

GENDERED ISSUES FOR A MOVE TO A REPUBLIC
Submission to the Senate Legal and Constitutional Committee
Inquiry into an Australian Republic

Prepared by Kim Rubenstein, Associate Professor in Law, University of Melbourne

This submission highlights some of the debates about a move to a republic and the impact on women in Australian society. It seeks to introduce as a central part of the discussion the gendered implications of some of the issues raised in this Inquiry into an Australian Republic.

The submission is divided into two parts: Part I raises gendered issues associated with the Role of Head of State and Part II raises gendered issues associated with the Appointment of a Head of State

Part I: THE ROLE OF HEAD OF STATE

It is important to consider the role of the Head of State in a Constitutional system, before discussing the appointment and removal procedures. The role of Head of State has built into it some gendered issues which need to be unravelled from the “neutral” Constitutional framework.

Generally, there are two different kinds of Head of State: Executive and Non-Executive. The difference between them is the amount of real power exercised independently by the Head of State.

Australia currently has a non-executive Head of State - this is a largely ceremonial role. While the Head of State has formal powers as set out in the Constitution, they are exercised on the advice of the PM (as head of the Executive government). This is explained further below.

An Executive Head of State has a lot of power - such as the US President where the Head of State exercises real power in government.

There can be variations between the two types of Head of State.

Most of the public discussion to date has evidenced a desire to continue with our current Non-Executive Head of State, and not to move to a US styled system of real power in the new Head of State. This submission will not develop further the gendered implications of the difference between a Non-Executive and Executive Head of State, although it will be argued that a non-Executive head of State has the potential to be more inclusive in reflections of different forms of power in society.

CURRENT POWERS OF THE HEAD OF STATE

The current system provides for the G-G to represent the Queen who is our Head of State and to exercise power within Australia. There are specific powers as set out in the Constitution such as proroguing and dissolving parliament- s5, issuing writs for the general elections - s 32, resolving a deadlock in providing for a double

dissolution- s 57, assenting to bills - s58, appointing Ministers - s64, acting as Commander in Chief of the naval and military forces - s68.

Currently those powers of the Head of State, as exercised by the Governor-General are limited by the Constitutional Convention (not written in the Constitution) that the G-G acts on the advice of the Prime Minister. This reflects our system of responsible government, inherited from the English parliamentary system. Many argue that if this unwritten Convention is to continue, we need to have it written into our Constitutional document. This in itself is not difficult, nor is it likely to be controversial in relation to those powers above.

The more controversial area is the Reserve Powers - that is those powers the Governor-General exercises *without* the advice of the Prime-Minister -i.e. the Dismissal of a PM. Given the events of 1975 there are many who argue that these issues need to be resolved and written into our Constitution so it is clear what the powers of the Head of State entail. The Broader those powers, the more reason not to have a popularly elected Head of State. The narrower those powers, the less controversial or problematic the direct election of a Head of State. The issues associated with the selection of a Head of State are discussed further below

The difference between the ceremonial duties and the Constitutional duties can be likened to the public/private divide in our public frameworks. The public/private divide is often identified by feminist analysis as a division between male (public) and female (private) responsibilities. Therefore, the ceremonial duties relate more to the individuals who make up our community - our social, personal and spiritual needs are recognised by having a person designated to represent us as a community. This symbolic position speaks to the notion of community which is broader than the pure power framework as expressed in the technical aspects of our democratic system and can be likened to being concerned with the "private" aspects of the State. This is what monarchists have traditionally seen as the "royal function" although it is not inherently something only possessed by people of Royal descent!

The other aspect to the Head of State is that of political umpire - Constitutional arbitrator. This is the only check on the abuse of executive political power that we have in Constitutional terms (save for the High Court's powers on unconstitutional legislative and administrative action through Chapter III of the Constitution) and this is not spelled out currently in our Constitution. The concept of reserve powers fits into our system here, as do the inherited Conventions. The 1975 crisis was an example where the reserve powers of the GG were the basis for the G-G's action in dismissing the democratically elected leader of the Government. This notion of power resonates more strongly with largely male (public) notions of contested power - battles between strong political contenders who fight it out in the Constitutional ring.

However, one of the values of our current system is that given these two roles are combined, it has the potential to emphasise the necessary synthesis between public and private in our political framework. This also lessens a singular political brute character role of the Head of State. When the position of Constitutional check is

coupled with the symbolic duties of community and cohesion, then it arguably broadens our conception of public power.

In this sense, the responsibility of the position of Head of State is not limited to Constitutional experts, but rather people who can both represent the community, and are intelligent and sensible people able to properly consider their role in our Constitutional framework.

VALUES AND PRINCIPLES IMPORTANT IN A HEAD OF STATE

Most of the discussion has concerned a Head of State “above party politics”. This is largely due to dissatisfaction with the current nature of our political framework and exercise of power. For many people, the Parliamentary question time represents all that is unnecessary and not worthy of respect - lack of decorum, lack of substantial debate, lack of sincerity and honesty in dealing with issues, and general rowdy, boisterous, adversarial behaviour. This is being rejected by both men and women, and is highlighted as a largely male-dominated environment.

The values that are consistent with a Head of State above politics include:

Cohesion, Harmony, coordinator of different social groups, diversity of Australian experience together with stability, consensus, stability, and representation. These ideals resonate in people and professions more broadly than just Constitutional law experts!

If we look at our community, we could draw from people in the worlds of education, health professionals, and social work, just to mention a few areas of our daily lives from whom people could be chosen to be a Head of State. These are areas where women appear more frequently. These men and women would have no difficulty in understanding our Constitutional arrangements.

CONSTITUTIONAL UMPIRE

If we believe that principles of negotiation and consensus are important values in any democratic society, then we must consider applying those in the situation of constitutional umpire.

Several suggestions have been put forward in relation to the potential problem of 1975 occurring again, or any constitutional dispute involving the Head of Government and the Head of State.

One is that the Head of State be given the power to dismiss an elected head of government in certain prescribed circumstances (such as losing the confidence of the lower house without resigning). In the event that such a situation occurs, not only would the Head of State fulfil that responsibility, but she would also be required to resign, with a new person elected/appointed. Arrangements could be set out in legislation to ensure that caretaker arrangements be fulfilled by a “Caretaker committee” with sufficiently broad representation to ensure that the necessary appointment procedures be put into place if such a situation arises.

Another suggestion is that a Council of Elders (evolving from indigenous notions) be set up to ensure that any Constitutional crisis would be adjudicated by both the Head of State and such a Council. This would require a range of people to be included with reflects the community - gender being a substantial issue in this context. Youth would also protest at the “elderly” bias that such a Council may reflect.

This part has raised issues that will have an impact on women’s participation in our Constitutional framework. This has primarily been seen in the way we characterise the role to be played by a Head of State. In order for it to be as inclusive a position as possible, so that the whole community has the ability of identifying in some way with the Head of State, then the more cohesive the system the better.

PART II: THE APPOINTMENT OF A HEAD OF STATE

Centrally linked to the appointment of a Head of State is the matter of the powers of the Head of State. The gendered issues associated with the powers of the Head of State are dealt with above

In this part the different powers of a Head of State are discussed when relevant to the different appointment processes canvassed.

One of the issues in the appointment process of specific interest and concern for women is the accessibility of the position of Head of State equally for women. In the 104 years of Federation, no woman has been appointed to the position of Governor-General. The Queen is currently our formal Head of State, however the laws of succession in England do not guarantee women’s equal access to the position.

A central aspect of the position of the Head of State is that person’s ability to best reflect the identity and collective experience of the people. If men are always, or mostly occupying that position, then women’s identity and collective experience will not be properly reflected. In a society where women make up 52% of the population, (not to mention the historic inadequacy of the system in representing their needs) then any new system of appointing a head of state MUST properly address the equal representation of women in the position of Head of State.

The following are some methods that must be considered in ANY appointment process:

ALTERNATING HEAD OF STATE

The most conclusive way of ensuring that women are properly included in the selection of Head of State is to mandate the alternating gender of the position. For instance, the Constitution could guarantee that the gender of the first person appointed as Head of State would then be the basis upon which gender would alternate for the position. Therefore, if a woman was appointed as the first Head of State in a move to a republic, then the Constitution would mandate that the next person appointed to the position would be a man.

Arguments in support of this proposal

The advantages of this system include that no matter what process of selection is chosen (election by the people or appointment by the Parliament) equality in outcome would be guaranteed. The different selection processes have other gendered implications considered further below.

This process would set clearly in our Constitutional document the fundamental importance of the equal opportunity for men and women to the most senior position in our Constitutional structure.

It would establish that all Australians could *realistically* consider that they have the opportunity of being considered for the position of Head of State.

The idea of placing such a condition on the position of Head of State is not without precedent. For instance, one can look at the US Presidency as an example where conditions are attached to who is entitled to be elected as Head of State. A person who has occupied the position of Head of State for two terms cannot be re-elected as President. This condition reflects the principle that no person should accumulate power for more than one term. The parallel principle exists on a broader level with this proposal - that no one gender should accumulate power over the other (which has been the experience with public positions in Australia). Both examples reflect the belief that the institution of President has built into it principles that need to be reflected in the appointment process.

Another related example is the Federal principles that currently influence the choice of appointments to the High Court. In choosing a new High Court justice, the system currently favours “representation” of the States. That is, if a Queensland judge is not on the Court, this will be a factor influencing the new appointment. Or more specifically, our current democratic institutions skew a pure democratic system to take into account the representation of states in both our Senate and House of Representatives. These are examples illustrating positions of public power often incorporate other values that our important to us in best representing the community and its interests.

Arguments against this proposal (with answers!)

Some will argue that this consideration should not be put above “merit” for the position. This argument suggests that the “best” person for the position may miss out because of the mandate of gender for the position.

Underlying this argument are several assumptions that need unpacking. First is the notion that there will only ever be one “best” person for the position of Head of State. This is not a fair or realistic reflection of the pool of people available to take up the position at any one time.

Another issue is that ‘merit’ in itself is complicated. What do we mean by merit when we look at the position of Head of State? Some of the characteristics we would put

next to the position of Head of State are as follows: Integrity, Wisdom, Intellect, Judgement, Objectivity in exercising any Constitutional powers - these are all matters that could be equally found regardless of gender. (Although because men have traditionally exercised public positions of power, there is a subtle implication that men best reflect these characteristics!).

Other matters that are important to the position of Head of State (as opposed to a regular Company Chief Executive or School Principal) include: reflection of the community, responsiveness to the community's needs, life experiences reflecting those of the community. We need to ensure the diversity of our community is reflected in the position of Head of State – this is one of the meritorious matters needing consideration in the appointment of the person.

Some argue that this would in fact be an unnecessary exercise of affirmative action. Once again there are some assumptions about the current process in need of questioning. It could be argued, that we currently have a position of affirmative action favouring men. That reality can be seen in outcome where many men are appointed for positions where women could easily have been appointed, but have not. This system which is not transparent is arguable more insidious in its impact on society than one which openly proclaims the importance of men and women equally holding the position of Head of State.

The argument that women's position would be devalued due to the mandatory nature of women holding the position also needs to be unravelled. This has never been a problem for men who have benefited from a system working in their favour for so long. Moreover, this system would also have the benefit of showing the range of women who are available and competent and meritorious and worthy of the position of Head of State. It is not that there will only ever be one woman who is available - rather there is a pool of women from the 52% of women in society who should properly be regarded for the position of Head of State. This will also better emphasise the diversity of women's experience in society - women is not one monolithic group. The more women who occupy the position of Head of State, the more likely that this will be better understood and reflected in our public institutions.

THE ELECTED VERSUS THE APPOINTED HEAD OF STATE

The public debate has concentrated on the alternative between a popularly elected Head of State and one appointed by Parliament. The constitutional issues and the gendered implications are set out below:

Appointment by Parliament:

This model is put forward as a minimalist model for a republic. It is that a majority of 2/3 of the Parliament choose the Head of State. This is different to the current system of appointment of the Governor-General by the Prime Minister. A Prime-Ministerial appointment is seen to be a political appointment, and has not been given much attention in future models.

The advantage about this proposal is that the person appointed would have the support of both political parties. It is also argued that the person appointed would not have grounds for believing that their position has a separate democratic legitimacy

over the government of the day (and hence the Prime-Minister as Head of the government), so that if there is any Constitutional crisis, the Head of State is not seen to be above the Parliamentary system of government.

This discussion however, needs to take into account the actual powers of the Head of State. Currently the powers of the Head of State, as exercised by the Governor-General are limited by the Constitutional Convention (not written in the Constitution) that the G-G acts on the advice of the Prime Minister. This is despite the range of powers actually set out in the Constitution for the G-G to exercise (such as proroguing and dissolving parliament- s5, issuing writs for the general elections - s 32, resolving a deadlock with a double dissolution- s 57, assenting to bills - s58, appointing Ministers - s64, acting as Commander in Chief of the naval and military forces - s68). Many argue that if this unwritten Convention is to continue, we need to have it written into our Constitutional document. This in itself is not difficult, nor is it likely to be controversial.

The more controversial area is the Reserve Powers - that is those powers the Governor-General exercises *without* the advice of the Prime Minister - the Dismissal of a PM. Given the events of 1975 there are many who argue that these issues need to be resolved and written into our Constitution so it is clear what the powers of the Head of State entail. The Broader those powers, the more reason not to have a popularly elected Head of State. The narrower those powers, the less controversial or problematic the direct election of a Head of State.

In considering the equal access of women to the position of Head of State as a fundamental principle, we should consider the implications of Parliamentary appointment:

- Parliament is currently disproportionately male in its composition. Therefore, women are not adequately represented in our Parliamentary system. This means that women's voices would not be properly represented in the choice of Head of State.
- Safeguards could be mandated in a Parliamentary appointment process to ensure women's equal access. The proposal of mandatory gender alternation would deal with this.

Alternatives include: A **transparent** system of Parliamentary appointment - i.e. equal numbers of men and women nominees to be considered by Parliament/

A Parliamentary committee made up of equal numbers of men and women who nominate equal numbers of men and women to be considered for the position by Parliament. **Transparency** is essential in the process to ensure that the gendered aspect of the appointment is a conscious and clearly identifiable issue.

ELECTION OF HEAD OF STATE

This is currently perceived as having popular support by the people keen to have a role in the new Republic and keen take it out of the politicians' hands. This is

discussed above as being problematic if it means that there are competing sources of democratic power in our Parliamentary system. However, it would not be as problematic if the powers of the Head of State were limited and specific in operation. It could also be argued that any election system promotes an adversarial contest reflecting the male structures within which we currently operate. Other gendered issues to be considered in such a process include

As women make up 52% of the population, they would have a formal equality in the voting system.

However, we know from our current situation that formal equality does not translate into substantive equality. Therefore, practical exclusions of an elected system must be considered:

- An elected system that depends upon a candidate mounting her own campaign would require substantial monetary resources. Statistically it is clear that women would not have the same resources as men to fund such a campaign - this issue also highlights class as a substantial exclusionary factor
- An elected system may promote “personalities”, that is people who command public appeal but may not possess the characteristics suggested to be necessary for Head of State. This may suggest that a nomination system requiring some sort of committee involvement be created. Such a committee would once again need to be made up of equal numbers of men and women.
- An elected system may mirror the current political frameworks within which candidates for preselection are chosen within political parties - or may be dominated by current political parties who do not have systems that are inclusive of women or allow for their equal representation. Therefore, once again, safeguards need to be included to ensure women’s equal access to power.

In all of the above scenarios, a common theme appears. That is that gender must be a central issue in any future discussions for the reformulation of our current constitutional system, and systems must be put in place substantively allowing women to have equal access to the position of Head of State.

The common values that need to be instilled to ensure that gender is a real part of the discussion include the following: **TRANSPARENCY, ACCESSIBILITY, FAIRNESS AND REPRESENTATION.**

These principles resonate for their implications for other groups within the community who are not properly represented in our current political frameworks - the indigenous communities, people from non-English speaking backgrounds, lower socio-economic groups. In highlighting these matters from the perspective of gender (which includes all the other groups) I am promoting a system of representative democracy for all people, men and women alike.

Kim Rubenstein, Associate Professor in Law, University of Melbourne
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