

Submission to the Senate Legal and Constitutional Committee

INQUIRY INTO AN AUSTRALIAN REPUBLIC

31 March 2004

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On behalf of the Melbourne-based Bill Drafting Committee¹, we welcome this opportunity to respond to the Senate Legal and Constitutional Committee's 2004 Inquiry into an Australian Republic.

This submission supports the proposal co-authored by former Victorian Governor, the late Richard E. McGarvie and Jack Hammond QC which they put forward at the Corowa Conference 2001. The Bill Drafting Committee submits that the Senate Legal and Constitutional Committee should recommend the adoption of a modified version of that proposal. The modified proposal is summarised in the document entitled "How the Process Works", attached to the Background Brief.² It supplements emails dated 23/12/03 from Juliette Brodsky on behalf of Jack Hammond to Committee secretary Louise Gell, which corrects information contained in the Senate Legal and Constitutional Committee's Discussion Paper (December 2003). Copies of those emails are attached.³

This submission also advocates Richard McGarvie's model ("the McGarvie model") as the best method for achieving a smooth transition to a republic, should Australia decide to sever its links with the monarchy.⁴

Process to resolve the head of state issue

Richard McGarvie identified three distinct questions central to the head of state debate. The *easy* question (whether to become a republic) depends on emotive preference. It distracts attention from the *hard* and *technical* questions: determining which "model for head of state in a republic would best maintain the character, strengths and quality of our present democracy", and the technical method for achieving this end.⁵

Despite 55% voting "No" to a republic in the 1999 referendum, opinion polls published in 1999, 2001 and 2002 revealed that 85 - 95% of Australians want an

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² See Attachment C.

³ See Attachment D.

⁴ The authors of this submission provided voluntary assistance to Richard McGarvie during the 1998 Constitutional Convention.

⁵ Richard E. McGarvie, *Democracy: Choosing Australia's Republic*, Melbourne University Press, Melbourne, 1999, pp. 2 - 3.

Australian for head of state.⁶ This strongly suggests that despite some impatience for symbolic change, Australians are seeking an informed, fair and effective *process* that will enable them to decide the head of state issue.

To that end, the 2001 Corowa Conference was instigated by Richard McGarvie and Jack Hammond.

Bill Drafting Committee

After the 2001 Corowa Conference, the afore-mentioned Bill Drafting Committee was formed in Melbourne. It prepared the attached Background Brief, Constitutional Arrangements (Head of State) (Victoria) Bill 2003 and Explanatory Memorandum. That material has been circulated to, amongst others, leading members of the Federal Government and Opposition, and the Victorian Government and Opposition.

The Bill is crafted to ensure a democratic, non-partisan, publicly consultative means of investigating and reporting on the head of state model that best preserves and / or improves our democracy, and which places least strain on the Australian federation, should Australia separate from the monarchy.

Essentially, the draft legislation provides a template which enables parliamentary committees, comprising parliamentarians and members of the public, to be set up by each state and territory parliament, and the Commonwealth parliament. Those committees would have the power to examine whether the Commonwealth and the states should sever their constitutional links with the monarchy. The committees would invite submissions from interested parties and thereby investigate models for the appointment, tenure, duties and powers of a head of state for the Commonwealth and of a head of state for the states. It is worth noting that this Bill makes full use of the people, parliaments and governments of Australia. It provides a politically feasible method of thoroughly assessing and resolving the head of state issue, while not presupposing that there will in fact be change.

Public Hearing on 14 April 2004, Melbourne

The Bill Drafting Committee proposes to appear before the Senate Legal and Constitutional Committee public hearing in Melbourne on 14 April 2004, in support of this submission. We await details of time and location.

⁶ The *Weekend Australian*, 9-10 October 1999, p.8; and Australian Election Study series, cited in *Federation: The Secret Story*, by Bob Birrell, Duffy & Snellgrove, Sydney, 2001, p. 325. Since reaffirmed in Newpoll, cited in *The Australian*, 15 November 2002, p.2, where only 51 % are in favour of Australia becoming a republic - yet 95% of Australians agree that an Australian should be head of state.

Senate Legal and Constitutional Committee Discussion Paper Terms of Reference

(a) The most appropriate process for moving towards the establishment of an Australian republic with an Australian head of state

EXECUTIVE SUMMARY⁷

One of Australia's greatest constitutional strengths is its federal democratic system. The following suggested process aims to retain that strength.

The Council of Australian Governments (COAG) is to coordinate implementation of the process. Each parliament is to set up an all-party committee to investigate and report on

- i) the model which would best preserve or improve our democracy if the federation separated from the monarchy, and
- ii) the method of deciding the head of state issue that would least strain the federation.

A non-partisan drafting committee should be created to prepare legislation to set up those parliamentary committees.

Each state or territory committee is to invite submissions and hold hearings in its regional areas and capital city, and prepare reports. The federal committee is to consider those reports, and report on them. In the reports, the majority or minority supporters of a model are to describe it in detail and give full reasons for preferring it. At each stage, government and opposition leaders, presiding officers of parliaments and the people through the media and Internet to be fully informed of reports and decisions.

Subsequent to the federal report, the following steps should be taken.

First, a national plebiscite in which the voters in each unit of the federation (ie. the Commonwealth, each state and territory) vote on the model they prefer for their unit. All electors will mark a ballot paper showing their preference for the Commonwealth and another showing their preference for their state or territory. Each of the detailed models with majority or minority support in the federal report will be included in the ballot papers.

Finally, all electors to vote in one referendum on the one question, namely, whether the whole federation should separate from the monarchy. If supported by the majorities as set out in S.128 of the Australian Constitution, and a request from each state parliament, the whole federation would separate from the monarchy at the same time, with each unit converting to the model its electors chose in the plebiscite. If that support is not obtained, there would be no change.

⁷ This proposal, co-authored by Richard McGarvie and Jack Hammond QC, was one of the five (Proposal 1) out of nineteen debated at the Corowa Conference 2001. A copy of this proposal as presented to the Corowa Conference 2001 is contained in Attachment A.

Senate Legal and Constitutional Committee Discussion Paper 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.*

The following addresses most of the questions set out in the Discussion Paper, in terms of the framework proposed by the McGarvie model.⁸

Since stepping down as Victorian Governor in 1997, Richard McGarvie developed an elegant solution to Australia's republic quandary. Compared with other models cited in the Discussion Paper, McGarvie's "simple achievable republic"⁹ commences the necessarily incremental and deliberative process of implementing change without jeopardising existing subtle strengths and safeguards in our democracy that have served Australians for over a century.

Briefly, the McGarvie model seeks to overcome logistical difficulties in the selection, appointment and dismissal processes in an Australian republic by rendering the Governor-General the actual rather than de facto head of state. This is accomplished through the removal of references to the Monarch and Crown in the Constitution.

The monarch's one remaining power - that of formally appointing and dismissing the Governor-General or Governor on the advice of the Prime Minister - would be undertaken by a non-hereditary Australian Constitutional Council of three, appointed by automatic constitutional formula.¹⁰

The community would not accept anyone choosing the members, so they will be determined by automatic constitutional formula. To avoid conflict of interest with an existing position, they will be retired people. Because a Constitutional Council will be essential to the working of the constitutional system over the century or more that new constitutional provisions are likely to last, there must always be an ample supply of members. This is best ensured if they are retirees from constitutional positions which will last for that time. They need the constitutional experience and community respect that go with high constitutional positions of trust. People experienced in the responsibilities of head of state or judiciary have advantages over those from the two political organs of government, the Parliament and government.

To meet these requirements, the Commonwealth Constitution will provide for places on the Constitutional Council first to go to retired Governors-General

⁸ See Attachment B for an outline of the McGarvie model.

⁹ Professor Greg Craven, appointed delegate to the Constitutional Convention, 12 February, *Hansard*, p. 841.

¹⁰ Richard McGarvie, *Democracy: Choosing Australia's Republic*, op cit, pp 208 – 209.

with priority to the more recently retired. Places left unfilled will go on the same basis in turn to retired State Governors, Lieutenant-Governors, High Court Judges and Federal Court Judges. For thirty years there will be a temporary provision that if there is no woman in the first two places filled, the third place will go to the woman with the highest priority amongst the eligible persons. My earlier proposals for age limits revealed a great deal of ageist prejudice against community elders. I now propose for all members an upper age limit of 74 or such age as Parliament prescribes, and no lower limit. Retired judges would be eligible only if they had served for ten years.

State Constitutional Councils would have similar membership and operate in the same way.¹¹

Under the McGarvie model, the head of state would continue to exercise the same powers that are conferred on the Governor-General in our Constitution. As in our current system, the Prime Minister alone makes the decision as to who should fill the role, and the grounds for that person's dismissal.

It must be acknowledged that leaving the decision to the Prime Minister evokes widespread perceptions of unaccountability and lack of transparency. There is always a risk that the Prime Minister could potentially choose a lapdog or "mate" for our head of state, although this does not necessarily occur. There are also fears that the Prime Minister could allow himself to be the proverbial tail wagged by the electorate dog. It would be politically risky and potentially disastrous, however, to choose a novice or divisive nominee for head of state, simply on the basis of poll preferences alone. Such a person, through ignorance or contempt for the Constitution, could actually end up disrupting the very processes that keep our parliamentary democracy functioning. This in turn would further undermine Australians' confidence in their system of government. For both utilitarian self-preservation and posterity reasons, it is highly incumbent on the Prime Minister as the elected representative of the people, to make a sound and sensible choice (ie. act in the interests of all Australians) - or else face the political consequences. As Richard McGarvie wrote:

Seen as acting for the whole community, and alone receiving all the praise or blame, the Prime Minister's standing and reputation are affected by the community's assessment of the quality of the choice.¹²

The McGarvie model's benefits may not seem immediately obvious. It has been described as "no-risk but uninspiring"¹³ and occasionally misrepresented as "elitist"¹⁴, but has the not-inconsiderable advantage of being developed by one with experience as a Governor and hence a working knowledge of how the system of governorship actually functions in Australia. The McGarvie model is not perfect (no approach is), but it is straightforward, easily implemented, demonstrates twin requirements of practicality and principle, and keeps the separation of powers intact.

¹¹ Richard McGarvie, "Resolving the Republic Issue by 2005", Paper 18, <http://www.chilli.net.au/~mcgarvie/paper18.htm> Also published in *Victorian Bar News*, No. 105, Winter 1998.

¹² Richard McGarvie, *ibid*.

¹³ Michael Gordon, "Turnbull takes mighty gamble", *The Age*, Friday February 13 1998.

¹⁴ Elected delegate, Jason Yat-Sen Li's speech to the Constitutional Convention, February 5, 1998, *Hansard*, p. 299.

As Richard McGarvie observed:

The McGarvie model has appeal across the whole spectrum because it provides a win-win solution all round. For republicans, it is a model capable of winning a referendum and converting Australia to a republic. For monarchists, it provides a system that operates like our constitutional monarchy and preserves all its strengths. For the whole community it has obvious advantages. It carries the real prospect of early resolution of the republic issue. It provides the obvious formal capping to the process of evolution towards independence developed in Australia over two centuries. Apart from the structural change that within each system the Australian entity of a constitutional council, usually at intervals of about five years, will act on advice in precisely the same way as the Queen has done, the whole system remains and continues to operate as the tried and familiar one that has secured the strength and stability of our democracy. A century ago Australians preserved the quality of our democracy and created a uniquely Australian system which integrates Westminster government, federation and referendums. We could do the same by integrating the operative strengths of a constitutional monarchy with the substantive and formal independence of a republic.¹⁵

Should Australia consider moving towards having a head of state who is also head of government?

In our opinion, such a move would be highly deleterious to Australia's system of powers. Our Constitution enshrines a sophisticated filigree of British responsible government and American federalism, and is presided over by a monarchic representative, the Governor-General. With the appointment of Australian Governors-General (from Sir Isaac Isaacs in 1931), the Constitution has become more distinctly Australian in intent and exercise.

In arguments for change, it is not always fully appreciated how our system of powers, their separation and their various checks and balances are co-ordinated. The Governor-General plays a crucial, if sometimes "behind-the-scenes" role in facilitating and encouraging the attitudes and processes that help make our democracy work.¹⁶ Combining ceremonial and consultative duties (eg. Governor in Council where suggestions are proffered by Governors-General and Governors to Ministers), the Governor-General is vested with seemingly considerable powers.¹⁷ In practice,

¹⁵ Richard McGarvie, "Resolving the Republic Issue after the 1999 Referendum", Paper 35, <http://www.chilli.net.au/~mcgarvie/paper35.htm>

¹⁶ Richard McGarvie's article "Governorship in Australia Today", published in *Victorian Bar News* (No. 90, Spring 1994, p. 45) gives possibly the most detailed outline of the duties of Governors, particularly the subsections on "The Governor and Parliament", "Governor in Council", and "counselling against irregularities". Former Governor-General Sir Paul Hasluck also had much to say about this role in his Queale Memorial Lecture in 1972.

¹⁷ This includes the power to adjourn Parliament, to dissolve it and bring about an election, to summon Parliament after the election, to convert bills which have passed both houses into Acts by giving assent, power to appoint or dismiss the prime minister and other ministers, the right to exercise the executive power of the Commonwealth,

however, the Governor-General is mostly bound to act as s/he is advised by the democratically elected government (which is in charge of the real business of governing the nation/state). With the exception of the small discretion permitted by the reserve powers, the Governor-General is rendered a *nominal* executive, whose main function is to be a unifying, non-partisan symbol of the nation/state, maintaining a vital distance from the political fray.

This is not to be conflated with notions of “rubber-stamping”:

(i) if a Governor-General received ministerial advice to exercise power in a way that was contrary to fundamental constitutional principle and would gravely damage the public interest, he or she could resign rather than exercise the power, and then make a public statement of the reasons for doing so. The depth of the Governor-General’s concern would be brought home to the community by the decision to resign from the high office rather than do what the Government advised.¹⁸

The importance of a *non-political* head of state in our federal democracy cannot be overstated.¹⁹ Richard McGarvie believed that effective democratic governance requires the following inbuilt system mechanisms. For example, the head of state must be:

- chosen in a way that gives no mandate to encourage rivalry with the elected Government. The Governor-General, being selected by one person, the Prime Minister, is given no mandate or power base to encourage rivalry with the government;
- liable to prompt dismissal for breach of the conventions to (1) exercise powers as Ministers advise, (2) not speak politically and (3) not collaborate politically with the Opposition. The Governor-General must comply with these constitutional conventions, which are made binding by the effective penalty of prompt dismissal for breach;²⁰
- chosen by a method and operate within a setting that provide a respected person who remains above partisan politics and exerts a unifying influence.²¹ The Prime Minister, in the interest of his or her own reputation, has every incentive to select a respected person capable of remaining above politics and exerting a unifying influence. If that decision proves to be ill-judged, then the Parliament and the voters will make that clear.

and the right to act as Commander in Chief of the defence force. With the exception of the latter, all are essential to keeping the democratic wheels turning in our system.

¹⁸ Richard McGarvie, *Democracy: Choosing Australia’s Republic*, op cit, p. 74.

¹⁹ Richard McGarvie, *ibid*, p. 75

²⁰ From Richard McGarvie’s website (<http://www.chilli.net.au/~mcgarvie/authors.htm>) – “Author’s Introduction”.

²¹ From Richard McGarvie’s website (<http://www.chilli.net.au/~mcgarvie/authors.htm>) – “Author’s Introduction”.

What powers should be conferred on the head of state?

A pressing question in any prescription for change revolves around whether a head of state in Australia should exercise purely ceremonial duties, or play the role of constitutional umpire (or both). The former leaves the discretion of exercising real powers to the executive (as in the Irish republic); the latter assumes that from time to time, there will be problems in the functioning of democracy which require a non-political, remedial solution. The Australian tendency to have it both ways conjures up, as one Constitutional Convention delegate caustically observed, “images of ballroom dancers, whirling in perfect coordination. (At) times when the dismissal provisions are likely to come in play, they (are) more like judo players circling each other and trying to catch each other off balance, with the fate of the nation depending on who has the fastest footwork.”²²

If Australia were to become a republic, we consider that the head of state’s powers should remain as they are now. Using a few small amendments to the Constitution, the McGarvie model transfers to the head of state (and state Governors) the monarch’s remaining powers, functions, rights and attributes, with one exception – that of the formal appointment and dismissal of the head of state.

*Eliminating the monarchy from any involvement in the systems of the commonwealth and states and making Australia entirely a republic, only requires updating the formal constitutional structure so that it catches up and corresponds with the practical substance of the operating system which Australians established years ago. The difficulty is that although the change is a small and formal one it carries a high risk that unless it is thought out and done with great care, it will distort the sophisticated balances that provide our good democracy. Many practical people do not become involved with the issue which they see as a formality, and most of the theorists who take it up do not see the practical risks if care is not taken.*²³

Under the McGarvie model, there is no chance of a destabilising Mexican standoff between the head of state and Prime Minister because the Constitutional Council preserves the existing balance maintained by the role of the monarch. In this sense, the McGarvie model protects and retains without risk the role of Parliament and elected members (MPs, ministers and Prime Minister) as the pre-eminent representatives of the will of the Australian people. It needs to be emphasised that the Constitutional Council has no operative powers in its own right, and is bound to act on ministerial advice, in exactly the way the monarch is constrained to act on the advice of its democratically-elected government.

²² Eric Lockett, elected delegate, 1998 Constitutional Convention Transcript of Proceedings, 4 February 1998, *Hansard*, p. 203.

²³ Richard McGarvie, “Resolving the Republic Issue after the 1999 Referendum”, Paper 35, <http://www.chilli.net.au/~mcgarvie/paper35.htm>

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

There would, and should, be no codification of the head of state's powers. By way of ensuring limits to the office-holder's powers, the Governor-General in our present system (and in the McGarvie model) is bound by constitutional convention to exercise his/her powers as ministers advise, and only as they advise. The head of state is thus precluded from becoming a rival to the elected government. Non-compliance with this convention would result in the sanction (ie. penalty) of dismissal.

Former Australian Republican Movement chairman Malcolm Turnbull believes that “[the] element of mystery surrounding the reserve powers is precisely what is wrong with them”.²⁴ There are many who argue that codifying the head of state's powers might serve to dispel this mystery. Others such as former High Court Chief Justice Sir Harry Gibbs believe that codification would rob the reserve powers of their flexibility and would render them justiciable (ie. subject to review by the High Court).²⁵ Essentially, utilisation of the High Court to preside over crises such as 1975 would require key amendments to the Constitution and permanently disfigure the current balance of power between the government, the Prime Minister and the head of state, and the judiciary.

It needs to be noted that conventions (inherited from the British Westminster system, but different in Australian political practice²⁶) pose many difficulties in interpretation for political scientists and lawyers. Sometimes described as customs,²⁷ understandings or practices²⁸, conventions are perhaps best defined, in the Australian context, as a series of disincentives to wrong or destabilising behaviour. They are not spelt out in our Constitution, but form an integral part of the value system that informs its authority. In *Federation Under Strain*, Geoffrey Sawer opines that conventions work most satisfactorily in political regimes where the ideological distance between parties is small, where there is a strong common interest in the continued observance of the working rule and “it is readily recognised that (there is a) reasonably scrupulous adherence to practices as well as laws embodying an institutional consensus.”²⁹ In his critique of the McGarvie model, Brian Galligan voiced concern that conventions transferred to a republican head of state are not necessarily as potent.³⁰ However, removal of references to the Monarchy and Crown will not result in an increased head of state mandate; the most effective sanction against a head of state's refusal to comply with conventions is the prospect of instant dismissal.³¹

²⁴ Malcolm Turnbull, op cit., p. 94.

²⁵ Quoted on the *Law Report*, ABC Radio National, November 18 1997.

²⁶ Richard McGarvie asserts that conventions are different in Australia (*Democracy: Choosing Australia's Republic*, op cit, p. 210); basing his argument partly on Geoffrey Sawer's views in *Federation under Strain*, Melbourne University Press, Melbourne, 1977, pp. 145-148.

²⁷ Malcolm Turnbull, op cit., p. 80.

²⁸ A. V. Dicey, *Law of the Constitution*, Macmillan, 7th edn, 1908.

²⁹ Geoffrey Sawer, *Federation Under Strain*, Melbourne University Press, Melbourne, 1977, pp. 191-192.

³⁰ Brian Galligan, “The Republican Model”, *Quadrant* April 1998, p. 20. Appointed delegate Professor George Winterton expressed similar concern at the Constitutional Convention, on 3 February 1998, *Hansard*, p. 88.

³¹ Richard McGarvie, pers. comm with Juliette Brodsky, May 1998.

Should some form of campaign assistance be available to nominees, and if so, what assistance would be reasonable?

The above is not necessary if the McGarvie model is adopted.

Should/Can political parties be prevented from assisting or campaigning on behalf of nominees? If so, how?

The above is not necessary if the McGarvie model is adopted.

If assistance is to be given, should this be administered by the Australian Electoral Commission or some other public body?

The above is not necessary if the McGarvie model is adopted.

If the Australian head of state is to be directly elected, what method of voting should be used?

The above is not necessary if the McGarvie model is adopted.

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?

“People Power” proponents argue that many Australians are feeling increasingly disenfranchised from the political process; they do not trust elected governments to carry out the electorate’s wishes on their behalf³²; and they would not mind a President who might occasionally act to pull the Prime Minister in line³³, especially if a Government is touting potentially unpopular or socially divisive legislation. Those advocating direct election, however, are more concerned with the appearance of representing the “people’s will”, and less with *how* that expression of the “people’s will” would actually function.

In order for a US-style directly-elected president to be elected in Australia, our Constitution would require substantial redrafting. Richard McGarvie considered that direct election poses many dangers to the existing strengths of our democracy. One danger is that a republican head of state, whether directly elected by Australians or via a bipartisan selection process, would be conferred a quite considerable mandate - wider than that of the elected Prime Minister, and potentially disruptive in our system of democracy. Such a mandate could predispose a head of state to become a rival of

³² David Solomon cites an undated Bulletin poll from 1997 where 56% of Australians said they no longer had faith in the political process in his “Elect the Government!” in Michael Coper and George Williams (eds.), *Power, Parliament & The People*, Federation Press, Sydney 1997, p. 54.

³³ Former Federal Independent MP, Phil Cleary, elected delegate and supporter of an elected president, addressing the Constitutional Convention, 3 February 1998, *Hansard* p. 102.

the government in political influence, and at present, our system is not designed for two competing power centres. Our kind of system needs a head of state that has neither the practical capacity nor the motivation to operate so as to rival the Prime Minister and elected Government. Under the McGarvie model, it is the penalty of prompt dismissal that would deprive a head of state of the capacity to operate in that way.

While our present system operates to keep a Governor-General out of politics, under direct election, community expectations that a head of state called 'President' would act as their champion in supervising the activities of the Government, would incline the President to perform that role. Moreover the President would owe political debt, obligation and loyalty to the party whose funds and organisation secured his or her election. Often the President would be depending on that party for election to a second term or for a future political career. Through the ability to veto Government actions, speak and write critically of it and collaborate with the Opposition, the President would have the capacity to wield great political leverage upon the Government.

Who should be eligible to put forward nominations for an appointed head of state? For an elected head of state?

As stated above, we do not support the notion of an elected head of state. The aforementioned Constitutional Council of three highly experienced persons,³⁴ appointed by automatic constitutional formula, would formally carry out the appointment of the head of state on the binding request of the Prime Minister.

The Constitutional Council will be bound, partly by law and partly by convention, to appoint or dismiss a Governor-General on the Prime Minister's advice. There will be a constitutional provision that the Council's power to appoint or dismiss can only be exercised as the Prime Minister advises, so that a purported exercise without that advice would be invalid and ineffective. A convention binding the Council in practice to appoint or dismiss whenever advised to do so would be specially created. It will work in much the same way as the basic constitutional convention. To emphasise its importance to the operation of our democracy and create a clear sense of obligation, the Constitution would state that members of the Council are obliged to appoint or dismiss a Governor-General within a reasonable time of receiving advice to do so. The Constitution would not permit the courts to investigate or to enforce compliance with that obligation by declaration or otherwise. In practice, at least the majority of the Council will usually be former Governors-General or Governors to whom acting in accordance with advice is a natural response. All members will share the long-followed habit of obeying constitutional obligations and be aware of the effect upon their reputations of a public failure to do so. The convention will be backed by an ultimate practical penalty. The Prime Minister will have the right to choose to give written advice to the Council to make the appointment or dismissal within

³⁴ Some do not like McGarvie's "elders" concept, but equally for the Council to be taken seriously, it is important that its members have attained positions of standing in the community and have no stake in the political process. This tends to result in people towards the latter stage of their careers.

*fourteen days. Unless within that time the Prime Minister withdraws the advice, or the Council makes the appointment or dismissal, its three members will automatically be dismissed from the Council, and no longer eligible to serve on it. Their places will be taken by the next three in line. The humiliation and loss of reputation involved in the prospect of public dismissal for breach of a clear constitutional duty will make it a very effective penalty indeed. That further reduces any risk of it failing to comply with constitutional obligations.*³⁵

An advantage of this procedure is that it separates the political function of selection/removal of the head of state from that of formal constitutional appointment/dismissal of the head of state. A second advantage of appointment (by the Constitutional Council) versus election is that, realising he or she has *not* been chosen by voters, the head of state is discouraged from “developing the self-image of having a mandate which justifies competing for power”³⁶ with the Prime Minister. S/he is however linked to the voters through the Prime Minister, and can continue to perform a range of community-cohesion/ambassadorial duties on their behalf.

Regarding the Turnbull model which recommended nominations for an appointed head of state (defeated in the 1999 referendum), Richard McGarvie stated the following:

Under the Turnbull model, a committee representative of Parliaments and the community would have prepared from persons nominated by citizens and community organisations a short list of those it considered suitable. That was to be considered by the Prime Minister and Leader of the Opposition who were expected to move and second a motion before a joint sitting of both Houses of Parliament for the election of a person as President. If elected by a two-thirds majority of a joint sitting the person would become President for a term of five years, but could at any time be dismissed instantly by a document signed by the Prime Minister.

It is vital not to consider the (Turnbull) model in theory but to look at the way it would actually have worked in practice. The President would be given the strong mandate and power base of selection by the Short-List Committee and the political parties on both sides of Parliament, and election by all or almost all the members of Parliament... Because no federal Government for fifty years has had a two-thirds majority of a joint sitting, the Turnbull model would give the Opposition the power, by withholding its vote, to frustrate the Government from appointing anyone as President. That would leave the office vacant, its duties being performed by a temporary Acting President, and create the impression of a Government unable to govern... At the (1998) Constitutional Convention, dismissal by a two-thirds majority of a joint sitting, which would have meant that the President was undismissible in practice and the conventions no longer binding, was abandoned, but the substituted instant dismissal by a document signed by the Prime Minister

³⁵ Richard McGarvie, *Democracy: Choosing Australia's Republic*, op cit, pp 221 –222.

³⁶ Richard McGarvie, “Governorship in Australia”, *Victorian Bar News*, No. 90, Spring, 1994, p. 45.

*would have inhibited or paralysed the exercise of a reserve power when necessary in a constitutional crisis.*³⁷

Moreover, there is the strong likelihood that a selection committee could take several months deciding on a candidate. When the choice is offered up to Parliament, for the Prime Minister and Leader of the Opposition to reach a deal, it would have to survive the vetoes of the party rooms, increasing the chance of producing a mediocre or “compromise” candidate. Media interest in the selection process would be considerable, with some likelihood that details of potential candidates could be leaked, resulting in a public contest of personalities³⁸ and free-for-all tarring of reputations (detering many who might in fact be best-qualified for the position). A contest of personalities and policies exists already in the election process for a government, sometimes with less than satisfactory results. There is no particular necessity for such a process to be duplicated in so far as the appointment of a non-executive head of state is concerned; this again creates the potential for a rival centre of power.

Should there be any barriers to nomination, such as nominations from political parties, or candidates being current or former members of parliament?

The existing practice relating to the Governor-General should be retained.

Should there be a maximum and/or minimum number of candidates?

The existing practice relating to the Governor-General should be retained.

Should there be a minimum number of nominators required for a nominee to become a candidate?

The existing practice relating to the Governor-General should be retained.

What should the head of state be called, Governor General, President of the Commonwealth of Australia, or some other title?

The head of state should be called Governor-General. The title 'President' could encourage both the Australian community and the head of state to regard the holder of the office as having a role similar to the President with whom Australians are most familiar - the powerful President of the United States. This may tempt an Australian President to act as champion of the people against Parliament and Government, without going so far as to be dismissed.

³⁷ From Richard McGarvie’s website (<http://www.chilli.net.au/~mcgarvie/authors.htm>) – “Author’s Introduction”.

³⁸ This would probably be along the lines of a US presidential-style campaign.

What should be the length of a term of office for head of state?

The existing practice relating to the Governor-General should be retained.

Should a head of state be eligible for re-appointment/reelection?

The existing practice relating to the Governor-General should be retained.

Should there be a limit on the number of terms an individual may serve as head of state?

The existing practice relating to the Governor-General should be retained.

Who or what body should have the authority to remove the head of state from office?

It would remain incumbent on the Prime Minister to determine whether the Governor-General should be removed. The Constitutional Council would be bound to formally carry out the dismissal as advised. It would do no more and no less than the monarch (the Queen) does now and do it in exactly the same way. Although constitutionally required to carry out the Prime Minister's request, like the Queen, the Council would have the opportunity to provide counsel and warning - if the Prime Minister is making an ill-judged decision. This provides an important constitutional brake to the process of removal.

On what grounds should the removal from office of the head of state be justified? Should those grounds be spelt out?

The existing practice relating to the Governor-General should be retained.

How should a casual vacancy be filled?

The existing practice relating to the Governor-General should be retained.

What should the eligibility requirements be for the head of state?

The only formal qualification for a Governor-General in the McGarvie model is Australian citizenship.³⁹ Richard McGarvie wrote that

it can be left to the good sense of the Prime Minister to choose a suitable person. There is advantage in appointing persons who, while still physically and mentally fit enough to carry out the demanding duties, are towards the

³⁹ Richard McGarvie, *Democracy: Choosing Australia's Republic*, op cit, p. 86.

*end of their working life. They will have had time to gain public standing and an understanding of their community and its constitutional system. Public observation of them over many years will enable a realistic assessment to be made of how they would perform as Governor-General.*⁴⁰

Richard McGarvie believed that the head of state's constitutional and community responsibilities are all best performed by persons who have the respect of the community and the personality that enables them to use their office to exert unobtrusive and apolitical influence within the community."⁴¹ Such people would have an ample understanding of the community in which they achieved their distinction and the communication and social skills that enable them to get on well with people. They also need a knowledge and understanding of the theory and practice of Australian government, particularly the latter.⁴²

On what grounds should a person be disqualified from becoming of head of state?

The existing practice relating to the Governor-General should be retained.

Should the head of state have power to appoint and remove federal judges?

There should be no change to the existing constitutional provision (S.72).

Should the head of state have the prerogative of mercy?

The existing practice relating to the Governor-General should be retained.

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

The existing practice relating to the Governor-General should be retained.

⁴⁰ Ibid, p. 236.

⁴¹ Ibid, pp 32-33.

⁴² Ibid, p. 235.

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

In a federal Australian republic, save for replacing the monarch with a state Constitutional Council to formally appoint / remove the Governor, on a similar basis to that proposed in the McGarvie model for the Commonwealth, there should be no change to the existing position.

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Attachment A

COROWA CONFERENCE 2001

PROPOSAL 1

Richard E McGarvie and Jack Hammond QC

PROCESS FOR EARLY RESOLUTION OF THE HEAD OF STATE ISSUE FOR THE WHOLE AUSTRALIAN FEDERATION

Aim of the Process

1. The purpose of this process is to enable the people to make decisions in an informed, fair and effective way so as to achieve early resolution of the head of state issue for the whole Australian federation.

Drafting Committee

2. That a non-partisan Drafting Committee of six persons be appointed to prepare draft legislation as directed by the Conference. As far as practicable, one member of the Committee is to be nominated by each of the Liberal Party of Australia, the Australian Labor Party, the National Party of Australia, the Australian Democrats, and one member is to be appointed as being representative of the members of Australian Parliaments who belong to other parties or are Independents. To the extent that that is not practicable, persons representing those political viewpoints are to be appointed. One member is to be appointed as a community representative without regard to political viewpoint but as suitable for the Committee. The Committee is to appoint a Chair who will have a deliberative and a casting vote.

All Party Parliamentary Committees

3. We recommend that
 - 3.1 the Prime Minister, Premiers and Chief Ministers meeting as the Council of Australian Governments (COAG) decide that a Federal All Party Parliamentary Committee be established within the Commonwealth Parliament and a State or Territory All Party Parliamentary Committee within each State and Territory Parliament to investigate and report on
 - 3.1.1 the head of state model which would best preserve or improve our democracy if the Australian federation separated from the monarchy, and
 - 3.1.2 the method of deciding the head of state issue that would least strain the Australian federation;

- 3.2 each State or Territory All Party Parliamentary Committee** is to comprise six members and to investigate and report upon the two questions after inviting submissions and holding public hearings in regional areas and the capital city of its State or Territory. Each Committee is to send its report to the Federal Committee, make it widely available to the public and the news media and place it on the Internet. To ensure a non-partisan Committee, as far as practicable, one member of the relevant Parliament is to be appointed to the Committee by the members within the Parliament of each of the Labor, Liberal, National and Australian Democrat parties and one by the members of the Parliament who belong to other parties or are Independents. If a member is not or cannot be appointed in that way, the member is to be appointed by the Speaker of the Parliament, bearing in mind the desirability of having a non-partisan Committee. After inviting applications from the public, the five members are to appoint to the Committee another person who is not a member of Parliament, to represent the community generally. The Committee is to appoint a Chair who will have a deliberative and a casting vote. The Committee is to be funded and have its administrative services provided by its Parliament. The Committee is to appoint one of its number to be a member of the Federal All Party Parliamentary Committee;
- 3.3 the Federal All Party Parliamentary Committee** is to comprise fourteen members. To ensure a non-partisan Committee, five are to be members of the Commonwealth Parliament appointed in the same way as the members of Parliament appointed to the State or Territory Committees. After inviting applications from the public, the five members are to appoint to the Committee a person who is not a member of Parliament, to represent the community generally. The other eight members are those appointed to the Committee by the State and Territory Committees. The Committee is to appoint a Chair who will have a deliberative and a casting vote. The Committee is to be funded and have its administrative services provided by the Commonwealth Parliament. The Committee is to report upon the two questions after considering the reports of the State and Territory Committees and after such investigation and consultation as it considers appropriate. The Committee is to append to its report the reports of each of the State and Territory Committees and distribute its report to each member and the secretariat of COAG, all Leaders of the Opposition, the President and Speaker of each Parliament, the National Library and the main Library of each State and Territory, make it widely available to the Australian people and news media and place it on the Internet;
- 3.4 in the report of each of the All Party Parliamentary Committees, the model recommended by the majority and any with minority support are to be described in at least the detail required by the 1998 Constitutional Convention and the members supporting a model are to give full reasons for preferring it over the other models;
- 3.5 where an All Party Parliamentary Committee is established within a Parliament with two Houses, as far as practicable, the members shall be drawn from both Houses.

Direction to Drafting Committee

- 4 Conference directs the Drafting Committee to prepare draft bills, in accordance with or to the effect of the recommendations of Conference, which the Australian Parliaments could pass to establish the Federal Committee and all the State and Territory Committees. The Drafting Committee is to distribute its draft bills to each member and the secretariat of COAG, all Leaders of the Opposition, the President and Speaker of each Parliament, make them widely available to the Australian people and news media and place them on the Internet.

The Initial COAG Decision

- 5 We recommend that COAG make its decision to set up the All Party Parliamentary Committees after considering the report of this Conference and the draft legislation prepared by the Drafting Committee: and also decide to act as the co-ordinating authority to ensure that the process for early resolution of the head of state issue is implemented without delay. The decisions of COAG in respect of the recommendations of Conference are to be notified to all Leaders of the Opposition, the President and Speaker of each Parliament, the Australian people and news media and placed on the Internet.

Following the Federal Committee Report

- 6 Conference recommends that after considering the report of the Federal Committee, COAG decide on the process then to be followed to reach early resolution of the head of state issue and take steps to implement it. This decision is to be notified to all Leaders of the Opposition, the President and Speaker of each Parliament, the Australian people and news media and placed on the Internet.

Conference Recommendations to All Party Committees

- 7 Conference recommends that each of the All Party Parliamentary Committees consider recommending that the following steps be taken so as to decide the head of state issue with least strain upon the Australian federation:
 - 7.1 Each Parliament to legislate to enable a national plebiscite of all Australian voters to be held, in which the people of each unit of the federation (i.e. the Commonwealth, each State and Territory) will choose the model they would prefer for head of state of their unit if the whole federation separated from the monarchy. All Australian voters are to mark one ballot paper showing their preference of model for the Commonwealth and another showing their preference for their State or Territory. Each detailed model with majority or minority support in the report of the Federal All Party Parliamentary Committee is to be included in the ballot papers;

- 7.2 A bill to be drafted and passed by the Houses of the Commonwealth Parliament proposing constitutional amendments for a single referendum in which all Australian voters would vote yes or no to the one question, asking, in effect, whether they approve the proposal that would separate the whole Australian federation – all its units - from the monarchy: and if the proposal receives support from the majorities as set out in S.128 of the Australian Constitution and a request from each State Parliament, the units of the Commonwealth, States and Territories would all separate from the monarchy at the same time, with each converting to its preferred model without a monarch: and if that support is not received, all units would remain monarchies.

Attachment B**The McGarvie Model**⁴³

by Richard McGarvie

My model originated when the Republic Advisory Committee sought my views in 1993 on the minimum constitutional changes necessary to achieve a viable republic. I advanced the model as the natural way of taking the evolution of Australian democracy the further step to a republic. I do not side with republicans or monarchists but am concerned to maintain the quality of our democracy whether in a monarchy or a republic.

The model provides the practical and simple way of becoming a republic while maintaining in full, the quality and strength of our present system of democracy. It will transfer to the Governor-General and Governors the Queen's remaining powers so that they become actual rather than de facto heads of state of their systems. The Queen's only active duty, appointing or dismissing the Governor-General and Governors, will be done in each system, on the advice of the Prime Minister or Premier, by a Constitutional Council of three experienced Australians, set up under the Commonwealth or State constitution. The only operational change the model makes is to substitute for the Queen, Constitutional Councils to perform her remaining duty. They will do precisely what the Queen does now, no more and no less, and do it in the same way as she does. Because the Governor-General and Governors will be performing the same responsibilities, within the same setting and subject to the same incentives, penalties and influences, they will continue to operate in a republic the same way as they do now.

Most of the criticism of the model has concentrated on two areas. Many monarchists and republicans have an almost supernatural belief that the only thing that keeps the Governor-General and Governors complying with constitutional conventions is the exertion over them of some mysterious and unspecified power or influence of the Queen. It is said that without a monarchy the conventions would no longer bind. That is a myth. For decades the Queen has had no power or influence beyond that of good example. What keeps a convention binding is the backing of an effective practical penalty for breach. As the penalties come from the operation of the system and as the system will operate in the same way, all conventions now binding will remain so.

Criticism has been directed to the Constitutional Council and based mainly on emotional grounds. It has often been misrepresented that a Council will choose a head of state or be an advisory Council on that. Of course, the Prime Minister or Premier still chooses. The Constitutional Council, like the Queen, would be entitled to counsel against the appointment of an inappropriate person, but if the Prime Minister or Premier insists, will be bound by effective convention to appoint. The convention will be backed by the practical penalty that failure to appoint within fourteen days of

⁴³ Richard McGarvie, "Resolving the Republic Issue by 2005", Paper 18, <http://www.chilli.net.au/~mcgarvie/paper18.htm> Also published in *Victorian Bar News*, No. 105, Winter 1998.

written advice to do so would result in automatic dismissal from the Council and the public humiliation that would involve. The Council's only power or function is to appoint or dismiss on advice. Ordinarily it would only meet about every five years when a new head of state is to be appointed.

The Council has been criticised as elite or elderly but there are good reasons for its membership. The community would not accept anyone choosing the members, so they will be determined by automatic constitutional formula. To avoid conflict of interest with an existing position, they will be retired people. Because a Constitutional Council will be essential to the working of the constitutional system over the century or more that new constitutional provisions are likely to last, there must always be an ample supply of members. This is best ensured if they are retirees from constitutional positions which will last for that time. They need the constitutional experience and community respect that go with high constitutional positions of trust. People experienced in the responsibilities of head of state or judiciary have advantages over those from the two political organs of government, the Parliament and government.

To meet these requirements the Commonwealth Constitution will provide for places on the Constitutional Council first to go to retired Governors-General with priority to the more recently retired. Places left unfilled will go on the same basis in turn to retired State Governors, Lieutenant-Governors, High Court Judges and Federal Court Judges. For thirty years there will be a temporary provision that if there is no woman in the first two places filled, the third place will go the woman with the highest priority amongst the eligible persons. My earlier proposals for age limits revealed a great deal of ageist prejudice against community elders. I now propose for all members an upper age limit of 74 or such age as Parliament prescribes, and no lower limit. Retired judges would be eligible only if they had served for ten years.

State Constitutional Councils would have similar membership and operate in the same way.

I consider that Australians will not be attracted to the approach of treating the Commonwealth system as the only one on which the community should concentrate with regard to the republic issue. My proposal is that the issue be resolved at the same time for the whole federation. To resolve it in that way would involve the production of a great deal of consensus and co-operative federalism. It would be pointless to seek consensus on whether or not we change to a republic. Consensus on how to go about resolving that issue should be achievable. Consensus would be needed on the model for head of state in a republic which would best maintain the strengths and safeguards of our present system of democracy, and on a method of making a clear choice between that model and the present system in a way which does not overstrain our federation and is constitutionally valid beyond credible argument.

Attachment C

Constitutional Arrangements (Head of State) (Victoria) Bill 2003

Background Brief

There is clear impetus for Australians to be involved in the shaping of our constitutional framework. Despite 55% voting “No” to a republic in the 1999 referendum, opinion polls published in 1999, 2001 and 2002 revealed that 85 - 95% of Australians want an Australian for head of state.⁴⁴ This is an unhealthy predicament for the body politic - which if allowed to languish, could create a destabilising effect on our federal democracy. To this end, the Peoples Conference at Corowa, NSW (December 2001) resolved that processes should be initiated to achieve an early resolution of the head of state issue. After the Conference, a self-appointed Bill Drafting Committee⁴⁵ was formed and prepared the attached Bill.

Australians have the irrefutable right to determine who shall be our head of state - and thereby an individual right to *choose* whether we sever or retain our formal constitutional link to the English monarchy. Accordingly, this Bill charts the way for the ultimate resolution of that sensitive issue, making full use of the people, parliaments and governments in Australia.

The Bill does not presuppose that there will be change. However, it is crafted to ensure a democratic, non-partisan, publicly consultative means of investigating and reporting on the head of state model that would best preserve or improve our democracy if the whole Australian federation separated from the monarchy. Moreover, it is a politically feasible method of resolving the head of state issue that would least strain the Australian federation.

The Victorian Parliament has an unprecedented opportunity to take the lead in resolving Australia’s head of state issue. This legislation provides a model process for other state and territory parliaments to follow and adopt. The Bill Drafting Committee has prepared an Explanatory Memorandum, and if required, can prepare the Second Reading Speech and any necessary briefing papers. Ideally, this Bill should be printed and circulated for discussion in the next session of Parliament; then introduced in the following parliamentary session, debated and then passed in that session.

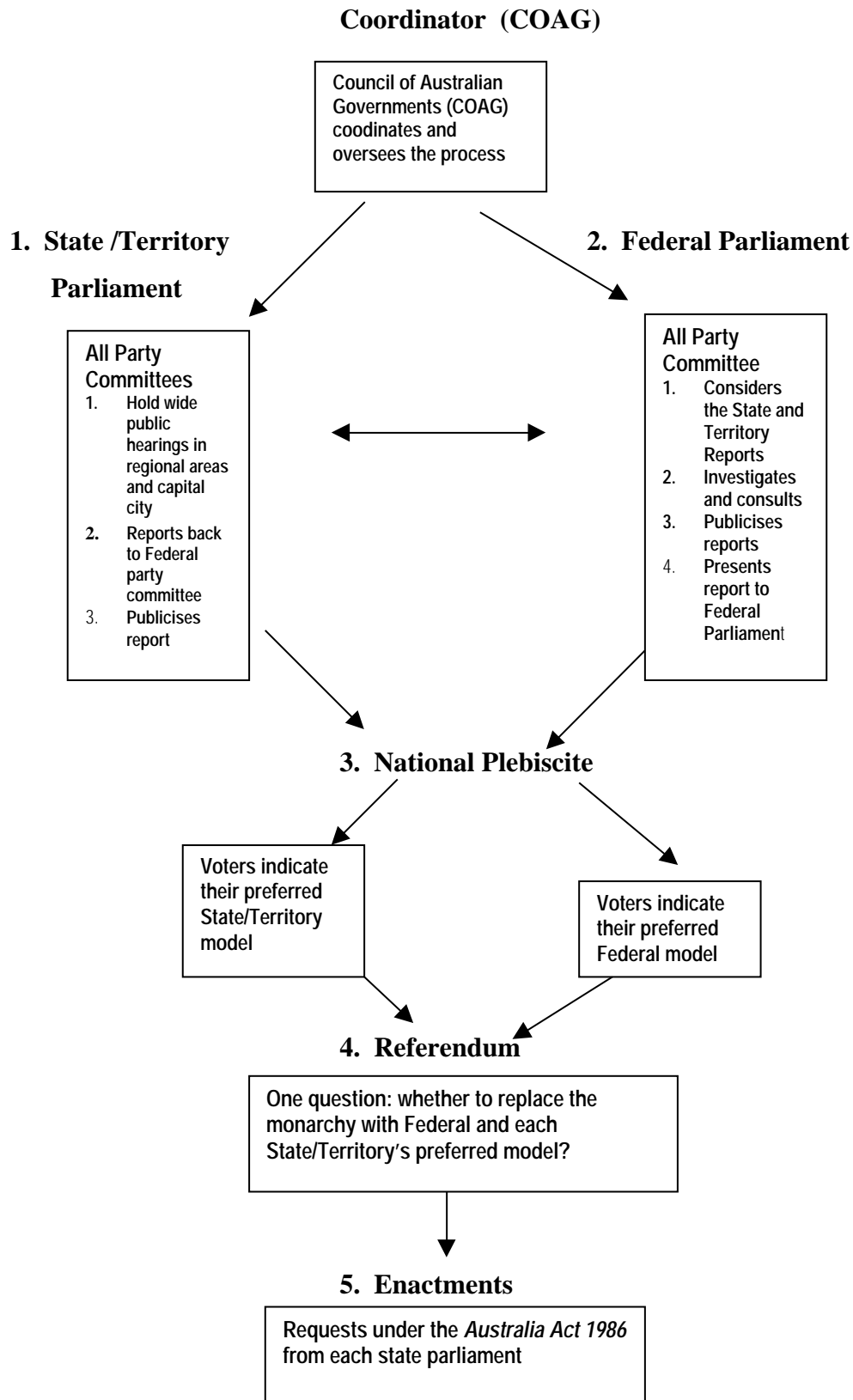
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⁴⁴ The *Weekend Australian*, 9-10 October 1999, p.8; and Australian Election Study series, cited in *Federation: The Secret Story*, by Bob Birrell, Duffy & Snellgrove, Sydney, 2001, p. 325. Since reaffirmed in Newpoll, cited in *The Australian*, 15 November 2002, p.2, where only 51 % are in favour of Australia becoming a republic - yet 95% of Australians agree that an Australian should be head of state.

⁴⁵ Susan Carden, MB BS, FRANZCO, FRACS; Sally Cray, BA, LLB; Cate Dealehr, B SC, LLB; Jack Hammond QC; David O’Brien, B Ec, LLB.

How the Overall Process Works



Sixth Draft 18/12/2002

A BILL

for the purpose of facilitating a process for determining whether Commonwealth and State constitutional links with the Monarchy should be severed, and for other purposes.

Constitutional Arrangements (Head of State) (Victoria) Act 2003

Preamble

1. The Corowa Peoples Conference held at Corowa, New South Wales, on 1 and 2 December 2001 resolved that processes should be initiated to achieve an early resolution of the issue of the Head of State for Australia in the event that the Commonwealth of Australia separates from the Monarchy.
2. The Conference approved certain recommendations for initiating a process to enable the people to make a decision in an informed, fair and effective way in order to achieve an early resolution of the Head of State issue for the whole Australian federation.

The Parliament of Victoria therefore enacts as follows:

1. *Purpose*

The main purposes of this Act are—

- (a) to facilitate a process for determining whether Commonwealth and State constitutional links with the Monarchy should be severed; and
- (b) to establish a representative committee to investigate and report on that question and on related matters.

2. *Commencement*

This Act comes into operation on the day after the day on which it receives the Royal Assent.

3. *Definitions*

In this Act—

"**Assembly**" means the Legislative Assembly of Victoria;

"Council" means the Legislative Council of Victoria;

"Committee" means the Committee established under section 4;

"establishment of the Committee" means the date of commencement of this Act or the date of the first meeting of the Assembly after the last general election, whichever is the later;

"Head of State" means the person who, for the time being, has the constitutional power to administer the government of the Commonwealth or the State, as the case requires;

"Monarchy" means Queen Elizabeth the Second and her heirs and successors;

"Parliament" means the Parliament of Victoria;

"President" means the President of the Council and includes any person acting as President of the Council;

"Speaker" means the Speaker of the Assembly and includes any person acting as Speaker of the Assembly;

"Territory" means the Capital Territory or the Northern Territory.

4. *The Committee*

- (1) There is established a Committee to be called the Constitutional Arrangements (Head of State) Committee consisting of 6 members of whom—
 - (a) one shall be a member of the Australian Labor Party and of the Parliament, appointed by the members of the Parliament who are members of that Party;
 - (b) one shall be a member of the Liberal Party of Australia and of the Parliament, appointed by the members of the Parliament who are members of that Party;
 - (c) one shall be a member of the National Party and of the Parliament, appointed by the members of the Parliament who are members of that Party;
 - (d) one shall be a member of the Australian Democrats Party and of the Parliament, appointed by the members of Parliament who are members of that Party;

- (e) one shall be one of the members of the Parliament who are not members of a party referred to in paragraph (a), (b), (c) or (d), appointed by those members;
 - (f) one shall be a person who is not a member of the Parliament, appointed by the members appointed under the preceding paragraphs, after inviting applications from the public.
- (2) If the members of a party referred to in paragraph (a), (b), (c) or (d) of sub-section (1) do not, within 2 months after the establishment of the Committee or of a vacancy occurring in the office of a member of the Committee appointed under or for the purposes of that paragraph, appoint a person under that paragraph, the President and the Speaker shall, after inviting applications from the public, appoint a person who is not a member of the Parliament to be a member of the Committee for the purposes of that paragraph.
- (3) If, at the time of establishment of the Committee or of a vacancy occurring in the office of a member of the Committee appointed under or for the purposes of paragraph (a), (b), (c) or (d) of sub-section (1), there are no members of a party referred to in that paragraph who are members of the Parliament then—
- (a) if, at that time, there is a Victorian branch of the party, the President and the Speaker, after consultation with the presiding member of that branch, shall appoint a person who is a member of that branch to be a member of the Committee for the purposes of that paragraph; or
 - (b) if, at that time, there is not a Victorian branch of the party, the President and the Speaker shall, after inviting applications from the public, appoint a person who is not a member of the Parliament to be a member of the Committee for the purposes of that paragraph.
- (4) If—
- (a) the members of the Parliament of the class referred to in paragraph (e) of sub-section (1) do not, within 2 months after the establishment of the Committee or of a vacancy occurring in the office of a member of the Committee appointed under or for the purposes of that paragraph, appoint a person in accordance with that paragraph; or
 - (b) at the time of establishment of the Committee or of a vacancy occurring in the office of a member of the

Committee appointed under or for the purposes of paragraph (e) of sub-section (1), there are no members of the Parliament of the class referred to in that paragraph—

the President and the Speaker shall, after inviting applications from the public, appoint a person who is not a member of the Parliament to be a member of the Committee for the purposes of that paragraph.

- (5) In appointing members of the Parliament as members of the Committee, it is desirable that the members include at least one member of the Council and at least one member of the Assembly.

5. *Term of office of Committee*

- (1) The Committee holds office until the Federal Committee referred to in section 21 has made its final report or until the expiry or dissolution of the Assembly during which it is appointed, whichever first occurs.
- (2) As soon as conveniently practicable after the day of the first meeting of the Assembly after a general election, the members of the Committee shall be appointed in accordance with section 4, unless the Federal Committee referred to in section 21 has made its final report before that day.

6. *Vacancies*

- (1) If a member of the Committee who, when appointed, was a member of the Parliament ceases to be a member of the Parliament, the office of that member is vacant.
- (2) If a member of the Committee appointed in accordance with section 4(1)(f) becomes a member of the Parliament, the office of that member is vacant.
- (3) The office of a member of the Committee appointed by the President and the Speaker in accordance with section 4(2), (3) or (4) does not become vacant by reason only that the member becomes a member of the Parliament.
- (4) A member of the Committee may resign from the Committee by notice in writing given to the chairperson.
- (5) A vacancy in the office of a member must be filled by the appointment of a person eligible to be appointed to that office in accordance with section 4(1), (2), (3) or (4), as the case requires, as at the time the vacancy is filled.

7. *Functions and powers of the Committee*

- (1) The main function of the Committee is to investigate whether the Commonwealth of Australia and the States should sever their constitutional links with the Monarchy and to report on that investigation.
- (2) The Committee must also—
 - (a) investigate—
 - (i) models for the appointment, tenure, duties and powers of a Head of State for the Commonwealth of Australia; and
 - (ii) models for the appointment, tenure, duties and powers of a Head of State for the State of Victoria—

that would preserve or improve the democracy of Australia or the State, as the case requires, and not place undue strain on the Australian federation if the Commonwealth of Australia and the States severed their constitutional links with the Monarchy; and
 - (b) report on the models so investigated that, in the opinion of the Committee, or of at least one member of the Committee, would best preserve or improve the democracy of Australia or the State, as the case requires, and would place least strain on the Australian federation.
- (3) The Committee must also—
 - (a) investigate methods of severing the Commonwealth of Australia's and the States' constitutional links with the Monarchy; and
 - (b) report on the methods so investigated that, in the opinion of the Committee, or of at least one member of the Committee, would best preserve or improve the democracy of Australia and the States and would place least strain on the Australian federation.
- (4) The Committee has the powers conferred on it under this Act and such other powers as are necessary to enable it to carry out its functions.

8. *Chairperson, quorum and procedure*

- (1) The Committee must elect one of its members to be chairperson and one of its members to be deputy chairperson.
- (2) In the absence of the chairperson, the deputy chairperson may exercise the powers and duties of the chairperson and, in the absence of both the chairperson and the deputy chairperson, the members present may elect one of their number to act as chairperson.
- (3) The quorum of the Committee is 4 members.
- (4) A decision of the majority of the members present at a meeting of the Committee is a decision of the Committee.
- (5) In the event of an equality of votes, the chairperson has a casting vote as well as a deliberative vote.
- (6) Subject to this section, the procedure of the Committee is in its discretion.

9. Meetings

The Committee must not make its final report unless at least three meetings of the Committee (whether the same, or any earlier Committee) have been held in the City of Melbourne or at a place or places in the Metropolitan area (within the meaning of the **Melbourne and Metropolitan Board of Works Act 1958**) and at least one such meeting has been held in each of the following places:

Ballarat, Bendigo, Dandenong, Geelong, Horsham, Mildura, Sale, Shepparton, Traralgon, Wangaratta, Warragul, Warrnambool.

10. Submissions and public hearings

- (1) The Committee must invite written submissions from the public, hold public hearings and allow any person to make an oral submission at a public hearing on any matter on which it is required to investigate and report.
- (2) At a public hearing, the Committee may refuse to hear any part of a submission which in the opinion of the Committee—
 - (a) is irrelevant to the matter being inquired into or being considered by the Committee; or

- (b) is unnecessary to be given because of other information at the disposal of the Committee.
- (3) A person or body shall not be entitled or permitted to be represented by another person at a public hearing held by the Committee but nothing in this sub-section prevents a person from making a submission on behalf of another person or on behalf of a body of which he or she is a member.
- (4) Notwithstanding anything in this section, the Committee may deliberate in private.

11. Assistance of Parliamentary officers

- (1) The President and the Speaker may nominate one or more officers of the Department of the Legislative Council or the Department of the Legislative Assembly to assist the Committee in carrying out its functions.
- (2) The chairperson of the Committee must ensure that minutes of meetings of the Committee are kept and that copies of all written submissions, and transcripts or summaries of all oral submissions made to the Committee are retained and made available to members of the Committee and to such other persons as the Committee determines.

12. Research

- (1) Subject to section 19, the Committee may commission any person or persons to investigate and report to the Committee on any aspect of matters being investigated by the Committee.
- (2) The Committee may, instead of or in addition to commissioning an investigation under sub-section (1), with the consent of the Public Employment Minister within the meaning of the **Public Sector Management and Employment Act 1998**, make use of the services of any of the employees in the public service for the purpose of investigating and reporting to the Committee on any aspect of the matters being investigated by the Committee.

13. Sub-committees

- (1) The Committee may appoint sub-committees of not less than four members of the Committee of whom one shall be appointed by the Committee as chairperson of the sub-committee.
- (2) A majority of the members of a sub-committee shall constitute a quorum.

- (3) A question arising at a meeting of a sub-committee shall be determined by a majority of the votes of the members of the sub-committee present and voting and in the event of an equality of votes the chairperson of the sub-committee has a casting vote as well as a deliberative vote.
- (4) Subject to this section and any direction of the Committee, the procedure of a sub-committee is in its discretion.

14. *Reports and discussion papers*

- (1) The Committee may at any time before making a final report on the matters being investigated by it–
 - (a) make one or more interim reports on the matters or any part of them; or
 - (b) publish a document pertaining to the matters or any part of them–

and must publish any such report or document on the Internet for access by the public free of charge.

- (2) The Committee must make a final report within 2 years after its first meeting or, if the Premier, by Order published in the Government Gazette, determines a longer period, within that longer period.
- (3) The Committee must in its final report include details of each of the models and methods investigated under section 7 that is recommended by a majority of the members or is recommended by one or more members of the Committee, together with full reasons for each recommendation and the reasons why each recommendation is preferred to other recommendations on the same subject matter.

15. *Reports to be laid before the Parliament and made widely available*

The chairperson of the Committee–

- (a) must cause each report made by it to be laid before each House of the Parliament within ten sitting days of that House after the report is adopted by the Committee; and
- (b) must give a copy of its final report to the chairperson of the Federal Committee referred to in section 21 and to–
 - (i) the chairperson of each other State or Territory committee corresponding to the Committee established under this Act;
 - (ii) the presiding officer of each house of each other Parliament in Australia;

- (iii) each member of the Council of Australian Governments and the secretary of that Council;
 - (iv) the leader of the Opposition in each other Parliament in Australia;
 - (v) the National Library and the main library in each State and Territory;
 - (vi) the libraries of the High Court and the Federal Court and the libraries of the Supreme Courts of each State or Territory;
- (c) must ensure that copies of its reports are available for the public free of charge;
 - (d) must cause a copy of each report to be placed on the Internet for access by the public free of charge.

16. *Committees to publish submissions and reports of investigations*

- (1) The Committee shall on request make available to any member of the public a copy of any written submissions made to it unless in the opinion of the Committee special circumstances make it undesirable to do so.
- (2) For making available to a person any document under subsection (1), the Committee may charge a member of the public a reasonable sum not exceeding the cost of making the document so available.
- (3) The Committee must not disclose or publish any submission given to it in private.

17. *Privileges and immunities*

The members of the Committee, while carrying out the functions or exercising the powers of such members, hold and enjoy the same privileges and immunities as are held and enjoyed by a member of a committee of the Parliament.

18. *Submissions may be considered by new Committee*

If the Assembly expires or is dissolved before the Committee has made its final report, any new Committee may have regard to submissions made to, deliberations of, and any reports made by, any earlier Committee.

19. *Expenditure of Committee*

- (1) Any expenditure incurred by or on behalf of the Committee, when authorised by and certified to by the Speaker and the President, is payable out of the Consolidated Fund, which is hereby to the necessary extent appropriated accordingly.
- (2) Each member of the Committee is entitled to receive an expense allowance or a travelling allowance at such rate and in such circumstances and subject to such conditions as are prescribed in respect of each attendance as a member of the Committee at a meeting of the Committee at which a quorum is present.
- (3) A member of the Committee is not entitled to any payment under sub-section (2) in respect of a meeting of the Committee that does not last for at least one hour and at which the member has not attended for at least 45 minutes.
- (4) The total amount payable under this section in respect of a financial year must not exceed such sum as is for the time being fixed by Order of the Governor in Council for that financial year.

20. *Status of payments as regards The Constitution Act Amendment Act 1958*

Despite anything in **The Constitution Act Amendment Act 1958** or in any other Act, a member of the committee who is a member of the Parliament shall not by reason only of receiving any payment under this Act be deemed to hold or to accept an office or place of profit under the Crown or to be employed in the public service so as to render him or her incapable of sitting or voting as a member of the Assembly or Council or to make null and void his or her election to Parliament or to disqualify him or her or to render him or her incapable of being or continuing a member of the Assembly or Council or to make him liable to any penalty under **The Constitution Act Amendment Act 1958**.

21. *Appointment of member to Federal Committee*

- (1) The Committee must appoint one of its members to be a member of the Federal Committee established by or under a law of the Parliament of the Commonwealth, the members of which are to include one member from the Committee established under this Act and one member from each committee established by or under a law corresponding to this Act of each other State and each Territory of the Commonwealth.
- (2) The Committee must make the appointment under sub-section (1) in accordance with the requirements of the law of the Parliament of the Commonwealth by or under which the

Federal Committee is established and must, in accordance with those requirements, appoint one of its members to fill any vacancy occurring in the office of that appointed member.

22. *Immunity from judicial review*

The proceedings of the Committee or any recommendation or report made by the Committee or any document published by the Committee does not give rise to any cause of action and may not be made the subject of, or in any way be called into question in, any proceedings before a court or tribunal.

23. *Supreme Court—limitation of jurisdiction*

It is the intention of section 22 to alter or vary section 85 of the **Constitution Act 1975**.

24. *Regulations*

The Governor in Council may make regulations for or with respect to any matter or thing which is required or permitted to be prescribed or which is necessary or expedient to be prescribed for giving effect to this Act.

(Draft 13/2/03)

Constitutional Arrangements (Head of State) (Victoria) Bill 2003

EXPLANATORY MEMORANDUM

Clause 1 provides that the main purposes of the Act are:

- to facilitate a process for determining whether Commonwealth and State constitutional links with the Monarchy should be severed; and
- to establish a representative committee to investigate and report on that question and on related matters.

Clause 2 provides for the commencement of the Act.

Clause 3 sets out a number of definitions including:

"Head of State" means the person who, for the time being, has the constitutional power to administer the government of the Commonwealth or the State, as the case requires;

"Monarchy" means Queen Elizabeth the Second and her heirs and successors.

Clause 4:

- establishes a 6-person committee to be called the Constitutional Arrangements (Head of State) Committee ("Committee"). The 6 persons shall comprise:
 - 4 members of the Victorian Parliament, one from each of the Australian Labor Party, the Liberal Party of Australia, the National Party and the Australian Democrats Party, each appointed by members of the Parliament who are also members of that party;
 - one member of the Parliament who is not a member of those 4 major parties appointed by members of Parliament who are not members of those 4 major parties;
 - one person who is not a member of the Parliament, appointed by the other 5 members of the Committee, after inviting applications from the public.
- further provides that in appointing members of the Parliament as members of the Committee, it is desirable that the members include at least one member of the Council and at least one member of the Assembly.

Clause 5 provides for the term of office of the Committee.

Clause 6 sets out the circumstances in which the office of a member of the Committee is vacant, provides for manner of resignation from the Committee and requires that the vacancy be filled by the procedures in Clause 4.

Clause 7 sets out the functions and powers of the Committee. It provides that:

- the main function of the Committee is to investigate whether the Commonwealth of Australia and the States should sever their constitutional links with the Monarchy and to report on that investigation.
- the Committee must also:
 - investigate models for the appointment, tenure, duties and powers of a Head of State for the Commonwealth of Australia and of a Head of State for the State of Victoria that would preserve or improve the democracy of Australia or the State, as the case requires, and not place undue strain on the Australian federation if the Commonwealth of Australia and the States severed their constitutional links with the Monarchy; and
 - report on the models so investigated that, in the opinion of the Committee, or of at least one member of the Committee, would best preserve or improve the democracy of Australia or the State, as the case requires, and would place least strain on the Australian federation.
- the Committee must also:
 - investigate methods of severing the Commonwealth of Australia's and the States' constitutional links with the Monarchy; and
 - report on the methods so investigated that, in the opinion of the Committee, or of at least one member of the Committee, would best preserve or improve the democracy of Australia and the States and would place least strain on the Australian federation.
- the Committee has the powers conferred on it under the Act and such other powers as are necessary to enable it to carry out its functions.

Clause 8 provides for the Committee's members to elect a chairperson and deputy chairperson, stipulates the quorum of the Committee (4) and further provides that subject to that section the procedure of the Committee is in its discretion.

Clause 9 provides that the Committee must not make its final report unless it has held at least 15 meetings, 3 in the City of Melbourne or the Metropolitan area, and at least one in each of Ballarat, Bendigo, Dandenong, Geelong, Horsham, Mildura, Sale, Shepparton, Traralgon, Wangaratta, Warragul and Warrnambool.

Clause 10 provides that:

- the Committee must invite written submissions from the public, hold public hearings and allow any person to make an oral submission at a public hearing on any matter on which it is required to investigate and report but may refuse to hear any part of a submission which is irrelevant or unnecessary.
- a person or body shall not be entitled or permitted to be represented by another person at a public hearing held by the Committee but nothing in this sub-

section prevents a person from making a submission on behalf of another person or on behalf of a body of which he or she is a member.

- the Committee may deliberate in private.

Clause 11:

- provides that the President of the Council and the Speaker of the Assembly may nominate one or more officers of the Department of the Legislative Council or the Department of the Legislative Assembly to assist the Committee in carrying out its functions.
- requires the chairperson of the Committee to ensure that minutes of meetings of the Committee are kept and that copies of all written submissions, and transcripts or summaries of all oral submissions made to the Committee are retained and made available to members of the Committee and to such other persons as the Committee determines.

Clause 12 provides that subject to section 19 (governing expenditure of the Committee) the Committee may commission any person or persons to investigate and report to the Committee on any aspect of matters being investigated by the Committee or alternatively, or additionally may with the consent of the Public Employment Minister make use of the services of any of the employees in the public service for those purposes.

Clause 13 provides for the appointment, quorum and procedure of sub-committees.

Clause 14 provides that the Committee:

- may at any time before making a final report on the matters being investigated by it make one or more interim reports on the matters or any part of them; or publish a document pertaining to the matters or any part of them and must publish any such report or document on the Internet for access by the public free of charge.
- must make a final report within 2 years after its first meeting or, if the Premier, by Order published in the Government Gazette, determines a longer period, within that longer period.
- must in its final report include details of each of the models and methods investigated under section 7 that is recommended by a majority of the members or is recommended by one or more members of the Committee, together with full reasons for each recommendation and the reasons why each recommendation is preferred to other recommendations on the same subject matter.

Clause 15 provides that the chairperson of the Committee:

- must cause each report made by it to be laid before each House of the Parliament within ten sitting days of that House after the report is adopted by the Committee; and
- must give a copy of its final report to the chairperson of the Federal Committee referred to in section 21 and to:
 - the chairperson of each other State or Territory committee corresponding to the Committee established under this Act;
 - the presiding officer of each house of each other Parliament in Australia;
 - each member of the Council of Australian Governments and the secretary of that Council;
 - the leader of the Opposition in each other Parliament in Australia;
 - the National Library and the main library in each State and Territory;
 - the libraries of the High Court and the Federal Court and the libraries of the Supreme Courts of each State or Territory;
- must ensure that copies of its reports are available for the public free of charge;
- must cause a copy of each report to be placed on the Internet for access by the public free of charge.

Clause 16 provides that the Committee:

- shall on request and for the disbursement cost of the document make available to any member of the public a copy of any written submissions made to it unless in the opinion of the Committee special circumstances make it undesirable to do so.
- must not disclose or publish any submission given to it in private.

Clause 17 provides that members of the Committee acting as such have the same privileges and immunities as a member of a committee of the Parliament.

Clause 18 provides that if the Assembly expires or is dissolved before the Committee has made its final report, any new Committee may have regard to submissions made to, deliberations of, and any reports made by, any earlier Committee.

Clause 19 provides:

- that any expenditure of the Committee authorised by and certified to by the Speaker and the President, is payable out of the Consolidated Fund, which is hereby to the necessary extent appropriated accordingly.

- for the payment of expense or travelling allowances to Committee members for their attendance at Committee meetings.
- the total amount payable under this section in respect of a financial year must not exceed such sum as is for the time being fixed by Order of the Governor in Council for that financial year.

Clause 20 provides that a member of the committee who is a member of the Parliament shall not by reason only of receiving any payment under this Act be deemed to hold or to accept an office or place of profit under the Crown or to be employed in the public service so as to render him or her incapable of sitting or voting as a member of the Assembly or Council or to make null and void his or her election to Parliament or to disqualify him or her or to render him or her incapable of being or continuing a member of the Assembly or Council or to make him liable to any penalty under **The Constitution Act Amendment Act 1958**.

Clause 21 provides:

- the Committee must appoint one of its members to be a member of the Federal Committee established by or under a law of the Parliament of the Commonwealth, the members of which are to include one member from the Committee established under this Act and one member from each committee established by or under a law corresponding to this Act of each other State and each Territory of the Commonwealth.
- the Committee must make the appointment under sub-section (1) in accordance with the requirements of the law of the Parliament of the Commonwealth by or under which the Federal Committee is established and must, in accordance with those requirements, appoint one of its members to fill any vacancy occurring in the office of that appointed member.

Clause 22 provides the proceedings of the Committee or any recommendation or report made by the Committee or any document published by the Committee does not give rise to any cause of action and may not be made the subject of, or in any way be called into question in, any proceedings before a court or tribunal.

Clause 23 provides that it is the intention of section 22 to alter or vary section 85 of the **Constitution Act 1975**.

Clause 24 provides that the Governor in Council may make regulations for or with respect to any matter or thing which is required or permitted to be prescribed or which is necessary or expedient to be prescribed for giving effect to the Act.

* * * * *

Attachment D

Emails from Juliette Brodsky on behalf of Jack Hammond QC to Senate Legal and Constitutional Committee secretary, Louise Gell (23 December 2003).

To: Louise.Gell@aph.gov.au
From: Juliette Brodsky <jbrodsky@ozemail.com.au>
Subject: Senate Committee discussion paper on inquiry into Australian republic - two corrections requested
CC:
Bcc: Noel Russell <noel.russell@vicbar.com.au>
X-Attachments: :Golden Ratio:26414:McGarvie model diagram.doc:

Dear Louise,

I'm emailing you on behalf of Jack Hammond QC, who's cited in the newly-released Senate Committee discussion paper on an Inquiry into an Australian republic.

As the Senate paper mentions, Jack worked closely with the late Richard McGarvie in initiating the Corowa Conference 2001 - and on Mr McGarvie's model.

Jack would be grateful if two errors in the Senate discussion paper could be corrected:

- 1/ Please substitute the attached diagram for the one you currently have on p. 19.
- 2/ In Appendix A (p.23), replace references to "President" with "Governor-General". Mr McGarvie never used the term "President" - in his 1999 book *Democracy: Choosing Australia's Republic* (pp. 207-208), he said 'there would be no change of names for the positions [of Governor-General and Governor]..... They would still be called "Governor-General" and "Governor"'.

Thank you very much, Louise - could you please acknowledge receipt of this email, and let me know if the above can be done.

Jack Hammond can be contacted on (03) 9225 7507 if you have any further queries.

Kind regards,

Juliette Brodsky

To: Louise.Gell@aph.gov.au
From: Juliette Brodsky <jbrodsky@ozemail.com.au>
Subject: Further to previous email - amended attachment
Cc:
Bcc: Noel Russell <noel.russell@vicbar.com.au>
X-Attachments: :Golden Ratio:26414:McGarvie model diagram.doc:

Dear Louise,

Further to the email I sent you (on behalf of Jack Hammond QC) this morning, please find attached an amended diagram to be appended to the description of the McGarvie model on p. 19 of the Senate Committee Inquiry into an Australian Republic discussion paper. (Please disregard the previous attachment - some words were missing.)

Kind regards,

Juliette Brodsky