommendation of the Parliament.
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Question 23 <i>Should the head of state have the prerogative of mercy?</i>	Yes
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Question 24 <i>Should the head of state be free to seek</i>	Yes, in so far as it relates to
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constitutional advice from the judiciary and if so, under what circumstances?

understanding his or her authority under the Constitution or validity of a bill that he or she has been presented.

Position of the states

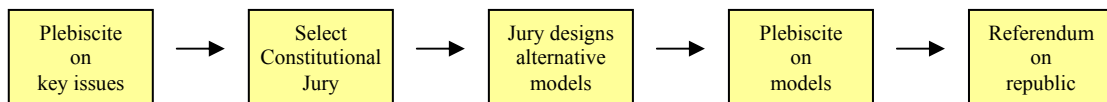
If Australia becomes a republic, then it will be almost farcical if the Queen of say Queensland is the Queen of England, but not Australia. In conjunction with Section 106 of the Constitution it should be possible to insert an extra clause of the Constitution stating that even though the powers of “the Crown” are divisible, the head of state for a State must be the head of state of the Commonwealth of Australia. The title of the head of state for a State would remain dependent upon State constitutions. This, of course, may lead to the unusual situation where the “Governor-General” of the Commonwealth of Australia is the King of Queensland, but more importantly from an external point of view there would be consistency as to who was our head of state.

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

The head of state for each state must be the head of state of the Commonwealth of Australia. Powers remain divisible.

A process for moving towards an Australian republic

Holding simultaneous compulsory plebiscites is an effective method for providing direction on key issues. In the event that the plebiscite indicates that there is not significant support for an Australian republic, then no further consideration should occur for a pre-determined period of say 25 years. The matters placed before the plebiscite should relate to design issues (eg title of the head of state, eligible for re-appointment, decided by direct election) and be determined by the Senate Legal & Constitutional References Committee as an output of this inquiry.



Assuming that there is support for a republic, a Constitutional Jury should be established. Membership of the Jury of say 100 people should be selected in the same manner as jury selection for trials. The use of a jury is important to create ownership of the process by every day Australians. Conventions and “expert” committees are susceptible to domination by lobby groups. Similarly parliamentary or elected committees will be significantly influenced by politics, whereas the transition to a republic must capture the desires and wants of ordinary Australians. A Constitutional Jury should ensure a representative group of Australians is recommending models for Australia’s future. The Jury should convene to design several models based on the results of the plebiscites over key issues previously considered by the Australian people. The Constitutional Jury would

then have the opportunity to place one final plebiscite before the Australian people presenting two or three alternative models devised by the Jury, prior to the final referendum being considered by voters.

Another major impact is consideration of when the transition to a republic should occur. Considering the respect to Queen Elizabeth II that many Australian people have, the first nominations and elections for the head of state should not occur until after she has passed away (ie at the time Prince Charles would become King). The transition arrangements in the Constitution should also include appropriate time frames for the cessation of the use of the “Royal” designation in names of organisations, depending on the preferred title of the head of state.

Question 26 <i>Should there be an initial plebiscite to decide whether Australia should become a republic, without deciding on a model for that republic?</i>	No. The plebiscite should be held in conjunction with plebiscites on other key issues.
Question 27 <i>Should there be more than one plebiscite to seek views on broad models? If so, should the plebiscites be concurrent or separated?</i>	Plebiscites on key issues held simultaneously. Subsequent plebiscite on preferred model.
Question 28 <i>Should voting for a plebiscite be voluntary or compulsory?</i>	Compulsory
Question 29 <i>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?</i>	A “Constitutional Jury” (refer above)
Question 30 <i>What is the preferred way for a process to move towards an Australian republic?</i>	Refer above.

Other symbols

The transition to a republic includes a significant element of symbolism and consideration of who we are as a nation. It is important to address the other symbols of nationhood at the same time that we address the republic question. As part of any referendum about whether Australia should become a republic, I would like to see the other symbols of Australia protected by the Constitution. In fact, I think this should occur regardless of whether the people of Australia desire a republic. This may also help the Australian people feel like they have greater ownership of the Constitution. Potential wording for an extra section of the Constitution could be:

The symbols of the Commonwealth of Australia are the anthem, the flag and the coat of arms. These symbols may only be changed if a referendum held in accordance with Section 128 confirms that a change is desired by the Australian people. The selection of a new symbol will be decided by a preference vote of all electors qualified to vote for the election of the House of Representatives and the existing symbol must be included as an option in the preference vote. The referendum confirming a change is desired and the preference vote may be held simultaneously.

Conclusion

The decision to become a republic is an important issue that requires design of a model that provides buy-in of the Australian people without creating a head of state that will compete with the head of government as to the centre of power. The “federation” model attempts to do this with several key features:

- model recommendation by a Constitutional Jury – more representative of ordinary Australians compared to Constitutional Conventions or Committees
- state-based nomination process – minimises domination by Sydney and Melbourne
- restricted campaigning and promotion – reduces role politicisation
- candidates to have received an honour for community services - emphasises the community role of the head of state
- involvement of Council of Governors – provides a moderation to removal processes, but still allows for prompt action if required
- effective on the passing of Queen Elizabeth II – shows respect that many Australians believe is appropriate
- protection of other symbols – emphasises the importance of the head of state at symbolising who we are as a nation.

I hope that you find the above comments of use in undertaking your inquiry and if I can provide any clarification on the points discussed above, please do not hesitate to contact me.

Yours sincerely,

Robin Clough