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MEMBER FOR GINNINDERRA

Senator Nick Bolkus  
Chair  
Senate Legal and Constitutional References Committee  
Parliament House  
CANBERRA ACT 2600

Dear Senator Bolkus

Thank you for your letter of 26 November 2003 concerning the Senate Legal and Constitutional Reference Committee inquiry into an Australian Republic. I apologise for the delay in replying.

As a committed Republican, I am pleased to respond to your Committee's Terms of Reference and the Discussion Paper you have circulated. I supported the Republican campaign in the 1999 Constitutional Referendum and I attended the Corowa Conference in December 2001. I hope that the following observations are of assistance to your Committee.

## The need for an Australian Head of State

The starting point for any discussion of Australia's constitutional arrangements must be a recognition that Australia does not have an Australian as our Head of State and that under present arrangements no Australian citizen can serve in that role.

Supporters of the Monarchy sometimes argue that the Crown – the Queen of Australia – is an Australian institution. Monarchists have argued that we have, de facto, an Australian Head of State in the office of the Governor-General. This is a quite incorrect understanding.

The Queen, not the Governor-General, is Australia's current Head of State.

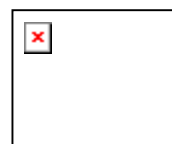
Although the evolution of constitutional and political practice over a century has transformed the office of Governor-General, the relevant provisions of Australia's Constitution remain unchanged since 1901 when Australia was still a colony within the British Empire.

Under Section 2 of the Constitution, the Governor-General is appointed by the Queen as "Her Majesty's representative in the Commonwealth during the Queen's pleasure". Section 61 provides that the "executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative". Moreover, covering

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Clause 2 of the Constitution provides that references to the Queen extend to “Her Majesty’s heirs and successors in the sovereignty of the United Kingdom”.

When our present Governor-General took office on 11 August 2003, he swore the following Oath of Allegiance: “I, Philip Michael Jeffery, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth, her heirs and successors according to law.”

It is a striking and anachronistic state of affairs that under Australia’s present constitutional arrangements: Australia’s Head of State is a foreign monarch; no Australian citizen can be our Head of State; and our Governor-General is sworn to serve the Queen of England, and her heirs and successors, not the Australian people.

The Queen does not represent Australia abroad as she does the United Kingdom. When the Queen visits a foreign country, she does so as Head of State of the United Kingdom only. On the advice of British Ministers of State, the Queen works to advance the objectives and interests of the United Kingdom, including trade interests, which may not necessarily coincide with the objectives and interests of Australia.

Monarchy is an ancient form of government that achieved its high point in the Middle Ages and the British Monarchy includes elements clearly at odds with modern Australian values such as equality of opportunity, non-discrimination and religious tolerance.

The Queen occupies the throne on the basis of hereditary, not merit or democratic mandate, and with a preference for male descendants over females. The King or Queen of England, and thus the King or Queen of Australia, must be of the Anglican faith. Yet Section 116 of Australia’s Constitution states that “no religious test shall be required as a qualification for any office or public trust under the Commonwealth”. This principle should apply to Australia’s Head of State.

The conditions that apply to the British monarchy are entirely inappropriate for the Head of State of Australia, an independent, sovereign nation.

The question may be raised as to whether Australia needs a Head of State. It may be argued that there is no need to incur the expense of a ceremonial Head of State: that the community role could be performed by other public officials such as the Chief Justice or Presiding Officers of the Australian Parliament; and that the ordinary governmental role could be performed by those persons responsible for giving the advice in accordance with which the Governor-General by convention presently must act.

The cost of the office of Head of State is a matter that can be dealt with outside of the Constitution. Parliament can provide for a lavish, or as modest, a life-style of the Governor-General or Republican Head of State as it wishes by amendment to the *Governor-General Act 1974* and annual appropriations for the office.

However, while dispensing with the office of Head of State could be considered, it should be understood that no nation, as opposed to states, territories or provinces within nations, does not have a Head of State. Moreover it would be a radical departure from Australia’s established national system of government, and as such it is an option the Australian people are very unlikely to support.

While the Prime Minister is unquestionably seen as the democratically elected leader of the nation, there is much to be said for a national figure who enjoys democratic legitimacy, but who stands separate from the hurly-burly of partisan politics, and who can represent our nation as a whole, both to Australians and to the rest of the world. Clearly this person must be one of our own citizens, not a foreign monarch.

### The path to an Australian Republic

The first step along the path to an Australian Republic is clearly a plebiscite on the fundamental question of whether Australians wish to have one of our own citizens as our democratically chosen Head of State, and so whether Australia should become a Republic. This could be followed by a second plebiscite on the most appropriate model. That choice could then be put to a formal referendum.

### Models for the Office of an Australian Head of State

If a new office of Head of State is to be established and our current principles of parliamentary government are to be retained, as appears to be the strong wish of the Australian people, the role and functions to be carried out should be broadly comparable to those of the Governor-General.

However, because the new Head of State will not be just a representative of the Queen, but Australia's Head of State in his or her own right, he or she may well occupy a more important and prominent role in Australia's national life, even though the day-to-day duties would presumably remain largely ceremonial.

Whether titled President, Governor-General or Head of State, there would appear to be a strong measure of agreement among Australians about the qualities an Australian Head of State should possess: that the person be an eminent Australian who is widely respected and can be relied upon to behave in a dignified and politically impartial manner. These are qualities that Australians have come to expect and require of Australia's Governors-General.

Provided that an appropriate degree of scrutiny is involved in the selection of the Head of State, a person who lacks these broad qualities would be very unlikely to be chosen. Specific qualifications would not appear necessary or appropriate apart from those that apply for election to the Australian Parliament, i.e. that a person be an Australian citizen, 18 or more years of age, and is either an elector entitled to vote at a House of Representatives election or is qualified to become such an elector.

At present, the Governor-General is chosen by the Prime Minister and appointed by the Queen on the Prime Minister's advice. This process rests on established constitutional convention. Selection by the Prime Minister has indeed been the accepted basis for selection of Governors-General since the appointment of the first Australian Governor-General, Sir Isaac Isaacs, in 1931. The Governor-General can be removed by the same process, that is, by the Queen acting on the recommendation of the Prime Minister.

Although there is no process of public or parliamentary consultation for the appointment of Governors-General, the democratic legitimacy of these arrangements is clear, resting as it does on the Prime Minister's accountability to the Parliament and ultimately to the electorate.

Leaving the appointment of an Australian Head of State in the hands of the Prime Minister would be the option that most closely reflects current practice. Prime Ministers would presumably continue to follow convention and select appropriately eminent individuals and those appointees would similarly carry out the functions of the office in an even-handed fashion. A Prime Minister who selected an overtly partisan or otherwise inappropriate person to serve as Head of State would diminish the office and would be judged accordingly by the political process and the electorate.

Selection of Australia's Head of State by the democratically elected Prime Minister would involve minimal change to Australia's established system of government – a key consideration in debate on Australia's future constitutional arrangements.

It may be argued, of course, that selection by the Prime Minister would be an insufficiently democratic basis for the appointment of a person to the more prominent role of Australian Head of State.

Involving the Australian people in the appointment of the Head of State through their parliamentary representatives would give more direct democratic legitimacy to the selection and, depending on the particular method selected, could ensure that the person selected enjoys bipartisan support from the major political parties. Moreover, it would, through the Senate, reflect the federal nature of the Australian Commonwealth.

Issues that arise in relation to a parliamentary election model for an Australian Head of State include:

- whether the Houses of Parliament should vote separately, thereby risking deadlock, or whether the members should vote in a joint sitting;
- whether the vote should require a simple majority of members or whether a “special majority” should be required to ensure that the person selected would have not only the support of Government members, but also of a substantial number of non-Government members; and
- whether a single nomination by the Prime Minister or a bipartisan nomination panel should be considered.

A joint sitting of the House of Representatives and Senate would be appropriate given the importance of the appointment of the Head of State.

Requiring only a simple majority in each House, or indeed of members of both Houses in a joint sitting could, depending on the relative size of the Government's majority in the House of Representatives and its representation in the Senate, see the Government of the day able to determine the appointment of the Head of State without the support of any other party, or with the support of only a small number of non-Government Senators or Members.

Adopting a voting procedure that would necessarily require the support of members of more than one major political party (e.g. a two-thirds majority) would encourage prior consultation and agreement between the major parties on a nominee or nominees.

A single nomination by the Prime Minister would have the advantage of avoiding partisan debate on the relative merits of candidates that could be divisive and detrimental to the office of Head of State. The alternative of a “bipartisan” nomination panel could create a forum for public and partisan debate about alternative candidates. Moreover if a two-thirds parliamentary majority were required for appointment, prior consultation with other major parties could in any case be expected, and indeed would be essential to secure bipartisan support.

While it has been suggested the negative outcome of the 1999 Constitutional Referendum reflected a popular preference for direct election of an Australian Head of State, the merits of a parliamentary appointment process should not be lightly set aside.

Appointment by a two-thirds majority of the Australian Parliament would enhance the democratic standing of the office of Head of State while preserving its non-partisan nature. It would also avoid the considerable complications and potential controversy likely to arise in relation to the alternative of direct election of the Head of State.

It has been argued that a direct election model would prevent a partisan political appointment to the office of Head of State, as could occur if the matter was left in the hands of the Prime Minister or Parliamentarians. In practice, however, the contrary could well be the case. Direct election could indeed ensure that the person elected as Head of State is the nominee of one or the other of the major political parties which have the expertise and resources to mount nation-wide political campaigns. A direct election model could well ensure that the Head of State is a “politician” – something quite at odds with the broad community preference for the office of Head of State to be non-partisan in nature.

Options sometimes suggested to reduce the partisan nature of a direct election include a ban on political parties endorsing candidates for the office of Head of State and excluding former Parliamentarians from nomination as a candidate. Neither measure would necessarily free an election from political campaigning and both would involve unacceptable restrictions on political freedoms.

It has also been suggested that some form of intervening process designed to encourage bipartisan support for candidates could reduce the likelihood of a direct election becoming a partisan contest.

One option could be nomination by a special electoral college, possible comprising representatives from the Australian Parliament and State and Territory legislatures. Reaching a consensus on the composition of an electoral college would be no straightforward task and there would be no guarantee of developing a formula which would ensure bipartisan nominations, let alone an election free of partisan endorsements and competition.

Another option may be that of nomination of at least three candidates by the Australian Parliament (either by both the House of Representatives and the Senate or in a Joint Sitting) for submission to the Australian people in a direct election. In order to require bipartisan support, it would be necessary to stipulate a two-thirds parliamentary majority for the nomination of each candidate. Consideration would need to be given to procedures to deal with the circumstance in which a two-thirds majority for all candidates could not be achieved within an appropriate timeframe.

It should be recognised, however, that if more than one candidate were nominated, political parties would still be free to express a preference and campaign for a particular candidate ahead of others. On balance, a partisan contest appears to be the likely if not inevitable consequence of a direct election model. This would involve a major departure from the present apolitical status of the office of Governor-General and a shift in Australia's system of government likely to generate considerable debate and controversy.

#### Term of Office and Removal of the Head of State

Formally, the Governor-General holds office "during Her Majesty's pleasure", but in practice the length of the Governor-General's term is determined by convention of five year appointments, although the term has been extended in a number of cases. It would appear most appropriate for the convention of five-year terms to continue with an Australian Head of State.

The term of office should not be tied to the term of the Australian Parliament as this could present the Head of State with a conflict of interest when given advice to dissolve Parliament. In the event of a direct election model, a five-year term will involve separate elections for the Head of State and the Parliament. In effect Australians would be obliged to vote separately for an additional level of government within Australia's federal system, with consequent additional expense.

Arrangements for the possible removal of the Head of State from office will depend on the model of appointment. If the Prime Minister appoints the Head of State, then he or she should also have the authority to dismiss the Head of State, possibly subject to specific criteria. If the Head of State is appointed by the Parliament or elected by the Australian people, the most appropriate mechanism for removal would be a resolution of both the House of Representatives and the Senate, in the same parliamentary session.

#### Codification of powers and duties of an Australian Head of State

A direct election model for appointment of an Australian Head of State would involve a significant shift in Australia's national system of government by the creation of an office that enjoys democratic legitimacy separate from the elected government of the day.

The process of popular election could encourage the Head of State, political parties and indeed the public, to believe that he or she has a popular mandate to exercise the powers of that office, including the ability to make public statements and speeches, in a manner which could bring the Head of State into conflict with the elected government.

If a direct election model were chosen as the method of selecting an Australian Head of State, then, if the effect of our current conventions and principles of parliamentary government are to be maintained, it would be necessary to also amend the constitution to define and delimit the powers and role of the Head of State, including in relation to the appointment of the Prime Minister and Ministers and the dissolution of Parliament.

Codification of the powers and duties of the Head of State, including an explicit statement of the non-partisan, impartial and non-executive nature of the office, would need to be designed to prevent constitutional conflict and ensure that the Australian people know precisely the powers and duties of the Head of State they will be called upon to elect.

It is clearly possible to define the powers of a new directly-elected Head of State in a way that preserves essential elements of Australia's system of responsible parliamentary government. However this would be a complex and politically sensitive task, and would inevitably involve much more change to the Constitution than the model proposed in the 1999 Referendum. Moreover long-standing debate on the exercise of the so-called "reserve powers" by Governors-General suggests that it could prove to be quite difficult to achieve a broad based consensus on the precise terms of codification. This could have significant implications for popular support for a direct election model.

### State and Territory issues

The Committee's Discussion Paper briefly discusses the position of the Australian States in an Australian Republic. The paper notes the role of the monarchy in the constitution of Australia's States through their state governors. Should Australia become a Republic, the States will presumably make the shift on an individual basis with amendments to their own constitutions and relevant legislation. While this may lead to anomalies where a State retains its links with the Crown within a Republican Federation, it would be unlikely such a circumstance would continue for long given the successful referendum requirement of majority support across the nation and in a majority of states.

The Discussion Paper does not consider the position of the Australian Territories in relation to the establishment of an Australian Head of State. In the Australian Capital Territory the Governor-General may exercise certain powers with regard to the ACT Legislative Assembly. These powers are enumerated in the *Australian Capital Territory (Self-Government) Act 1988* and are exercised by convention on the advice of Commonwealth Ministers.

The Governor-General is empowered to dissolve the Legislative Assembly if the Assembly is considered to be incapable of effectively performing its functions (Section 16), to disallow Assembly enactments within 6 months of them being made (Section 35), and to make regulations (Section 74).

At a minimum, should Australia become a Republic, the retention of the ACT's current system of governance would require consequential amendments to the *ACT (Self-Government) Act 1988*, replacing references to the Governor-General with those to the new Head of State.

Should the Head of State of an Australian Republic be vested with a significantly different range of powers to those of the Governor-General (including any change in the relationship between Ministers and the Head of State), it would be necessary to also review the role of the Australian Head of State in the ACT's constitutional arrangements.

Yours sincerely

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Chief Minister