

The Secretariat, Senate Legal and Constitutional Committee

I understand that on 26 June 2003 the Senate referred an inquiry to the Senate Legal and Constitutional Reference Committee on the matters of the process towards, and models for, an Australian Republic with an Australian Head of State.

Moreover I understand that submissions from the general public on these matters are welcomed by the Committee.

I would therefore be obliged if the Committee would accept my submission as attached below which addresses Terms of Reference (b).

My submission consists of

(i) description of a proposed model for an Australian Republic, and

(ii) comment on the model in the context of the questions posed in the Committee's Discussion Paper.

From Dr. Peter Carden, Berry NSW

THREE TIER MODEL FOR AN AUSTRALIAN REPUBLIC

"retaining the Governor General is the linchpin of the whole scheme. It is what separates an elected tier one from an elected tier three. It makes an elected President possible."

Dr Peter Carden

This model gives recognition to the fact that Australia consists of the States and Territories as well as the Commonwealth. It will enable the President of Australia to be truly the President of all constitutional components of Australia in the same sense as the Queen is presently the Queen of Australia.

In this model the President of Australia may be elected by the people without detracting from the authority of the Prime Minister and Cabinet.

The alterations to present constitutions, necessary to bring about the Republic, can be simple leaving existing conventions untouched.

Tier One: The President of Australia.

The President directly replaces the Queen. The President, acting upon the advice of the Prime Minister, appoints the Governor General. The President is also available to appoint Governors of States when the Constitutions of those States are appropriately altered.

The President is the 'Head of State' of Australia. As with the Queen, all authority ultimately resides with the President. The President is a single-person embodiment of the Australian people and as such 'owns' the armed forces and 'requires' the various governments to assist in running the country. But the existing constitutional and conventional restrictions now applying to the Queen and transferred to the President will ensure that only under the most desperate circumstances will the country need to fall back on the President for executive action.

The President of Australia will undertake all ceremonial duties related to the whole of Australia. The President shall be a symbol of unity of all Australian people and governments. For example it would have been appropriate for the President to have opened the Olympic Games in Sydney.

Tier two: The Governor General and the State Governors.

These Officers will continue to exercise the existing reserve powers of each office. The processes of their appointment will continue to be upon advice. The Governor General will continue to sign all Commonwealth legislation and perform all ceremonial duties concerned with the powers and obligations of the Commonwealth.

Similarly the duties of the Governors will continue unaltered with respect to each State.

Tier Three: The Parliament of the Commonwealth and the Parliaments of the States.

These will remain unaltered in function and composition except for the replacement of the Queen by the President.

Discussion:

The President will normally be so constrained as to be unable to directly influence Parliament. For example the President can only appoint the Governor General as advised by Parliament (currently the Prime minister). Once appointed the Governor General acts independently of the President. Therefore if provision be made for the President to be elected by the people it is unlikely that political parties will make much effort or spend much money campaigning. Given an apolitical President, severely constrained, Governments, particularly Prime Ministers, need not fear disruption due to the presence of a superior authority.

Many will appreciate the virtue of a model where the President is directly elected but constrained. It is midway between the Monarchist view expressed by the jibe "if it isn't broken why fix it" and the extremist vision of a new and untried system based on an American style Presidency. This model gives Australians what the polls say they want: an Australian Head of State, an elected President, and a Constitution at least as good as we now have.

The Office of President may be created without a referendum although a supporting plebiscite would probably be essential. Assuming that the outcome of such a plebiscite were positive it would be a courtesy to the Queen to invite her, as head of the Commonwealth, to create the Office of President of Australia by an 'Imperial Act'. By the Act the Queen would create the Office of President (in effect providing for the existence of a replica of herself in Australia) and transfer to the incumbent of the Office all her powers and functions in Australia, first with respect to the Commonwealth, to take effect once the Commonwealth Constitution were amended (by referendum) so as to confirm the President's function and power in the Commonwealth, and to address the questions of election, salary, residence and tenure.

This proposal has its precedent in the Federation of the Commonwealth which was brought about by an 'Imperial Act' despite two prior negative referenda. We must nicely take advantage of the fact that the Queen is currently the head of state of Australia and can do things (upon advice) without a referendum. The Monarchy created legal Australia so it is fitting that the Monarchy should now finally set us free.

Once the Imperial Act should come into effect all the State Constitutions that relied on the Queen would be rendered incongruous, but the availability of the Office of President would make it a simple matter for these Constitutions to be

amended so as to adopt the President in place of the Queen. Once all States had done this the President would be truly the President of Australia.

The alternative is to create the Office of President within the Commonwealth Constitution, by referendum, either

- (i) ignoring the States or
- (ii) anticipating their adoption of the President by defining within the Commonwealth Constitution possible and likely roles for the President outside the Commonwealth, available should each State agree. This procedure has us simply rejecting the Queen instead of inviting her to permanently withdraw.

Moreover option (ii) would rob each State of its independence with respect to its Head of State placing this matter solely in the hands of the Commonwealth. For this reason it is unlikely to be an option favoured by the States given that the alternative (i) allows each to keep the Queen or create its own "in - house" president. Thus the grand concept of a single President of Australia would be lost.

Incidentally the same comment applies to every other model proposed so far (as contained in the Discussion Paper). None are conducive to the idea of a President of Australia.

It has to be said that the procedure described above for the creation of the Office of President by Imperial Act does not leave the States entirely independent of the Commonwealth should they adopt the President for their own. The questions of election, salary, residence and tenure are matters all will have to agree on and it is difficult to see any other means of ultimately controlling these aspects except by Commonwealth referenda. However the initial Commonwealth amendments could make provision for a Maintenance Committee, with State inputs, to deal with these matters. At least in regard to the fundamentals of State independence, power and function of the head of state, a President created by Imperial Act is beyond interference from the Commonwealth.

The creation of the office of President by Imperial Act is the method preferred for this model of an Australian republic.

The amendment of the Constitution of the Commonwealth would be an appropriate time to declare Australia to be a Republic if that were thought necessary (it may be more diplomatic not to do so!)

The powers and function of the President of Australia in the Commonwealth would parallel the present powers and function of the Queen, that is to say the President would be a formal part of Parliament and would appoint the Governor General according to the present convention. In addition the executive power of the Commonwealth would be vested in the President but exercisable by the Governor General.

Additional codification of the President's powers and function should not be necessary if it is generally held that the reserve powers of the Governor General and the Governors are presently well understood and seem to be adequate to deal with any foreseeable crisis. Therefore it may be unnecessary to spell out any ultimate authority the President might have. If it ever got to the point where the Government and the Governor General were unable to act, then we might rely on an unwritten convention that the President must take charge as a last resort. This understanding might best be written into the "Oath of Office". This model relies heavily on the precedent given by the Queen's present position. None of her powers are codified but are never the less limited by convention. This seems to be a much safer arrangement than that regarding the

Irish president who seems to have his/her hands absolutely tied no matter how dire the crisis.

Dismissal:

The duties and obligations of the President of Australia would be spelt out in the various Constitutions and the Oath of Office. Should a President be perceived to fall short of legal or conventional requirements to a substantial degree then the Prime Minister or Leader of the Opposition should be able to take action before the High Court with a view to dismiss the President. The list of persons able to initiate such action should extend to State counterparts also.

It would be inappropriate for the President of Australia, directly elected by the people, to be subject to impeachment by any Parliament for two reasons:

- (1) The President of Australia should be above politics, the province of Parliament;
- (2) impeachment by Parliament implies superiority of one elected entity over another. It is not intended that the President be answerable to Parliament, only the people.

Apart from the above, it is not envisaged that there be any direct interaction between the President of Australia and the Judiciary.

A criticism of this model might be the additional expense said to amount to the cost of an extra Governor General. However the additional expense would be ameliorated by the necessary reduction of the ceremonial function of the Governor General. Considering the cost of all six Governors plus the Governor General, the addition of a President should not represent a very large percentage increase. One must also take account of the savings from no longer having to fund the Queen's official visits.

A further criticism often raised is that it is "top heavy". "We want something simpler..too many chiefs.." My answer to this is that only one tier is actually 'heavy' viz. tier three. The others are feather weight armour. No one would argue about the office of President but many will ask "why a Governor General AS WELL?" Yet retaining the Governor General is the lynchpin of the whole scheme. It is what separates an elected tier one from an elected tier three. It makes an elected President possible.

This model is unlike any other model proposed all of which are essentially "two tier". Two tier models attempt to elevate the Governor General of the Commonwealth into a President of all Australia ignoring the fact that Australia is first and foremost a Federation of States which despite the President will continue to owe allegiance to the Queen through the Governors. How are the States to deal with this anomaly? Two tier models do not offer any guidance let alone a neat solution as does the three tier model.

What has been described here is a "minimum change" version of the three tier model. Many Australians would like to modernize some aspects of the Constitution irrespective of whether we become a Republic or not. It may be a good thing to do this, provided there is definite overwhelming support. Incidental changes that are controversial have to be avoided because they will detract from the main question: do we want to be a Republic?

It is better to step over the threshold to our Republic with as small a step as possible. Once over we can argue the next step and the next and so on. It

would be folly to make this an argument about big steps across a threshold that already engenders apprehension among many Australians.

SOME ANSWERS TO QUESTIONS RAISED IN THE COMMITTEE'S DISCUSSION PAPER

On page 6 of the Discussion Paper is the question "who is the current head of state?" There follows the observation that the focus of debate has been on replacing the Queen as head of state with an Australian head of state.

In fact, despite the debate, none of the models outlined in the Discussion Paper advocate "replacing the Queen". They simply ignore her. All fail to put an Australian in the place of the Queen as head of state.

My model is the exception.

In my model the (popularly elected) President directly replaces the Queen. Consequently the powers and duties of the President will be no more intrusive on our present system of government than the existing powers and duties of the Queen. Thus my model provides an affirmative answer to question 8 which asks "can the office of head of state (directly elected) be designed so as to avoid the situation where the President becomes a rival centre of power to the Government?"

Question 13 deals with the name of head of state: should it be "Governor General", "President of the Commonwealth of Australia" or some other title. In my model it is ultimately "President of Australia". My model is the only one that allows this simple, non-exclusive title because it provides for an office of President above the States and the Commonwealth, decreed by the very power that created them in the first place. There is something aesthetically pleasing about the closure that this model provides to an almost bygone chapter of our history.

Similarly my model singularly addresses question 25: what is the best way to deal with the position of the States in a Federal Australian Republic. In my model the Republic is not merely a Federal one. The Office of President does not arise out of the Commonwealth Constitution. The Queen provides an alternative to herself, a pseudo queen if you like, and then withdraws from all Australian Constitutions in favour of her pseudo.

Questions 26 - 30 deal with the process for moving towards a Republic. I favour an initial plebiscite which includes my model as an option. Should it be favoured by the people then the Prime Minister should then advise the Queen that it would be appropriate for her, as head-of-state of the Commonwealth and the States, to create the Office of President by Imperial Act.

A form of convention involving the Commonwealth and the States would need to decide on the matters of election, salary, residence and tenure.

The next step would be a Commonwealth referendum in which the people are asked to endorse the model. If carried the way would then be clear for the nomination of candidates and election of the first President who would initially be the President of the Commonwealth. Once all the States had adopted the President then the incumbent would truly be the President of Australia and should be so addressed.

The process outlined above seems best to suit Corowa Proposal B because here the effects on the States are most directly addressed and because complete models are examined. However as it stands Proposal B does not anticipate a model that simultaneously applies to the States and the Commonwealth.

Corowa Proposal A has the disadvantage of being indeterminate in the event that the people indicate a preference for a popularly elected President. In that case the models to choose from range from the radical e.g. the American model to the minimalist i.e. my three tier model. Clearly the plebiscite of Proposal A needs to be modified so as to resolve this problem.