



## Rethinking the Republic

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Where do we go now with the republic debate? There are four possibilities:

- (1) John Howard may be right. He may have won one of the great political gambles. Australia will keep the monarchy for generations to come, there now being no prospect of any republican model winning a majority thanks to the co-operative efforts of Kerry Jones, Ted Mack and Phil Cleary during the 1999 referendum campaign.
- (2) Everyone puts the debate to bed for a generation and dusts off the Turnbull model for recycling at a future time.
- (3) The politicians decide to run with the McGarvie minimalist model in the hope of winning a majority coalition of those who accept the inevitability of a republic but who want absolutely minimalist change to the existing arrangements.
- (4) The republicans take seriously the public sentiment for direct election and start the hard work on reshaping a Constitution with the unique Australian combination of an upper house having the power to reject supply together with a popularly elected president.

If option 1, 2 or 3 is adopted, there is not much further thinking to be done. It will be all a question of timing and fine tuning. Option 4 requires a lot of fundamental constitutional thinking and political spade work if it be the only viable option for Australia's transition to a republic. Now is the time to plant the seeds, if only to establish that any attempt will encounter very rocky ground in the Australian constitutional garden.

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He is an Officer of the Order of Australia (AO) for services to Aboriginal Australians, particularly as an advocate in the areas of law, social justice and reconciliation. In 1996, he and Pat Dodson shared the inaugural ACFOA Human Rights Award. In 1997, he was Rapporteur at the Australian Reconciliation Convention.

In 2002, he returned from 18 months in East Timor where he was the Director of the Jesuit Refugee Service. He was awarded the Humanitarian Overseas Service Medal for his work in East Timor and was a recipient of the Australian Centenary Medal in 2003 for his service with refugees and human rights work in the Asia Pacific region.

The 1999 referendum result showed that we are a nation of diverse groupings: monarchists, those who favour the status quo simply because “If it ain’t broke, don’t fix it”, and republicans of all shapes and sizes. The republicans cover a spectrum of views but can be placed in three camps: McGarvie minimalists, Turnbull pragmatists, and Cleary/Mack direct electionists. There is no shortcut to a republican consensus. The received wisdom prior to the 1999 referendum was that it was not possible, politically or constitutionally, to graft an elected presidency on to the existing Australian system of government. The Turnbull model with the resultant bells and whistles added by the 1998 Constitutional Convention was a compromise between involving the public in the mode of selection and maintaining the existing power relations between Prime Minister and Governor-General. But this compromise fell between two stools. It appealed neither to the direct electionists like Ted Mack and Phil Cleary nor to the minimal republicans like Richard McGarvie. The Australians for a Constitutional Monarchy (ACM) succeeded by following the advice of Malcolm Mackerras, handing their trump cards to John Howard “because he, as Prime Minister, would be in the best position to play the cards”.

There can be no doubt that the overwhelming majority of Australians want to sever all links with the British crown. In that sense, we are a nation of republicans. Only 9% of those intending to vote “No” in the 1999 referendum said they liked having the Queen as our head of state when they were polled by AC Nielsen. 70 per cent of Australians want us to be a republic. At the 1998 Constitutional Convention, 89 delegates voted “That this Convention supports, in principle, Australia becoming a republic”. Only 52 delegates were opposed with 11 abstentions which included republicans such as Richard McGarvie and Greg Craven.

In 1996, there were suggestions that there should first be a plebiscite of the people: “Should all references to the Queen be deleted from the Australian Constitution by 2001?” The Howard government had no interest in conducting such a plebiscite. The Constitutional Convention proceeded in February 1998 and attempted to wrap together the plebiscite question and a preferred model, forging a “No” coalition of monarchists and radical republicans. Only 73 of the delegates supported “the adoption of a republican system of government on the bipartisan appointment of the President model in preference to there being no change to the Constitution”. A majority of the delegates were opposed or abstained (57 opposed, 22 abstained).

It was only in the closing days of the 1999 referendum campaign that John Howard for the first time gave a public explanation why he was opposed to a plebiscite. He thought it could have left the country “in a constitutional no-man’s land”. More significantly, monarchists like Howard and Nick Minchin knew that any plebiscite would favour the republicans building a momentum for change. Whereas any particular model of republic put cold to the people at referendum would be unlikely to get up. The opponents would always be a combination of monarchists, status quoers and those republicans whose model was not on offer. And so it could be for any future referendum.

The Republic Advisory Committee chaired by Malcolm Turnbull in 1993 and which investigated republic options for the Keating Government, the Australian Republican Movement, and the 1998 Constitutional Convention had good reasons for rejecting a directly elected president. They thought it could not be grafted onto the existing constitutional arrangements. But the public remains unconvinced. The International Social Science Survey/Australia has charted Australian republic sentiment for the last twenty years. Since

1996, support for a republic has run at 66%. The Survey calculates that a direct election presidency “would have won handily in Australia as a whole” in November 1999 with 55% in favour of that model.

There are many voters who say they do not understand much about the complex provisions of the Constitution; they do not trust politicians; and “If there is going to be a president, we should have some say in choosing that person who will represent us as the head of state”. After all in countries such as Ireland, there is an elected President and there are no constitutional problems. True. But in Ireland, the upper house cannot reject or block supply. In Ireland, the President has recourse to a Council of State for seeking advice. In Ireland, there is no prospect of a John Kerr sacking a Gough Whitlam as occurred in 1975.

We need to revisit 1975 and see if changes can be made to the Australian constitutional arrangements so that we could safely advocate a directly elected president. One theoretical option would be to take away the Senate’s power to block supply, making the Senate in that regard more like the House of Lords and the Irish upper house. But can you imagine trying to run a referendum campaign on the need to take away the Senate’s power? It would be turned into a referendum about the propriety of John Kerr’s and Malcolm Fraser’s actions in 1975. State righters would run rampant exclaiming, “How dare you attempt to wind back the powers of the States house.” At the 1976 Constitutional Convention, Gough Whitlam did propose that the Constitution be amended

So as to remove the power of the Senate to reject, defer, or in any other manner block the passage of laws appropriating revenue or moneys, or imposing taxation.<sup>2</sup>

It was no surprise that Sir Charles Court, Premier of Western Australia, countered on behalf of the non-Labor parties and the minor states proposing a constitutional amendment providing that a failure by the Senate to pass a supply bill within 30 days would be the equivalent of a rejection and the Governor-General would be required automatically to dissolve both Houses. After the election, the House of Representatives would then be able to deliver supply to the government regardless of the Senate’s composition and disposition.<sup>3</sup> The debate went nowhere. Douglas Lowe from Tasmania succeeded by 46 votes to 45 in having both motions sidelined and sent to committee, observing “that to adopt either...would be meaningless because it has been proven that where there are deep shades of division within the two principal political parties...there is no chance of getting the numbers through that is required by the Constitution.”<sup>4</sup> Both sides were intractable and could be expected to remain so.

The only practical option is to refine the constitutional arrangements, smoothing out some of the difficulties and inconsistencies highlighted in 1975 while leaving in tact the Senate’s constitutional power. Whatever the mode of election and whatever the powers granted the President, it would be essential to assure electors that the model on offer would not cause greater instability and uncertainty were the events of 1975 to recur.

If the President is directly elected by the people, there has to be some symmetry between the mode of appointment and the mode of dismissal. A directly elected President could be removable only for proven misbehaviour or incapacity established either before a

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<sup>2</sup> Item No H. 8, Proceedings of the Australian Constitutional Convention, Hobart, 29-29 October 1976, p. 1

<sup>3</sup> Ibid, p. lxi

<sup>4</sup> Ibid, p. 113

court or else determined by impeachment proceedings involving both houses of parliament. Given the mix of politics and law in any decision to sack a head of state, it makes sense to vest the power of termination in the Parliament with each house being required to play a role in the impeachment process. One consequence of this constitutional symmetry would be that an elected John Kerr in a re-run of 1975 would be guaranteed absolute security of tenure throughout the crisis. There is no way that the Senate would vote to sack him. He would be in a stronger position against the Prime Minister than if the Prime Minister were still able to contact the Palace and order dismissal.

Given the increased security of the President, there is a need for better safeguards to avoid the questionable practices of Kerr in 1975 or to render those practices beyond reproach. Three matters would need reform before there could be consideration of a directly elected president. In 1975, Kerr consulted the Chief Justice despite the Prime Minister's expressed desire that he not do so. He dismissed the Prime Minister without notice, having previously made the Leader of the Opposition more aware of his intended course of action than the Prime Minister. He decided to grant a double dissolution of the Parliament on the advice of the new Prime Minister, Malcolm Fraser, who had no intention of proceeding with the Whitlam bills which had been blocked by the Senate. These 21 bills related to issues such as health levies and State electoral redistributions to which the Coalition parties were opposed.

Paul Kelly revisited the 1975 crisis in his 1995 book *November 1975: The Inside Story of Australia's Greatest Political Crisis*. He concluded, "Given the magnitude of the decision Kerr had reached - resort to the reserve powers to dismiss the Prime Minister - there can be no decisive argument against his consultation with the supreme judicial figure. In such an extreme circumstance the Crown must possess a right to such consultation."<sup>5</sup> But on the death of Sir Garfield Barwick, the then Chief Justice Sir Gerard Brennan observed, "It seems that the most newsworthy event in his varied career was the tendering of advice to Sir John Kerr in November 1975, a course for which he could find precedent in the tendering of advice by some of his predecessors in office. It was, and remains, a controversial matter but, if only on that account, will not happen again. It can now be seen as a subject of academic interest, not the defining event in a life of other achievement."<sup>6</sup> If the reserve powers (including the power to dismiss a Prime Minister and commission a new Prime Minister, and of necessity without the advice and the consent of any Minister) are to be retained without being codified, the President needs to be able to consult with advisers who are not serving High Court judges. In 1994, I suggested "a Council to provide advice to the Head of State if and when it was sought with the approval of the Prime Minister. Such a Council of eminent persons could include retired prime ministers, chief justices and representatives of indigenous people. The council might also play a role in nominating the Head of State."<sup>7</sup> More recently, Richard McGarvie has suggested a three member Constitutional Council which would perform the tasks presently performed by the Queen. His Council would not give advice; it would receive advice when acting as the post box for appointment and dismissal of the head of state. The Council would simply appoint or dismiss the head of state on the Prime Minister's

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<sup>5</sup> P Kelly, *November 1975*, Allen & Unwin, 1995, p. 229

<sup>6</sup> (1997)187 CLR viii

<sup>7</sup> Constitutional Centenary Foundation, *Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia*, An Options Paper Prepared by Fr Frank Brennan SJ, 1994. See also F. Brennan, "The Status of Aborigines and Torres Strait Islanders in an Australian Republic" in *Australia: Republic or Monarchy?*, M.A. Stephenson & C. Turner (ed), University of Queensland Press, 1994, at p. 259

advice.<sup>8</sup> He favours the appointment of retired Governors-General, state Governors, state Lieutenant Governors and then judges, with a guarantee that at least one member be a woman. I favour a larger Council of Advisers (say seven) consisting of those persons willing and able who have held the office of President, Prime Minister, Chief Justice or Solicitor-General provided any such person is no longer a member of parliament, a judge or a member of a political party and provided any such person has not attained the age of 75 years.

The two most unsatisfactory aspects of Kerr's actions in 1975 were the privileged access Fraser had to Kerr's thinking while Whitlam was still Prime Minister, and Kerr's pre-emptive decision to act before supply ran out. Kerr claimed he needed to keep Whitlam in the dark for fear that the Palace would become involved with Whitlam providing advice to the Queen for the termination of Kerr's commission. That would not be a fear with an elected presidency subject to removal only by impeachment. The perception of subterfuge could be overcome if the Constitution provided, "The president may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions relating to the exercise of that power provided the President first publishes a proclamation of intention to exercise such a power after a period of at least two days." This way there would be no risk of a Prime Minister being ambushed and reduced risk that the Leader of the Opposition would be better informed than the Prime Minister.

Kerr's political strategy was posited on finding what he described as "a democratic and constitutional solution to the current crisis which will permit the people of Australia to decide as soon as possible what should be the outcome of the deadlock which developed over supply between the two Houses"<sup>9</sup>. He could always dissolve the House of Representatives on advice from a willing Prime Minister. The Senate was a different matter. Senators are elected for fixed six year terms. The regular election for half the Senators can be held up to a year before the Senators' terms expire. But the Senate can be dissolved only under the double dissolution procedure. A double dissolution cannot occur within six months of the scheduled dissolution of the House of Representatives. It can occur only if the House of Representatives has twice presented legislation to the Senate which has then twice failed to pass it. In 1975, Fraser and Kerr used the coincidence that the Senate had rejected 21 bills unrelated to supply (bills unacceptable to the Coalition) as a pretext for dissolving the Senate when there was no intention or expectation that Fraser would proceed with those bills. This improper use of the double dissolution procedure could be precluded if the President could grant the dissolution only on receipt of a request from the House of Representatives. Such a request would never have been forthcoming in 1975.

With these changes, the following would occur in a re-run of 1975. Kerr would be entitled to receive advice from the Council of Advisers at any time, regardless of the Prime Minister's disposition. After receiving advice, Kerr would issue a proclamation giving at least two days notice that he intended to exercise the reserve power to dismiss Whitlam. Kerr would be secure from any risk of immediate dismissal himself. Impeachment would be a protracted process which would succeed only with approval from both houses. Kerr would need to calculate the political risk in commissioning Fraser to form a government because Fraser would be able to advise the dissolution of the House of Representatives but only a half-

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<sup>8</sup> R. McGarvie, *Democracy*, Melbourne University Press, 1999, pp 217-9

<sup>9</sup> Governor-General's Statement of Reasons, Government House, 11 November 1975, reproduced as Appendix E in P Kelly, *op. cit.*, p. 346

Senate election. This would not be seen as what Kerr was seeking, namely “a democratic and constitutional solution to the current crisis”. Fraser could not advise the dissolution of the whole Senate. The President could not dissolve the Senate unless the House of Representatives sought this as a means of breaking the deadlock. Given that the deadlock related to supply and not to the 21 bills on health and elections previously rejected by the Senate, the House of Representatives would be unlikely to request the dissolution unless there was truly no political solution to the supply deadlock. In that case, the House of Representatives, not the President, would wear the political responsibility for dissolving the Senate on the basis that it would be best to clean out both chambers and have the people decide the supply deadlock forcing all Senators as well as members to face the people.

Throughout, Kerr would be assured competent political and legal advice as well as his security of tenure; Whitlam would be sure that he was not being kept in the dark by Kerr meeting secretly with Fraser; the House of Representatives rather than the President would carry responsibility for the dissolution of the Senate; and Kerr would not be in the position to claim that he had a ready democratic means on hand for letting the people decide.<sup>10</sup> Kerr would need to be acting only as a last resort. It would be beyond doubt that the country was in a financial and political crisis because the President would be threatening to dissolve the people’s house because of the intransigence of the upper house, throwing down the gauntlet to the people’s house to have both houses dissolved so the people could decide the deadlock. With these changes in place, there would be no need for the Prime Minister to retain the power of summary dismissal of the President. The Senate could retain the power to block supply. And the President could be elected by the people.

Should a repeat 1975 crisis be assured adequate resolution under option 4, there will still be the problems stated by the 1993 Republic Advisory Committee:<sup>11</sup>

While the option of popular election of the head of state is one which appears to have significant public support, it should be recognised that it would be expensive (particularly if held separately from a parliamentary election), would almost certainly involve political parties in the endorsement of candidates, and by its nature could discourage suitable candidates from standing. Moreover, the process of popular election may encourage the head of state 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 the head of state is to be democratically elected, there will be a need to redraw the public understanding of the different roles of Prime Minister and President. Being elected by all Australians and not just the electors of Bennelong, an elected Deane would be seen as having democratic legitimacy especially on issues where there was a difference of perspective from the Prime Minister. This legitimacy would be emphasised by Howard critics, Deane

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<sup>10</sup> At the 1976 Constitutional Convention, E G Whitlam observed, “We know, however, that the dissolution of both Houses was a fortuitous event. It need not have happened, and could not have happened, if the Senate had refused Supply before the conditions for a double dissolution had been met under the provisions of section 57. So, in essence we are not just dealing with the question: Is it proper for the Senate to refuse Supply and get rid of an elected Government? We are also dealing with the additional question: Is it proper that the Senate can force the House of Representatives to an election without facing the people itself?” (Proceedings of the Australian Constitutional Convention, Hobart, 1976, p. 100)

<sup>11</sup> The Report of the Republic Advisory Committee, Volume 1, Commonwealth Government Printer, 1993, p4

supporters and media outlets. Even an elected president who has run the gauntlet of party preselection would be expected to be head of state for all Australians.

In the lead-up to the 1999 referendum, Sir Zelman Cowen who had been Governor-General after Sir John Kerr and who rightly enjoys the reputation for having healed many of the wounds on the body politic following the events of 11 November 1975, joined with ex-Chief Justices Mason and Brennan, saying:<sup>12</sup>

It is a central aspect of the office of president that he or she should always be concerned to promote the unity of the nation. He or she is Head of State, and not of government. He or she should possess the capacity, intuition and skills to promote the unity of the nation. By speech, conduct and example, the president can help to interpret the nation to itself, and foster that spirit of unity and pride in the country which is central to the well being of our democratic society.

They doubted that this role could be performed by someone coming to office through the machinations of party politics, fund raising, and election campaigns. At his press conference following the referendum, John Howard went out of his way to offer a rejoinder to this proposition:<sup>13</sup>

Can I just say in relation to the mood in the Australian community - I listened to the debate about the mood and one of the arguments that was put in favour of the republican cause was put by Sir Zelman Cowen the former Governor-General, the idea of having somebody who is head of state who would interpret the nation to itself. With the greatest respect to him and others who hold that view, I don't think that can ever happen in this country. We are too individualistic to ever find one single person who is going to interpret the nation to itself.

And yet, one could argue that John Howard did achieve this role himself in his memorable address at Galipoli on Anzac Day 2000 when he honoured the fallen on behalf of the nation:

We come to draw upon their stirring example of unity and common purpose. To believe that whatever our differing circumstances, we are all companions with each of our countrymen and women, and together we travel a single path. We come to join with those that rest here in a shared love of our nation, bathed in sunlight and so blessed with bounty. We come to stand on soil rich with the lives of our kin and vow that what they began, we will finish.

For they fought to build a nation which would stand proud and respected amongst the free people of the world. A nation where ordinary men and women would live long lives of happiness and fulfilment. A country where children would grow nourished by the land's harvest, and by the love of their parents. A country where prosperity and opportunity are derived not by birth, but by endeavour. A people made independent united and free for all time. And in the attainment of these ideals, in the keeping of a decent and responsible Australia, in every year of peace between the nations of the world, we will build for all those who have served and suffered in war, a monument upon which evening will never fall.

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<sup>12</sup> This was the third published letter of the three. They wrote on 7 October 1999 ([The Australian](#)), 22 October 1999 ([The Weekend Australian](#), 23-4 October 1999) and 3 November 1999.

<sup>13</sup> J Howard, Press Conference, Sydney, 7 November 1999

The nation would be well served by a Head of State, rather than a party politician, who can promote the unity of the nation, interpreting the nation to itself. If the task is to be performed by an elected President, there will be a need for a clear demarcation of functions between the President and Prime Minister. Some elected Presidents would rightly want to continue Sir William Deane's style of leadership which annoys some powerbrokers who resent leadership which is not managed from offices in the ministerial wing of Parliament House.

Let's recall that during the 1999 referendum campaign, some Aborigines went to London to see the Queen. Sir William Deane assisted with their request to meet the Queen at Buckingham Palace. Ex-Minister Peter Walsh was horrified. Writing "1975 revisited" in Christopher Pearson's *Adelaide Review*, he said, "If however it can be safely assumed the government neither knew nor approved of this self-indulgent exhibition of vice-regal vanity, it follows that Sir William, behind the government's back, facilitated the Queen's involvement in what is a controversial political issue in Australia."<sup>14</sup> A month later, Glen Milne took up the theme in *The Australian*: "In doing so, Deane acted without the knowledge or advice of the Prime Minister – the convention that underpins the legitimacy of our constitutional monarchy."<sup>15</sup> Milne had asked Deane's spokesman what consultations had occurred. Following protocol, the spokesman was not prepared to disclose the details of such consultations, if any. But then the spokesman added, "It was just facilitating the call [to the palace]. The Governor-General would not normally feel the need to consult the Government in such circumstances." The editorial of *The Australian* went well over the top saying, "Intensifying disquiet is the news that Sir William supported the meeting without telling the Government. This not only violates convention, it is sneaky."<sup>16</sup> For its part, the Government remained silent, leaving the Governor-General hanging out to dry. Four days later, Peter Yu, one of the Aboriginal delegates clarified the matter with a letter to the editor: "We also, as a matter of courtesy, advised the Australian Government of the trip, and its aims, to avoid any perceived embarrassment to our Government."<sup>17</sup>

An elected President would be expected to perform more controversial political tasks than acting as postman for the Palace. The powers and functions would need to be clearly articulated so that allegations of sneakiness when the President is simply doing the job will be readily perceived even by the President's critics to be misplaced.

It may be another decade before the republic is revisited at the polls. I still favour the model proposed by the 1998 Constitutional Convention but with the addition of a Council of Advisers which would also be the post-box for any notice of dismissal of the President by the Prime Minister. An elected presidency has popular appeal and many constitutional pitfalls. If the elected presidency is the preferred path for the Australian people, now is the time to face the fact that nothing is as simple in this debate as Ted Mack and Phil Cleary made it seem. On reflection, maybe Mack and Cleary should be offered knighthoods for their contribution to the maintenance of the monarchy in a time of rising republican sentiment. Maybe Turnbull and Keating had it right. And maybe John Howard had good grounds for displaying smugness at his cleverness when the true monarchists came to the party popping champagne

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<sup>14</sup> *Adelaide Review*, November 1999, No 194, p. 13

<sup>15</sup> *The Australian*, 6 December 1999, "Palace Visit Politicises G-G's Office", p. 15

<sup>16</sup> *The Australian*, Editorial, 7 December 1999, p. 14

<sup>17</sup> *The Weekend Australian*, 11-12 December 1999, "Palace Trip a Kimberly Idea", p. 18

for a victory of lasting consequence. Contrary to the will of the people, we are likely to remain tied to the regal apron strings for some years to come.