

**COMMENT:
WHY THE CONSTITUTIONAL CONVENTION PRODUCED
THE BEST REPUBLICAN MODEL**

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In February of this year, something remarkable occurred. One hundred and fifty two delegates from all over Australia gathered in Canberra for the 1998 Constitutional Convention to consider Australia's future. The concept of a constitutional convention itself is not unique to Australia's history, but it really was a continuation of this history and its progress into the 21st Century that made this Constitutional Convention so significant.

In the ninety-seven years of our federation there has been far too little public involvement in the Constitution and its reform. We believe that the principal obstacle to constitutional change in Australia has been ignorance and a lack of popular involvement. The republican cause is, apart from the 1967 amendments, the first occasion where there has been genuine popular movement for constitutional change, and the Constitutional Convention was a great testament to this.

There has however, been some criticism of the Constitutional Convention and its processes and outcome. These criticisms range from a regret that it was not entirely elected, through there being insufficient representation of Australians of non-English speaking background, through Gareth Evans and I engaging in "dominant behaviour", concluding finally in a complaint that the Convention did not get it right.

I do not propose to address those criticisms at length. Suffice it to say that no convention could be perfectly convened. For example, if the Constitutional Convention had been entirely directly elected (my intuitive preference) we may not have had all the Federal, State and Territory Government and Opposition Leaders gathered together; and that was certainly worthwhile. In any event, the Convention is over now. It was clearly more democratically constituted than any of the numerous conferences, committees and conventions we have had to discuss the Constitution in the last 30 odd years and in its proceedings and in its

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outcome it clearly engaged the attention and imagination of the Australian people.

Coming out of the Constitutional Convention process, two things became very clear: Australians want an Australian as Head of State and an even larger percentage of them want to be able to vote on this issue at a referendum.

The Australian people expected us at the Constitutional Convention as commentators, advocates and opinion leaders, to present them with a republican alternative that they felt confident enough to vote for. Our role was to frame the question and to present the case for change, so that they may give us the final answer. In response to this, the Constitutional Convention finally concluded with a recommendation, overwhelmingly carried, that the "Bipartisan Appointment of the President Model" be put to the people in a referendum pursuant to s 128 of the Constitution.

The goal of republicans now is a clear one. Australia's Head of State should be an Australian citizen, representing Australian values, living in Australia, chosen by and answerable to Australians. That is the goal for which we have fought so long and so hard. The Australian people clearly support this change. Our task is now to offer them the means of doing so. If we fail to mobilise behind the Bipartisan Appointment Model agreed to at the Convention, we may deny the people the opportunity to achieve an Australian Head of State at the turn of the century.

Let me briefly summarise what the Bipartisan Appointment Model involves. A President would be Australia's Head of State, replacing the Queen and her representative the Governor-General. The President would have the same powers as the Governor-General does today. The President would be an Australian adult citizen and would be chosen by a two-thirds majority of a joint sitting of both houses of the Australian Parliament. The motion of appointment would be moved by the Prime Minister and seconded by the Leader of the Opposition.

A degree of public consultation would precede the nomination of the President. This would involve consultation with State, Territory and Local governments. Nominations, suggestions and so on would be considered by a bipartisan committee comprising representatives of all parties having "party status" in the Federal Parliament and such a committee would, consistent with maintaining a workable size, be representative of the diversity of Australia in terms of ethnicity, age, gender and geography. In short, it will not be able to be comprised solely of middle aged gentlemen from Sydney and Melbourne. Nonetheless, the final choice will be very much in the gift of the leaders of the major political groups in the Parliament.

The powers of the President would be handled in this way: in those circumstances where the Governor-General has conventionally acted on advice (which is in all cases but those involving the use of the reserve powers), the Constitution will state that the President will act on advice. However, this will not be so in those areas where the reserve powers are, or can be, applicable: the appointment and dismissal of the Prime Minister, the dissolution of Parliament and the issuing of writs for an election. In this area, the Convention decided not

to codify the constitutional conventions, and instead resolved that the Constitution should state that the existing conventions, which govern the office of Governor-General, should continue to apply. Advocates of codification, myself included, had to face up to the fact that the overwhelming majority of delegates did not share our passion for "spelling it all out."

In terms of dismissal of the President, the Convention resolved that the Prime Minister should have the power to dismiss the President. Within 30 days the President would be required to bring his or her action before the House of Representatives for ratification. If it were not ratified, this would constitute a vote of no confidence and, consistent with convention, he or she would be obliged to resign. It should be noted in this context that following the removal (or indeed the resignation, death or disability) of the President, the office would be filled, pending a formal new appointment by the Joint Sitting, by the senior State Governor which is consistent with current convention. I notice that this provision for a casual vacancy did not find its way into the final *Communiqué*, but it was generally agreed and accepted in the course of the debate.¹

It can be seen that this model is essentially a republican facsimile of the status quo with four significant innovations. The first is that the President is appointed by a bipartisan, parliamentary process instead of as at present, by an hereditary, sectarian procedure governed by British law in the case of the Queen, or by the decision of the Prime Minister in the case of the Governor-General. There is more to democracy than 50 per cent plus one. The Bipartisan Appointment Model offers an opportunity to improve the quality of our public life. It is an opportunity to say that at least one public office in this country shall be the result of cooperation between the two leaders in our parliament. It is also an opportunity to say that the person who fills this office will have the bipartisan support of our parliamentary representatives and through those representatives, the support of the vast majority of the Australian people.

The second innovation is that public consultation will be injected into the process of determining Australia's Head of State, where it has never existed before. Behind this nomination procedure is the fundamental belief that the Australian people should be involved and consulted in the process of determining Australia's Head of State. The idea is that the sifting through and assessment of nominations should be done by a group of people who truly represent our Australian society; our diversity of gender, culture, ethnicity and geographical diversity.

It should be noted that the Convention's resolution on the public consultation mechanism is more indicative than prescriptive and notes: "This process for community consultation and evaluation of nominations is likely to evolve with experience and is best dealt with by ordinary legislation or parliamentary resolution".²

The third innovation is that while the reserve powers remain the same (with all of the attendant merits and vices of the current dispensation), the non-reserve

1 See Constitutional Convention, *Transcript of Proceedings*, pp 851, 855.

2 *Report of the Constitutional Convention*, AGPS (1998), vol 1, p 44.

powers are to be stated to be exercised on advice thereby making the Constitution a more accurate reflection of how the system actually works.

The fourth innovation is that while the President can be dismissed by the Prime Minister, thereby preserving the current arrangement as between the Prime Minister and the Governor-General, the Prime Minister cannot, in a republic, sack the President and appoint a new one in his or her place. The casual vacancy so created will be filled by the senior State Governor in office, over which the Prime Minister will have had no influence at all. Then, within a specified interval, the Parliament would convene in a Joint Sitting to appoint a new President a process which, as we have seen, will require the concurrence of the Opposition Leader.

It appears that the dismissal mechanism remains the most questionable aspect of the Bipartisan Model. The Australian Republican Movement (ARM) agreed to amend its original bipartisan dismissal mechanism because we took on board the points made by Richard McGarvie and others. They felt that if the President were failing to act impartially and, for example, conspiring with the Opposition to bring down a Government, there would be no prospect of securing bipartisan support for his or her removal. As my ARM colleague Linda Kirk said at the Convention:

The ARM's model for removal of a president promotes prime ministerial government and the supremacy of parliament. Furthermore, it satisfies the McGarvie principle of providing for prompt and effective removal of a President who acts without or contrary to advice. But unlike the McGarvie model, which makes the Constitutional Council a mere puppet of the Prime Minister, the ARM's model puts the onus on the Prime Minister to account to the Australian people through their representatives.³

At the moment, of course, the Prime Minister can appoint and dismiss a Governor-General at his or her whim. The Queen, who makes the formal appointment and removal, is obliged to act on the Prime Minister's advice. She is entitled to express her opinion to the Prime Minister on the wisdom of the Prime Minister's course of action, but in the final analysis she is but a rubber stamp on the Prime Minister's decision. The Convention model, in fact, presents a very considerably improved mechanism.

First, it preserves the principle that if the Prime Minister cannot work with the President, the Prime Minister can remove him or her. This was regarded by most delegates as a very important principle and one, the maintenance of which was a 'deal breaker' for many of the more conservative republicans.

Secondly, it imposes a formal discipline on the Prime Minister in obliging him or her to present his or her actions to the House of Representatives for ratification. A Prime Minister would be most unlikely to consider sacking a President unless he or she was absolutely certain of the support of their party room and wide support in the community.

Thirdly, and this is the most important, a Prime Minister in an Australian republic will not be able to appoint the successor to a President he or she has just removed. In other words, a Prime Minister may be able to dispose of someone

3 Note 1 *supra*, p 786.

he or she feels they cannot work with, but he or she is not going to be able to put a stooge in their place. A new President will need to be appointed by a Joint Sitting of the Parliament, with support of Government and Opposition. Pending that appointment, the vacancy will be filled by the senior State Governor at the time.

There are only two types of reasons why a Prime Minister would want to sack a President; a good reason and a bad reason. The good reason is that the President is not doing his or her job properly. Perhaps he or she is a drunk, perhaps he or she has gone mad, perhaps he or she is playing politics with the Opposition and compromising his or her impartiality. The Prime Minister can remove him or her and in his or her place there will be, in the first instance, the senior State Governor and, once the Joint Sitting has been convened, another bipartisan appointee.

The bad reason would be that the Prime Minister wants the President to do something wrong or stop him or her from doing something right. Perhaps the Prime Minister wants the President to sign a bill into law which has not been properly passed by Parliament. Perhaps the Prime Minister is consistently breaking the law and fears being sacked by the President. Certainly such an unscrupulous Prime Minister can sack a scrupulous President, but he or she cannot put someone compliant in their place. Indeed one can well imagine that the new President (be it the senior State Governor *pro tem*, or the new bipartisan appointee) will be even more alert to Prime Ministerial misconduct.

Perhaps it is appropriate to look at what other mechanisms could be used to dismiss a President. One approach, which the ARM canvassed early in the Convention, was for dismissal to be effected by a simple majority vote of the House of Representatives. It was felt by many, however, that too much mischief could be done in the lead up to that debate. As such, it was better, and more seemly, for the dismissal of the President to take place immediately, with the Prime Minister being left to defend his or her actions after the event.

Another refinement would be to require the Prime Minister to seek some counsel before he or she acted. In reality, a Prime Minister would do precisely that as a matter of course. Does anyone imagine a Prime Minister would sack a President without canvassing the views of their Cabinet or at least the more significant members of their party room? If it were felt that this should be formalised (and I do not think there is any need to do so), then it could be provided that the notice to dismiss the President should be countersigned by a majority of the members of the Executive Council.

The Bipartisan Appointment Model has often been criticised as the creation of compromise. Indeed, this is in fact its best feature. The Bipartisan Appointment Model was the result of the largest, and most representative body of Australians ever gathered together to consider the Australian Constitution. It did not flow from one single minded thought uncorrupted by the opinions of other people, but was genuinely the result of many ideas, many people and an effort to accommodate many different aspirations.

It is undeniable that there is still much work to be done on refining the desires of the Constitutional Convention. Indeed, it was for this reason that the final

Communiqué to come out of the Convention specifically transferred to the Commonwealth Attorney General's Department and the Federal Parliament the authority for drafting the model into an appropriate form. Perhaps, as has been suggested, a Parliamentary or Senate Standing Committee would be an appropriate way to ensure that the desires of the Constitutional Convention are fully realised in the drafting of the model and the referendum question. There is indeed considerable merit in considering how to continue the popular involvement in constitutional reform that this debate has initiated.

However, when we debate the relative merits of the Constitutional Convention and the Bipartisan Appointment Model, we must always remember that the destiny of our nation transcends any issue of the moment. If we are to make a prouder, stronger nation from our diverse community, we need to develop and support the symbols and institutions that reinforce the one thing we all have in common: Australia.