

**SUBMISSION TO SENATE LEGAL AND  
CONSTITUTIONAL COMMITTEE**

**INQUIRY INTO AN AUSTRALIAN  
REPUBLIC**

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**Introduction**

1. The Committee's terms of reference effectively relate to two issues in relation to an Australian republic. The first concerns the best process for the achievement of a republic, while the second concerns the best model for an Australian republic.
2. In reality, the two are closely intertwined, with the choice of process strongly influencing the type of model likely to emerge, and the choice of model profoundly affecting the type of process likely to be preferred by particular individuals and interests.
3. In this submission, I will deal with issues relating to republican models first, before considering questions of process.

**Republican models**

4. In terms of the case for an Australian republic, this can be made convincingly and comprehensively without the slightest disrespect to the Queen, the monarchy, or Australia's essentially British constitutional traditions.
5. That case begins with the undeniable fact that the position of the monarchy in Australia is purely symbolic. It goes on to posit the self-evident truth that the validity of any symbol depends upon whether it is true of the thing to which it relates. The question for the Australian constitutional monarchy therefore is whether it is true of, whether it accurately reflects, Australia. To answer this question, one must identify the central characteristics of the monarchy itself.

6. Here, it is impossible to argue against the proposition that two fundamental features of the monarchy are its profoundly British character, and its hereditary nature. The proximate question therefore is whether an institution that is quintessentially British and hereditary truthfully symbolizes modern Australia. The only possible answer is a negative one. This said, the disposition of the case for monarchy is the easiest part of the Australian republican debate: far more difficult is the task of producing an adequate replacement.
7. A major difficulty here has been the rush to models, with each participant hastening to produce his or her own version of a republic. Particularly at a point when no referendum on the subject is imminent, this is not a particularly useful activity. Far more important is the need to structure the debate by asking and answering some fundamental and quite general questions about the Australian Constitution, and relating them broadly to its possible amendment in a republican direction. This is the approach adopted in this submission.
8. The first of these questions is how good we believe the Constitution to be, particularly in its executive arrangements concerning the interaction of the head of state and the ministry? If we believe that, putting aside its monarchist trappings, the Constitution provides a good model, then any republican amendments should be aimed at reflecting that model in a republican idiom. If we believe that those arrangements are seriously deficient, more radical amendment will be required.
9. The second question, particularly relevant if we are contemplating radical amendment, is how easy we believe the production of quality constitutional outcomes to be? If we believe that the production of workable constitutional solutions is a relatively straightforward matter, we should be reasonably bold in our proposals. If we view constitutional reform as a fraught and difficult undertaking, we should be conservative.
10. Finally, what is the likely interaction between any proposed model and the Australian Constitution's existing process for amendment under section 128? Clearly, referenda have their own intrinsic politics, and the choice of a republican model must be influenced by such considerations as whether it has a reasonable chance of success, as well as by constitutional preferences.

11. The remainder of this section of the submission is devoted to a brief consideration of the issue of possible republican models in light of these questions.
12. On the first question, the initial judgement must be that Australia has a Constitution that is not perfect, but which is very good indeed. The only rational basis upon which to make such a judgement is a comparative one. Australia's Constitution has presided over one of the oldest continuous constitutional democracies in the world, a performance in stark contrast to that of the constitutions of many other nations. Specifically in terms of executive arrangements, the Constitution has produced only one major crisis – that of 1975 – which was in any event largely attributable to factors other than its executive provisions, and was peacefully resolved. In a world where constitutions typically fail, this one – including its executive arrangements – works well.
13. Indeed, it is worth noting the central feature of our Constitution's executive arrangements that has served us so well. These arrangements produce a surrogate head of state – the Governor-General – that enjoys respect and legitimacy, but no power; and a head of government – the Prime Minister - who exercises power, but is entitled to no great institutional respect. In this way, our Constitution ensures that no political figure is produced who simultaneously embodies constitutional power and popular respect, like the Emperor Napoleon, or more prosaically, an American President. At the same time, it ensures that political and constitutional wires stay uncrossed: the Prime Minister runs the country, the Governor-General presides over it.
14. As regards the second question, it would take a wilful suspension of critical faculties to believe that the process of producing good constitutional outcomes is anything other than fraught. Once again, the comparative experience is telling: the world has many more wrecks of constitutions than it has constitutions. Locally, our own experience in Australia – including the 1999 republican referendum – should tell us just how hard it is to produce workable constitutional reforms.
15. Finally, on the third question of the interaction of any proposed republican referendum with the practicalities of constitutional amendment in Australia, we need to accept two realities on the

basis of repeated and painful historical experience. First, all referenda will face serious difficulties. Second, the bigger and more complicated a referendum is, the more problems will beset it.

16. From these general conclusions, a number of crucial lessons for any republican referendum may be drawn.
17. The first is that an Australian republic should be achieved not through radical surgery, but by the modest adaptation of the existing executive arrangements from a monarchist to a republican idiom. This follows inexorably from the conclusion that the relevant aspects of the Constitution are fully functional and in no demonstrable need of reform, other than by virtue of their outmoded monarchist connection. This is not to say that there are no aspects of the executive arrangements of the Constitution that might not be improved, but none of these are directly relevant to the achievement of an Australian republic.
18. If one accepts this conclusion, it has immediate implications for the choice of a republican model. There are only two models that have been suggested that are broadly consistent with the Constitution's existing arrangements. The first is the McGarvie model, where a President would be appointed and dismissed upon prime ministerial motion by an apolitical Constitutional Council. The second is some form of parliamentary appointment, along the lines of that proposed by the 1998 Constitutional Convention, and put to referendum in 1999.
19. The reasons underlying the consistency of these two models with existing arrangements are straightforward. Each is designed specifically to preserve the central constitutional reality that the head of state (or surrogate) is an apolitical figure of unity, substantially without power, while political power resides in the Prime Minister and Cabinet. Notwithstanding alarmist claims to the contrary, either model could be inserted into the Constitution without undue difficulty.
20. The other proposed model for the selection of a republican head of state, direct election, is fundamentally different in this respect. It is in no sense consistent with current constitutional arrangements, and inevitably would involve a fundamental change in our constitutional system. Again, the reason for this is straightforward. The presently apolitical, symbolic character of the Governor-

General as surrogate head of state is grounded on the fact that the Governor-General is not elected but appointed, effectively by the Prime Minister, formally by the Queen. The significance of this is that within Australia's contemporary constitutional and political mores, an unelected official can have no claims to the exercise of political power or leadership. Moreover, as the procedure for the dismissal of a Governor-General mirrors that for appointment – royal removal on prime ministerial direction – any Governor-would be most unwise to entertain interventionist ambitions.

21. Neither of these factors would survive direct election. An elected head of state necessarily would stand for election, whether immediately or at some remove, and would arrive in office if not with policies then with positions. Once elected, the logic of the office as representative of the Australian people would impel the incumbent towards intervention. Depending upon the powers of the President this could take more or less dramatic forms, but at the very least would be highly likely to involve institutional conflict with the Prime Minister. Further, it would not be plausible to devise a model where the President was elected by the whole people, but was readily dismissible. This would mean that the sanction of dismissal would be removed from the equation at the same time as the logic behind the office of Australian head of state was fundamentally changed.
22. There is no obvious way of resisting such conclusions. Notably, attempts to devise “indirect” means of indirect election do not successfully resolve the problems. For example, it sometimes is suggested that the head of state be selected by an “electoral college”, whose members would be elected or appointed, or a combination of the two. Yet to the extent that the members of the college were elected, this merely would comprise the election of the head of state at one remove, with the creation of a transferred popular mandate rather than an immediate one, as is the case with the President of the United States. Conversely, were a substantial number of the members of the College to be appointed, such a model hardly would appeal to supporters of direct election. Indeed, as soon as one seeks to compromise direct election, its *raison d’être* – popular choice – dissipates.
23. Similar comments apply to the often-heard suggestion that the difficulties of direct election may be resolved through codification of the powers of the head of state. This is an illusory hope. First, all

attempts at codification of the primary conventions of responsible government in Australia historically have collapsed in a welter of political disagreement, and there is no reason to suppose that this position will differ in the future. Second, there is very considerable room for disagreement on the precise formulation of many of the conventions of the Constitution. Third, codification would leave many of our political-constitutional norms in a straightjacket of legalese, without room to develop. Finally, taking all these factors into account, a republican model saddled with a major measure of codification would face prodigious difficulties at referendum.

24. Nor should facile arguments that direct election has “worked” in other countries lightly be accepted. Unless a careful assessment is made of the relevant comparator constitutions with a view to determining the similarity of conditions between Australia and the nation state in question, such comparisons are futile. To take the most common example, Ireland, that country has a very different and complex tradition regarding its head of state; is not a federation; is a vastly smaller nation state than Australia; and does not possess one of the chief complicating characteristics of the Australian Constitution, a strong upper house.
25. The inevitable conclusion must be that the only models for an Australian republic that would be consistent with a desire to substantially preserve Australia’s existing executive arrangements would be some version of the McGarvie model or a variant of parliamentary selection. Given the position argued here that the executive arrangements of the Constitution are not in need of radical reform, it is models of these types that should be pursued in any future republican initiative.
26. It will, of course, be argued that a conservative model was tried in 1999, and failed. This argument only is of force on the assumption that there is some superior model that has not been attempted and would indeed prove successful, namely, direct election. This assumption will be rejected immediately below. Nevertheless, it is clear that the 1999 model for parliamentary selection contained features that made it irredeemably unattractive to the electorate, and which would have to be varied in any future attempt. The most obvious example of such an unsaleable feature was presidential dismissal by prime ministerial action.

27. This brings one to the question of the interaction of republican models with referendum politics. As already has been suggested, the central lessons of Australian referendum history are that it is extremely difficult to secure passage of any referendum, and that large, complex, divisive referenda in particular face almost certain defeat. These realities are of enormous importance in considering the prospects of direct election as a viable alternative republican model, particularly at a time when the collapse of the 1999 proposal has led many to view it as the default republican challenger for constitutional status.
28. Comprising as it does a fundamental change to the executive prescriptions of the Constitution, a proposal for direct election necessarily will be an ambitious one, textually and schematically complex, and destined to arouse intense political and community controversy. Inevitably, its processing would require significant amendment to the text of the Constitution, as would the almost unavoidable degree of codification that would accompany it. By way of comparison, any proposal for direct election would be in an entirely different order of complexity to that defeated in the 1999 referendum.
29. What all this means is that direct election would be bitterly opposed, and not merely by monarchists. It would be passionately resisted by all those committed to Australia's existing constitutional platform of powerful parliamentary, responsible government, coupled with a powerless but respected head of state. Such opposition would include not only conservative republicans falling within politically conservative groupings, but also those who are constitutionally, as opposed to politically conservative, a group that would extend well into the ranks of Australian Labor Party. Such a bloc of opinion, combined with monarchists and perennial constitutional sceptics, would spell disaster for any direct election proposal at referendum.
30. This is, perhaps, the most important conclusion to draw at this stage of Australia's republican debate. There is a natural tendency on the part of republicans to turn to direct election after the disappointment of 1999, but this course leads to catastrophe. The unavoidable outcome of a direct election model will be to produce a negative force at a republican referendum vastly more powerful than that which was able to secure victory in 1999, with multiple supporters of the previous parliamentary selection proposal joining



monarchists to bring down what they regard as a constitutional nonsense.

31. There seems to be a naïve view in this context that conservative republicans, when faced with the choice, will vote for a direct election republic rather than no republic at all. Nothing could be further from the truth, or more inconsistent with all the available evidence. Conservative republicans from both sides of politics repeatedly have made it clear that they will join monarchists to defeat direct election, and this is precisely what they will do. There is a tremendous danger for Australian republicans in being seduced by the populist promise of direct election into a referendum rout that will make 1999 look like a minor reverse.
32. The conclusion on the substantive question of what form an Australian republic should take therefore must be that a model should be adopted that preserves Australia's existing executive arrangements, while translating them into a republican idiom. Effectively, this means adoption of some version of McGarvie, a parliamentary selection model, or some hybrid of the two. On the last point, there is much to be said for a model under which the President is appointed by Parliament, but is dismissible by a constitutional council, which would remove the obnoxious dismissal mechanism from the 1999 proposal. Direct election is neither consistent with our basic constitutional arrangements, nor does it offer any realistic hope of referendum success.

## **Processes**

33. At this stage of Australia's debate over a republic, it is in fact questions of process that are more immediately important than those relating to the question of a model. Partly this is because the achievement of a republic is, on the most optimistic analysis, several years away, while the need to have a workable process is (from a republican point of view) immediate.
34. Moreover, as was indicated earlier in this submission, the choice of a process will very significantly affect the issue of which republican model ultimately emerges. In this sense, the process question is not a neutral one, but one which various interest groups in the debate will seek to answer in a manner which privileges their particular cause or option.

35. Within these realities, all shades of Australian republicans will be inclined to support a process which has three features. First, and very obviously, such a process will maximize the chances of a republican model. Second, that process will force monarchists to declare their hand and support the monarchy, rather than hiding behind a third non-offered option (direct election) as occurred in 1999. Third, the process will produce the “right” republican option, which of course will be the preferred option of the particular republican concerned.
36. Realistically, there are two broad process options presently under debate. The first is the use of one or more republican plebiscites, as suggested by the Australian Republican Movement and the Labor Party. The most common suggestion is for an initial plebiscite on the general question of whether Australia should become a republic, followed (or accompanied) by a further question as to the type of republic that Australia should become. The obvious alternative would be the holding of another constitutional convention, possibly in conjunction with other steps. Naturally, the two processes could be combined, with a convention following upon the holding of one or more plebiscites.
37. As regards the general issue of conducting plebiscites, it is possible cautiously to consider the holding of an initial plebiscite on the question of whether Australia should become a republic. Such a question would have the twin virtues of producing some serious indication of popular feeling on the head question, while going some way towards ensuring that any resultant referendum is a genuine contest between the monarchy and a particular form of republic, as opposed to a guerrilla war between a proposed republic and a phantom alternative republic. This said, there is something peculiar about asking people to express themselves as being in favour of a generic republic divorced from any particular republican proposal. This peculiarity may mean that a general plebiscite question concerning a republic will be harder to carry than many republicans imagine.
38. It is the second plebiscite, requiring an expression of opinion as between a number of republican options, that is a matter of grave concern. By way of beginning, the enthusiasm for this plebiscite seems to be based on a fundamental misconception shared by many republicans.

39. This misconception is that, once people have committed themselves in a plebiscite to a particular republican option, all that is required for a successful referendum outcome is the formal drafting of that option, which can then be submitted to the vote in perfect confidence that it will be carried. Few positions could be more naïve. Merely because the Australian people have given a particular answer in what effectively is constitutional opinion poll will no more commit them to that answer at a referendum than an answer given to a pollster in the very early stages of an election campaign commits them to voting for a political party. Everything will depend on what comes after the plebiscite: the details of the proposal, who supports and opposes it, and the referendum campaign itself.
40. Indeed, the position is rather worse, as a multi-choice republican plebiscite is programmed to produce precisely the sort of republican proposal that will haemorrhage support throughout the lead-up to a referendum vote. This is because the plebiscite process encourages a pervasively shallow consideration of the relevant options in at least two ways. First, voting in plebiscite, the Australian electorate will know perfectly well that its choice will not become law (as occurs in a successful referendum), and therefore will feel free to choose without too much concern the option with the greatest degree of surface appeal, secure in the knowledge that if flaws later emerge, it can be eliminated at referendum. Naturally, the entire object of a No case at referendum is to produce precisely such a catalogue of flaws.
41. The second reason that a multiple-option republican plebiscite would encourage a shallow consideration of the relevant issues is precisely because it is multiple-option. Unlike a referendum, where a particular proposal is fully exposed in the exclusive glare of public scrutiny, any given plebiscite option will be only one of (say) four proposals. Inevitably, this will mean that there will be far less time and opportunity for the flaws of any of the proposals put to plebiscite to be exposed and discussed, once again heightening the likelihood that a proposal emerging from plebiscite will be seriously sub-standard, with severe implications for the future of such a proposal at referendum.
42. There is an important conclusion to be drawn here. Not only is the plebiscite process programmed to produce a problematic republican option, but it will favour a republican option that

possesses two particular characteristics. First, it will favour any model that has immediate, popular appeal, whatever difficulties it may possess, because the shallowness of the plebiscite process will maximise immediate impact while suppressing complications of detail. Second, and far from encouragingly, supporters of any republican model that did indeed conceal fundamental difficulties would be well-advised to opt for the plebiscite process, with a view to having it anointed as the preferred model on the basis of a limited analysis, before it could be demonstrated through deeper analysis to be seriously deficient. In the current debate, there is one republican model that answers precisely this description.

43. This model is direct election. Direct election undoubtedly is the model that excites immediate popular support, for the simple reason that election is the instinctive option occurring to most people when asked how a President should be elected. Yet its difficulty is that the more it is probed, the more its inconsistencies with existing arrangements are exposed, and the more questions are asked of its precise operation, the more it loses support. In short, direct election is precisely the model of strong surface appeal and weak content that would benefit prodigiously from a multi-option plebiscite. All the settings of such a plebiscite would be for a direct election victory, and this is so obvious that it is a fair inference that whenever such a plebiscite is proposed, its proponents are doing so with the precise intention of producing a direct election outcome.
44. Pursuing this, it is factually difficult to see how the outcome of a multi-option plebiscite, assuming that outcome to be republican, could be anything other than direct election. To take the simplest example of a first-past-the-post ballot whose options included the existing monarchy, the anti republican forces would be unlikely to muster more than around thirty-five per cent of the vote. Of the remaining sixty-five percent, it would be surprising if less than forty per cent favoured direct election. This hardly is a ringing endorsement, but if the poll were arranged so that monarchists voted (or chose to vote) only on the first, general issue of whether Australia should be a republic, direct election could be expected to capture around sixty-eight per cent of the indicative republican vote, a more than respectable total.
45. Victory of direct election at plebiscite would be of incalculable value for its supporters, as it then would become the anointed republican model. Here, it is important to appreciate the

significance of the steps that would follow the holding of a plebiscite. Critically, there would have to be a drafting stage, during which the proposal was elaborated and reduced to technical form. This could be entirely internal to government, but would be more likely to involve a convention, or at least a parliamentary committee. Normally, this would be the point at which the enormous constitutional difficulties posed by direct election would become apparent, and lead to serious (and very likely fatal) attacks upon the whole concept. Yet the effect of it having been anointed by plebiscite would be that direct election was effectively immune from such internal criticism, and all who wished for an Australian republic would be faced with the stark choice of working towards the elaboration of an approved direct election model, or opposing a republic altogether. This is a designed outcome of the plebiscite proposal.

46. In this sense, the plebiscite proposal should not be seen as a genuine attempt to engage the Australian people in the republican debate at an early stage. Rather, it is an essentially cynical attempt to extract from the electorate a premature statement of preliminary opinion on the basis of a deliberately inadequate debate, and to use that statement as a gag with which to stifle republican criticism of the canonized model.
47. Ironically, for the reasons outlined earlier in this submission, this stratagem will do nothing to increase the practical chances of a direct election model at referendum. On the contrary, as soon as the model leaves the safe harbour of its closed- production phase, it instantly will be subjected to the usual barrage of criticism, founded and unfounded. Given its nature, a direct election model will (as previously discussed) attract extraordinary hostility, much of it well-directed, from an enormous range of quarters. Its increasingly distant in-principle approval will count for little or nothing in such circumstances, while the exclusionary process by which it was produced should guarantee both increased hostility and a maximum of internal flaws.
48. The net conclusion must be that if the adoption of a direct election model guarantees referendum defeat, then the adoption of the plebiscite process guarantees the defeat of a direct election model by the greatest possible margin. It would represent a disaster for the republican cause that would prevent the achievement of an Australian republic into the remotely foreseeable future.

49. Sadly, the only sensible process for the achievement of a republic is one with little glamour and no speed. As indicated above, it may be that the process usefully could be kick-started with a general plebiscite, although given the cautions expressed here concerning the use of plebiscites, this is not a course to be undertaken lightly.
50. Beyond this, there seems little choice but to pursue the issue of a republic through a constitutional convention. A convention is the only body obviously capable of discharging the representative, debating and legislative functions inherent in the production of a viable republican option. This said, we have learned from the 1998 Constitutional Convention, and the next – while similar - should have some significant differences.
51. First, it should be fully elected. Despite the fact that the appointed delegates in 1998 performed an important role, and added considerable expertise to the Convention, a future Convention would have to be popular to enjoy credibility. Experts could be provided either as officers, or at most as non-voting members with speaking rights.
52. Second, fully elaborated models should be prepared as the basis for the Convention's discussions. This might be the task of a parliamentary committee, after a suitable inquiry. The 1998 Convention suffered seriously from the fact that, until its last few days, there was no real proposal to ground its debates.
53. Third, any future Convention should sit over a much longer period. In 1998, the Convention sat for ten days, a frankly ludicrous period. Any future Convention should sit for as long as necessary to produce a fully detailed proposal; should approve an actual draft; and should re-convene after that draft has been given a long exposure to the electorate, for the purpose of considering and making amendments.
54. This Convention process profitably may be compared with the proposal for a multi-option plebiscite. Unlike that proposal, a Convention would genuinely consider all options in an atmosphere of debate: would continuously expose the strengths and weaknesses of each option; and would not anoint any option as the preferred model until that process was over, at which point as strong a model as possible would be put to the Australian people.

## **Conclusion**

55. As a matter of substance, the executive arrangements of the Australian Constitution are sound, but should be translated into a republic idiom consistent with the Constitution's underlying suppositions. This means either a McGarvie constitutional council model or a parliamentary selection model, or some hybrid of the two. Direct election is not a viable option, both as being irreconcilable with our fundamental constitutional arrangements, and as being impossible to carry at referendum.
56. As a matter of process, a multi-option plebiscite inevitably will produce a direct election model, precisely for the reason that such a process favours models with shallow surface appeal and multiple flaws. Equally inevitably, such a model would be doomed at referendum. The only plausible means by which an Australian republic may be pursued is through an elected constitutional convention.

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