Chapter Four

The Republic: Problems and Perspectives

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Introduction

As this address arises directly from my work with the South Australian Constitutional Advisory Council, I should, for the benefit of those who are visitors to this State, begin by offering a brief explanation of our task.

In deciding to establish a Constitutional Advisory Council in September, 1995 the South Australian Government was responding to two developments. First, the then Prime Minister had made it very clear that if his Government was re-elected, he was determined to hold a national referendum in an attempt to turn Australia into a republic. Second, the then Leader of the Opposition in the Federal Parliament (Mr Howard) had espoused an undertaking given by his predecessor (Mr Downer) that, if the Coalition won the 1996 election, a `people's convention' would be called to review Australia's constitutional arrangements. Both of these commitments possessed the potential to have important consequences for the States. Hence an Advisory Council was commissioned to investigate and, after the widest possible consultation with the people of South Australia, report on the constitutional arrangements which will best sustain, not only national unity, but regional diversity into the 21st Century.

Central to this task, of course, is a consideration of the adequacy, or otherwise, of the current distribution of power between the Commonwealth, the States and Territories, as affected by the High Court's activities and by the exercise of the Commonwealth's financial and treaty-making powers. Closely related to our deliberations upon this are such questions as: should the federal Parliament retain its monopoly of the right to initiate referendums to change the Constitution of the Commonwealth, if its meaning, as currently interpreted by the High Court, is found to be unsatisfactory, or should the State Parliaments, or any one or two of them acting in concert, also be given that right? Or again, should the State Attorneys-General, according to some rota, be given the right to fill every second vacancy on the bench of the High Court? But matters of that kind are not what I have been asked to canvass today.

The posturings of our federal parliamentarians have had the result that the feature of our current constitutional arrangements which has been most in the spotlight since 1992 is the fact that Australia shares a monarch with the United Kingdom, New Zealand, Canada, Papua-New Guinea and a dozen other nations. Before addressing some of the problems of seeking to change this, I must also explain that the South Australian Government sought to make the State's Constitutional Advisory Council as broadly representative as a workable group (limited to twelve people) could be. For example, as part of this process, each of the three political parties represented in the South Australian Parliament was invited to nominate a person.

The mixed composition means that some of my fellow-Councillors are convinced and committed republicans. Others are convinced and committed constitutional monarchists. Hence the Premier made it plain that his Government was *not* asking us to report on whether Australia should

become a republic or not, because that is a question for the people of Australia as a whole to decide. Our job was to advise the Government so that, amongst other things, the State is not left unprepared, and therefore in some kind of constitutional hiatus or limbo, if change does come at the federal level.

Consequently, insofar as the republican question appears in our brief, we have seen our task as:

(a) to help raise awareness of the issues and encourage debate amongst the people of South Australia, who will be sharing in making the national decisions on these matters; and

(b) to make recommendations on the most appropriate actions this State should take if the campaign for a republic looks like being successful.

Accepting appointment by the Governor in Council has meant that, rather than representing a particular constituency, each member of the Advisory Council has a duty to share in making judgments on what is best in principle, for the nation and the State, leaving it to our parliamentarians to assess what is politically possible. It is within these parameters that I must confine my remarks today.

Is a `minimal' Republic realistic?

The most prominent advocates of republicanism in Australia have been advocating minimal change, evidently because they believe that a change which does the least violence to our existing arrangements is the only kind that will be acceptable to the necessary majorities of the Australian people. Thus, in June, 1995 Paul Keating indicated that, because his object was to terminate the links of the federal government and Parliament with the Crown, his Government's `*preferred* position'[1] was to vest the powers currently held by the Queen and the Governor-General in a new Head of State, and that these powers should be exercised in accordance with the constitutional conventions that have hitherto governed their use. Mr Keating also proposed that it should be left to each of the States to decide whether or not it wanted to follow suit. The first of these propositions raises many problems which have been contentious. The second is pregnant with mischief. Let me give some examples.

The Head of State

It is often said that the sovereign's role in Australia is almost entirely symbolic. Since Federation, we have had six monarchs, but only one of these, Queen Elizabeth II, has actually visited Australia since ascending the throne, and most of her visits have been quite brief. Virtually all her powers as Queen of Australia are exercisable only by the Governor-General (for national purposes) and the Governors (for State purposes). This underlines the growing belief that our actual constitutional Head of State, at the national level, is not the Queen but the Governor-General.

The notion is not just an abstract theory. It reflects the way the system operates. In 1926, at one of the Imperial Conferences that were the forerunners of the Commonwealth Heads of Government Meetings of our own day, the assembled Prime Ministers of what were then styled the self-governing `dominions' within the British Empire decreed that a Governor-General holds the same position in relation to the administration of public affairs in the dominion as is held by the King in the government of Great Britain.[2] As a result, when the Speaker of the House of Representatives asked the Queen to intervene and direct the Governor-General to reverse his dismissal of the Whitlam Ministry in 1975, Her Majesty's Private Secretary replied that the Queen has no part in the decisions which the Governor-General must take in accordance with the Constitution.[3] Meanwhile, the next Imperial Conference, in November, 1930 had taken the further step of declaring that, from that time forward, in appointing a Governor-General, the

King "should act on the advice of His Majesty's ministers in the Dominion concerned".[4] This was implemented in that very same month when, on the advice of Prime Minister Scullin, Sir Isaac Isaacs was appointed as the nation's first Australian-born Governor-General.

The evolution of rules and conventions such as these has led many to say that because the Crown's constitutional significance is now diminished to the point that we are a *de facto* republic already, we should therefore take the next step and become a *de jure* republic. Others insist that we would lose something of value in that process.

In the past 160 years, our monarchs have established a firm tradition of standing above and apart from party strife and pressure groups. It was this development that enabled the Crown to become a symbol of national unity, as well as continuing to be the trustee of the particular constitutional arrangements we have enjoyed at any time. The oath or affirmation of allegiance has effectively reminded all who have accepted vice-regal appointments that they are not doing so for the perks and privileges of office, but that their first and foremost duty is to serve the Crown, in its capacity as the people's representative and trustee. It is this obligation which has helped former politicians, such as Isaacs, McKell, Casey, Hasluck and Hayden to perform their vice-regal duties with a striking degree of impartiality, dignity and distinction, because all of them have been conscious of a very personal duty to their sovereign to act with the same detachment that has so long characterized the monarchy. If we jettison this part of our current constitutional arrangements, many people ask, is there any effective way of securing a similar outcome?

Mr Keating's answer was to exclude parliamentarians from nomination as President until five years had elapsed from their departure from any Parliament. Yet two of the most able and successful of all our Governors-General (McKell and Hasluck) were translated to vice-regal office within days of their relinquishing senior Cabinet posts. On the basis of their record, it has been argued, Australians would be foolish to exclude such statesmen, because those who have honed their skills - and gained a proper grasp of our constitutional arrangements - in high political office, and who are still close to the peak of their powers, are ideally suited to serve in the role of Head of State.

Appointment and Dismissal

For the moment, let us accept the much-publicized view that the Head of State in a republican Australia should be called `the President'. Now while a great deal of energy has been devoted to argument about methods of appointing a President, too little has been given to the at least equally important question of dismissing the Head of State. There is great merit in the current situation under which the Governor-General can dismiss a Prime Minister who is acting illegally, while the Prime Minister can demand the speedy dismissal of a Governor-General who is acting improperly. Each can act as an invaluable check upon the other.

It would be very difficult, and probably impossible, to remove a President who had been elected - by any method. If he or she had been elected by the people, the people would be extremely suspicious of any Prime Minister wanting to displace their President. Again, it would be possible to get a two-thirds majority of both Houses of the federal Parliament to accept the nomination of a distinguished citizen as President, but practically impossible to organize a two-thirds majority to displace that person, because it is more than fifty years since any government commanded the allegiance of that proportion of our national legislators. And what would you do if Parliament had been dissolved pending a general election?

Again, some have suggested that a President should be appointed by an electoral college comprising representatives of the national and State Parliaments, as is done in some other federal republics such as India and Germany. This has been criticized on the ground that it would

maximize the likelihood of the choice of a President being open to horse-trading and manipulation. There is also the consideration that because the President's role would be linked to the business of national government, with the States retaining their own separate Heads of State for State purposes, the State Parliaments could have no legitimate claim to be involved in the appointment of the national Head of State. Furthermore, reconvening such an electoral college, in the event that ministers genuinely perceived that it was in the national interest to dismiss a particular President, would be problematical if most State and federal legislators were away enjoying their mid-winter or mid-summer recesses.

Above and beyond all these considerations, however, we should note that if a President were to become a bender-drinker or bankrupt, or to lose the faculties of sight or reason, or all sense of the obligation to perform official duties according to the law and conventions of the Constitution, it would be cruelly humiliating to that individual, and to his or her family, to have the President's defects publicly exposed, debated and voted upon by the people or their parliamentary representatives in *any* forum.

For these and similarly relevant considerations, there is much to be said for retaining, in a republic, the present system whereby the Head of State is in effect appointed by, and can be dismissed by, the Prime Minister. It does the least violence to our existing arrangements and, of all the proposals that have been put forward, it best accords with our traditions of representative government. At the appointment stage, the Prime Minister's nomination could be presented to the retiring President, who would have the Head of State's usual rights to be consulted about whatever he was asked to assent to, and to warn the Prime Minister of the consequences if he or she believed the Prime Minister was proposing someone who would be unacceptable to a significant proportion of the population. Under such a system, would Prime Ministers be any less likely, than they are under our present system, to nominate someone who could not command widespread public support?

We could also provide two safeguards against the cavalier or self-interested dismissal of the President. First, we could impose a constitutional restraint on impulsive action by instituting a time delay equivalent to that arising from the present necessity of making contact with and properly consulting Her Majesty. For example, it could be stipulated that the President must be given forty-eight hours notice before his dismissal became operative. This would allow the Prime Minister time for second thoughts. It would also allow the President time to commission a new Prime Minister if he deemed that practical, appropriate and in the public interest, and if he could find anyone prepared to take the job in those circumstances.

Second, we should extend the current rule that, in the event of the death, absence or incapacity of the Head of State, the most senior of the State Governors should assume office as Administrator of the Commonwealth. That is, we could extend this present rule by requiring that if a President is dismissed for any reason, the most senior available State Governor should serve as Administrator for the whole of the remainder of the displaced President's term. Thus the disgruntled Prime Minister could not just choose his own party hack, but would have to put up with whoever happened to be the senior State Governor at the time.

What about the People?

Opinion polls have been consistent in indicating that about eighty per cent of Australians hold that a President should be elected by the people. I must report that it has seemed to me that no more than *twenty* per cent of the South Australians who have attended public meetings on constitutional questions this year want popular election of the Head of State. It is probable that those who are interested enough to go to a meeting have a greater and more informed grasp of

what is at stake than those who stay at home. At the same time it is clear that many of those who do call for a popularly elected President are either monarchists seeking to divide and thus undermine the republican push, or else - and this appears to be a much more widespread phenomenon than you might think - they have been misled, by the proposed name of the office, into thinking in terms of the American presidential system of government. One method of enlightening this second group of people would be to avoid the title `President' altogether, and continue to style our Head of State `the Governor-General'. It would help dispel any assumptions that the nature of the office was undergoing wholesale change.

We live in an age in which standards of political integrity have been in decline. Citizens have become, on the one hand, increasingly disdainful of the motives, appalled by the parliamentary behaviour, and scandalized by the ethics of many politicians. On the other hand, citizens have resented the rising power of those special interest groups which have periodically secured incorporation into governmental consultative mechanisms. It is therefore understandable that many people want a strong Head of State, and that they want to be in control of the choice of that person.

At the same time it does show the need for an educational campaign to help more people see the advantages of our tradition of separating the offices of Head of State and head of government. It was the loss of the sovereign's active role in law-making and government, in the course of the eighteenth and early nineteenth Centuries, that had enabled Queen Victoria to become so admired and respected. As I have noted elsewhere,[5] in the eighteenth Century the revolting colonists in North America had blamed King George III for all their grievances, real or imaginary. No one could regard his grand-daughter in such a light once it was made plain that her ministers were responsible for what the Crown did, and that they were answerable to Parliament and the people for the advice they gave her.

During the Victorian era, this principle was extended to all the Queen's realms in which parliamentary government had been inaugurated. As long ago as 1880, it had become firmly established that a constitutional Governor should never be held accountable, within the sphere of his government, for the conduct of public affairs, because that responsibility rests with the Cabinet ministers, who share in all the functions of sovereignty, devolved under the Governor's commission, on condition that they accept full responsibility for its exercise.[6] This was the development which not only gives a Governor the capacity to act as an impartial mediator, in those very rare crises when exercise of the reserve powers is called for, but also the capacity to act, so effectively, as the representative of the whole community on important public occasions.

The strongest case for popular election of a Head of State is the one presented, at this Society's last conference, by Professor Patrick O'Brien. He argued that popular election would underline the fact that the sovereignty of the Crown had been replaced by the sovereignty of the people. Yet it would also make the President a much more powerful figure than any of our Governors-General have been. Indeed, it would transform the office of Head of State, and our constitutional arrangements, in a revolutionary way, reproducing the very means by which that democratically elected French President, Louis Bonaparte was able to realize his ambitions and proclaim himself the Emperor Napoleon III.

We cannot afford to ignore the lessons of history. We must always remember that the reason why our monarchs, and their vice-regal representatives, were able to become so popular and respected was that they were shorn of their former powers. It is not good enough when those who have lauded this development are summarily dismissed by Professor O'Brien as

`Unreconstructed Westminsterites'.[7] Bluster, as I'm perhaps too fond of reminding Mr Paul Kelly, Editor-in-Chief of *The Australian* newspaper, has never yet won an argument.

As for the sovereignty of the people, this is already manifested by their command of the Constitution of the Commonwealth. That Constitution was drafted by delegates who were for the most part elected, by the people, expressly for the purpose of devising a scheme for the federation of what used to be called the Australian colonies. The Constitution was also ratified by decisive majorities of those voting in referendums held in each of the colonies that were to become the States of the new nation. Moreover, the Constitution can now only be changed with the consent of the people, voting in a referendum. Thus the really important - one might say the vital - manifestations of popular sovereignty, control of the Constitution and control over who will be our lawmakers, are in place here and now.

It is appropriate to add that the continued existence and occupancy of the throne itself is subject to the popular will. Notions of `the Divine Right of Kings' were banished from the English speaking world when Charles I lost his head, and they were soon crushed when his grandson tried to resurrect them. From the Revolution of 1688-89 onwards, when James II was forced to quit the throne and William of Orange was invited to take his place, the Kings of Britain in fact held office at the pleasure of the British people's elected representatives. This was confirmed early in the eighteenth Century, when Parliament again altered the succession, transferring it from the Stuarts to the House of Hanover. The principle was modified at the Imperial Conference of 1930, which ordained that any question "touching the Succession to the Throne ... shall hereafter require the assent ... of the Parliaments of all the Dominions" as well as the assent of the United Kingdom Parliament.[8]

It was Australian ministers who first invoked the spirit of that resolution, in 1936, when the Lyons Government's representative in London, High Commissioner S M Bruce, took what the records show was the `decisive' initiative and insisted that King Edward VIII must abdicate if he wished to contract any form of marriage with the divorcee, Mrs Simpson - on the ground that if the King made such a marriage he could not command the respect of the majority of the Australian people. It was this Australian intervention which forced the British Prime Minister, Stanley Baldwin, to stop prevaricating on the matter.[9] John Major's gaffe last year notwithstanding,[10] as long as we acknowledge Her Majesty as Queen of Australia, Australian public opinion must be heeded in the event of any future crisis regarding the succession to the throne.

The consent of the people is also integral to the few powers remaining in the hands of our constitutional Head of State. As the late Professor Kenneth Bailey, of the Melbourne University Law School put it, our constitutional system :

> " ... is the combination of the democratic principle that all political authority comes from the people, and hence that the will of the people must prevail, with the maintenance of a [Head of State] armed with powers to dismiss ministers drawn from among the people's elected representatives, and even to dissolve the elected legislature itself. In normal times, the very existence of these powers can simply be ignored. In times of crisis, however, it immediately becomes of vital importance to know what they are and how they will be exercised. ... [T]he reserve powers ... are not the antithesis but the corollary of the democratic principle that political authority is derived from the people."[11]

There is every reason why this should continue to be the case, in a republican Australia, without any need whatsoever for the new Head of State to be popularly elected.

A Warning from the 1890s

It is always instructive to look at the records of the Constitutional Conventions of the 1890s. At the Convention of 1891, Sir George Grey, who had been Governor of South Australia exactly half a century earlier - he was a psychological case then, and grew dottier in his old age - suggested making it a constitutional requirement that the Governor-General of Australia should be a person elected by the people, rather than one nominated by the Queen's ministers. The statesman whose name is commemorated in the name of this Society, Sir Samuel Griffith, replied that this would politicize the office and thus destroy its value.[12] Is it conceivable that Professor O'Brien could scorn Sir Samuel as just another unreconstructed Westminsterite? Griffith's prophecy has been echoed in our own day, by former Governor-General Sir Zelman Cowen, a jurist whose views command at least some attention.[13]

Be that as it may, it was largely at the instigation of one of the South Australian delegates to the Convention of 1891, Sir John Downer, that Grey's proposal was finally scotched. Downer argued that an elected Governor-General could claim a direct mandate from the people and thus become a rival to the Prime Minister, developing pretensions to real power and authority instead of being just a ceremonial figure and, in times of trial, an umpire - the dignified part of the Constitution. Downer's logic carried the day by thirty-five votes to three,[14] and the members of my Council believe it is as vitally relevant to current debates about the mode of appointing a Head of State in the proposed republic as it was, in reference to the choice of the Governor-General, a century ago.

It is, for example, most unlikely that someone of the calibre of Dame Roma Mitchell, who by every yardstick has been the best as well as one of the most popular Governors South Australia has ever had, would consent to undergo the ordeal of an election campaign even at the State, let alone the federal level. It also seems certain that no person could succeed in such a campaign without endorsement by one of the major political parties. The Indian experience illustrates the kind of outcome that may be expected from political endorsement. In that nation, as I have mentioned, the President is appointed by an electoral college comprising representatives of the State and national legislatures. Since the adoption of a republican constitution in 1950, most nominees for the presidency have been distinguished citizens, often scholars of world stature. Even so, none would have succeeded without party endorsement.

When Mrs Indira Gandhi's ministry resolved upon the declaration of a state of emergency in 1975, President Ahmed demurred on the ground that the proposal was unwarranted, unlawful and unjust. She thereupon reminded him that he owed his position, and therefore his first duty, to the Congress Party which had put him in office, and thus coerced him into kowtowing to her will, with tragic results. Ever since, Indian political commentators have, quite reasonably, been using epithets like `nodding automaton' and `glorified cipher' as synonyms for their nation's Head of State.[15] Could we risk a similar result without being utterly irresponsible?

Why should the Offices remain Separate?

Members of my Council have encountered a handful of people who would like Australia to scrap the system of responsible government and replace it with a presidential system. Most South Australians, on the contrary, believe we should continue to separate the offices of Head of State and head of Government if Australia becomes a republic. People have observed that in places where this is not done, as is the case in the United States, it gives one person such power that it maximizes the opportunities for scandals and corruption of the kind witnessed most dramatically during the presidency of R M Nixon. The only exception has been Switzerland, where the president is elected for a mere twelve months only and is surrounded by elaborate machinery for

the preservation of both collegiality and participatory democracy, which most Australians, and their parliamentarians, would find insufferable.

Indeed, the United States and Switzerland are the only nations in history that have managed to unite the offices of Head of State and head of Government and yet remain democracies. In every other instance, and there are hundreds of examples, tyranny has been the immediate and the long term result. Likewise, making the office of President more powerful than that of Prime Minister, as has become the case in the current French Republic, can be equally disastrous for the public good, as the blatant corruption of two recent French administrations made plain.

Is a Republic actually Achievable?

A couple of the eighty-nine written submissions presented to the Constitutional Advisory Council have suggested that there is now no mechanism by which Australians could lawfully proceed down the republican path. One of these submissions, backed by opinions from retired judges of great distinction, demands notice here. I believe it is fair to summarize the argument as follows. The preamble to the *Australian Constitution Act* 1900 begins by reciting that :

> "The people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established."

The first rule of statutory construction, as Professors Lumb and Ryan put it, is that "the preamble is not part of the Act, and can only be used as an aid in interpretation in resolving ambiguities in the text".[16] Nevertheless, in this case it has rather special value as a guide to the unprecedented objects of the legislation. In addition, section 2 of the Act refers, not to the sovereignty of the Crown but to `the sovereignty of the United Kingdom' - an odd expression, reflecting something of both the Jingoistic imperialism and the legal positivism that were rampant in that era.

Now this *Constitution Act*, which in its section 9 incorporated and thus gave legal force to the Constitution of the Commonwealth, is an enactment of the United Kingdom Parliament. Because the terminology is a little confusing, there was much to be said for the practice prevalent, when I was an undergraduate studying constitutional history in the 1950s, of styling the Act the *Australian Constitution Statute*, for this served to highlight the fact that it was a superior kind of law, with quite a different character from the Constitution of the Commonwealth, even though it contained the latter. The point of the distinction is that whereas the Constitution provides, in section 128, a procedure for its amendment within Australia, by referendum, the *Constitution Statute* was not amenable to that procedure. Because it expressly applied to Australia, the Statute, by virtue of the *Colonial Laws Validity Act* 1865, an enactment of paramount force, was only alterable by fresh imperial legislation.

Next, that great charter of dominion independence, the *Statute of Westminster* 1931, which waived nearly all the *Colonial Laws Validity Act's* restraints on the Australian federal Parliament's capacity to pass laws, contained express provision in section 8 that one thing our national Parliament could still *not* do was repeal or alter the *Australian Constitution Statute.* There the matter rested until the passage of the *Australia Act* 1986, section 1 of which terminated the power of the United Kingdom Parliament to legislate for Australia. So some have suggested that there is now no lawful means of removing the references to the Crown and the United Kingdom's sovereignty from the *Australian Constitution Statute.* That is, it would require an unlawful, namely a revolutionary, action. If that were really true, so that our *Constitution Statute* appeared to be forever frozen, it would be perceived as such an affront to our national dignity that there would soon be clamour for a unilateral declaration of independence.

Luckily for avowed republicans, there appear to be less drastic remedies at hand. Section 15 of the *Australia Act* 1986, provides a mechanism for the amendment and repeal of the *Statute of Westminster*. It states that this may be effected "by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States". So repeal of section 8 of the *Statute of Westminster* would empower the federal Parliament to change the *Constitution Statute* if all the States consented.

Curiously, in view of the enormous amount of time and effort that was put into the preparation of the *Australia Act*, this provision in its 15th section seems superfluous, because the power it presumes to grant to the federal Parliament was already contained in the Constitution itself, at section 51, placitum xxxviii. This gives our national Parliament, "at the request or with the concurrence of the Parliaments of all the States directly concerned", any power which at the time of federation could only be exercised by the United Kingdom Parliament.

Still more curiously, that placitum completely mystified Quick and Garran, who professed themselves unable to imagine what it meant.[17] One person did know, and that was Richard O'Connor, who was later to join Griffith and Barton as one of the High Court's first three Justices. At the Sydney sitting of the Federal Convention of 1897-98, he noted that it offered a means of escaping the *Colonial Laws Validity Act's* prescription that imperial statues applying to Australia had paramount force. Isaac Isaacs rubbished O'Connor's observation with such vehemence that O'Connor did not press his suggestion, and the other delegates, along with Quick and Garran, accepted the Isaacs view but did not bother to delete the placitum.[18] With hindsight, it is obvious that O'Connor was right.

In the meantime, historical events have affected the interpretation of the *Constitution Statute* and its preamble. After southern Ireland and three of the nine counties of Ulster were carved off from the United Kingdom, the reference to the Crown had to be construed as meaning the new Crown of the United Kingdom and *Northern* Ireland. Since 1953, as constitutional monarchists keep insisting, we have had an Australian Crown, and the common law recognizes Australian independence, along with the fact that the Australian Crown is divisible and separate from that in the United Kingdom. Thus the substantive provisions of the Constitution and its statute are now read in the light of Australia's being independent and separate.

In the High Court's decision in *McGinty v Western Australia* (1996),[19] Justices Toohey, McHugh and Gummow acknowledged that the sovereignty of the Australian nation has ceased to reside in the United Kingdom Parliament and has become embedded in the Australian people. All of them referred to the referendum provision in section 128. As Gummow put it, "ultimate authority ... is reposed by section 128 in a combination of a majority of all the electors and a majority of the electors in a majority of the States". These judgments reinforce the view that section 128 does provide a mechanism for amending the Constitution to establish a republic, notwithstanding the *Constitution Statute*. It may perhaps be added that the wording of the *Constitution Statute* was itself devised in Australia, and approved by the Australian people in referendums before it was sent away to be proclaimed in London. As a document which is fundamentally Australian, it is fitting that the power to alter or repeal it now rests wholly within Australia.

Because the Constitution and its Statute were initially ratified by Australia's voters, which even then included Aborigines as well as women in some of the colonies, there is a case for maintaining that it would be improper to proceed to radical change by parliamentary action alone, as is permitted by section 51 (xxxviii). Our democratic traditions demand that the people should be consulted in matters of such moment. And if, as I shall argue presently, we should not move to a republic without simultaneously putting the States' constitutional instruments in order,

so that neither any region nor the federal balance is adversely affected by the change, there are many who would say that the State Constitutions ought not be changed simply by use of section 128, because this could have the result that the Constitutions of one or two States were altered without the consent of a majority of the electors in those States. Hence it may in the end prove necessary to use some sort of combination of section 51 (xxxviii) and section 128. This needs further investigation.

The proposed Republic and the States

When political leaders in Canberra announced that they were willing to throw the nation's constitutional arrangements into the melting pot, this encouraged would-be reformers to propose all manner of radical changes. From the numerous meetings members of our Advisory Council have attended, all around the State, and from the written submissions we have received, it is clear that there are still quite a few people who seem not to want to take stock of the fact that, in the wider world, centralism is very much in decline. In recent decades, several federations, including the West Indian and Malaysian ones, have wholly or at least partially disintegrated,[20] and in those that survive, the principle of subsidiarity is very much in the ascendant - that is, the notion that whatever can be managed locally ought to be managed locally. Even in Australia, we have seen the Australian Labour Party, after seven decades of outright hostility, realizing that its leaders must learn to live and work within Australia's federal system, because one referendum after another has demonstrated that a majority of the Australian people are strongly opposed to transferring any more power to Canberra, save in the most exceptional circumstances.[21]

It must be made clear to all who participate in Mr Howard's `people's Convention' that if that forum resolves to present a proposal for an Australian republic, then it must include in the package machinery for the proper maintenance of our federal system. In particular, what is to become of State Governors if the office of Queen of Australia is abolished?

We have received a few submissions suggesting that the post of Governor should be abolished, with all its ceremonial and representative duties, including the provision of hospitality to visiting dignitaries from overseas, being performed by the Lord Mayor of Adelaide (within the metropolis) or the relevant heads of local government (outside it), and all the Governor's constitutional duties being carried out by the State's Chief Justice.

Two objections to this are that the Chief Justice is now a very busy person anyway, and that the present one, like his two immediate predecessors, has been much influenced by the conceit (which the High Court has been developing over a long period, and which it has already used to nullify parts of our Constitution) known as the doctrine of `the separation of powers'. This is a conceit that has been developed in disregard of the fact that the makers of the Constitution had no time for French and American fantasies but saw the crucial separation of powers, and the best defence against tyranny, in the Australian Commonwealth as resting in the division of power between the centre and the States.[22]

The important consequence, for present purposes, is that our recent Chief Justices have been most reluctant to serve as Governor's Deputy, as that office is styled here, for more than a day or two at a time, and even then only rarely and when absolutely unavoidable. Meanwhile, it has become so abundantly clear that the Governor's post is a full-time job that both the Premier and the Leader of the Opposition have announced that they have no wish to follow the example set by the New South Wales Premier, Mr Carr, when he attempted to make the office a part-time one in that State.

Here again the Constitutional Convention of 1897-98 is relevant. All the delegates were for federation. No one stood up for unification. At the opening session, Edmund Barton (later to

become the Commonwealth's first Prime Minister) set the tone by successfully moving a resolution declaring that the purpose of the proposed federation was "to enlarge the powers of self-government of the people of Australia". The resolution explained this by decreeing that the first condition for the creation of a federal government was:

> "That the powers, privileges, and territories of the several existing colonies shall remain intact, except in respect of such surrenders as may be agreed upon to secure uniformity of law and administration in matters of common concern."[23]

The debates record that the ideas embodied in this resolution remained a central theme throughout the preparation of the Constitution. They show that when present-day Premiers claim that the federation process created a concept of States' rights, they are not guilty of `rewriting history', as is sometimes asserted by federal ministers, but simply stating a fact. Even the most militantly left-wing of the Constitution-makers, South Australia's Dr John Cockburn, maintained that the preservation of States' rights "was the best guarantee of democracy", because "Government at a central and distant point can never be government by the people".[24]

The convention delegates studied and rejected the Canadian model. Canada has `Provinces' instead of States; and the central government appoints the head of each provincial executive, who is styled `Lieutenant-Governor' rather than Governor. Canada's Constitution gave that country's central government not only power to fill all the important judicial posts in the Provinces, but also power to disallow any statute enacted by a provincial Parliament, even if it deals with one of the subjects falling within the field assigned to the Provinces.

The makers of Australia's Commonwealth Constitution wanted none of that. The consensus was that it was "a basic principle" of Australian federation "that we should take no powers from the States which they could better exercise themselves", and that the new central government should be given "no power ... which is not absolutely necessary for carrying out its purposes".[25] To help ensure this outcome, it was agreed that each State should continue to have its own Governor. The Convention accepted Barton's argument for retaining that title, instead of Lieutenant-Governor, on the ground that, as Sir Samuel Griffith had previously put it, "Governor ... is the proper term to indicate that the States are sovereign".[26]

Barton and half a dozen other delegates stressed that the Governors must not in any way be representatives of the Governor-General or subordinate to the national government. They should remain entitled to communicate directly with the monarch. This would underline their independence from the central power in the Australian Commonwealth. Moreover, as in the case of the Governor-General, to save them from the Scylla of becoming dangerously powerful within their domain and the Charybdis of being mere party puppets, they must continue to be appointed, not given any mandate by being elected by the people.[27] In her final Proclamation Day address (December, 1995) before retirement, Dame Roma Mitchell reminded South Australians of the relevance of those speeches to the current republican debate.

If what is left of Australian federalism is to survive, abolition of the Australian Crown must not lead to State Governors being rendered subservient to anyone in Canberra. That is why the members of my Council believe it would be mischievous to leave the position of the States unsettled if Australia becomes a republic. We cannot risk further change in the federal balance being allowed to come about by default. New machinery for the appointment and dismissal of the State Governors must be put in place simultaneously with any republicanization of our federal constitution.

Furthermore, everywhere my Council has raised the question, there has been either unanimous, or else unanimous save for a single dissenter, agreement that it would not be a realistic option for

a State to seek to retain a formal association with the monarchy if the Australian Commonwealth ceases to be a constitutional monarchy. South Australians think it would be bizarre and grotesque to attempt to do that if the bulk of the nation had repudiated the Queen's sovereignty. Like the Commonwealth, the States no longer have any link with Her Majesty in her capacity as Queen of the United Kingdom. The link relates only to her position as Queen of Australia.

I have the greatest respect for Dr Greg Craven and agree with him on most things, but can not accept his suggestion that there are seven Australian monarchies, namely "a monarchy over Australia as a whole, founded by the *Commonwealth of Australia Constitution Act*, and six State monarchies, deriving from the different constitutional documents of the States".[28] That notion conflicts with the established doctrine of the unity of the Crown. From the time when Henry VII authorized the colonization of Newfoundland in the fifteenth Century until well into the twentieth Century, there was only one King and one sovereignty governing every portion of the British Empire. Even Sir Frank Gavan Duffy, the sole dissentient from the majority judgment in the *Engineers' Case*, shared his fellow Justices' opinion that, in 1920, the Crown was still "one and indivisible throughout the Empire".[29] While sovereignty might be exercised through different organs of government in different parts of the Empire, it was one common sovereignty. As a member of the Constitutional Advisory Council, Adelaide barrister Mr Michael Manetta, has pointed out in a paper which will be published as an appendix to our report, although federation may have been said to have united Australians under one Crown, "it is more accurate to say that Federation brought closer union to a people already united under one crown".

There is no sense in which the monarchy can properly be said to have been founded by Australian constitutional instruments dating from the colonial or early federal eras. It predated them all. The State and federal Constitutions simply provided new machinery to govern the exercise of the Crown's already extant powers in particular parts of the Empire. It was only when the Empire began to dissolve, after World War II, that the Crown in each of the countries owing it allegiance evolved into separate legal entities linked only in the person of the monarch.

We must also note that the Australian *Royal Style and Titles Act* 1953, proclaiming Her Majesty Queen of Australia, was passed pursuant to an imperial statute enacted earlier in that same year. While that imperial statute authorized our federal Parliament to legislate, it clearly did not empower the State Parliaments to create any new royal titles, as the Bjelke-Petersen Government discovered to its embarrassment in 1973 when it had to abandon an attempt to proclaim Her Majesty Queen of Queensland. If Australia changed from being a federal Commonwealth under the Crown of Australia to being a group of States united in a republican federal Commonwealth, it seems likely that State legislation purporting to erect a particular State into a monarchy would be in conflict with the revised Constitution of the Commonwealth, and therefore invalid.

Considerations such as these suggest that each State Government ought to consider how its constitutional instruments could be adapted to republican forms and insist that if the Commonwealth eventually does put to the people a proposal for a change to a republic, then this must incorporate all the changes necessary to republicanize the States as well, so that the nation and the States all change together, or else nothing changes. It would necessitate putting before the people a very lengthy and complex document, bristling with lawyers' language. You may well say that this would doom the experiment to failure. Yet the members of my Council believe that the consequences of failing to put the republican proposal in that comprehensive way are so dire that we shall advise the State Government to campaign vigorously for a `No' vote if Canberra fails to comply.

Endnotes :

1. Keating, P.J., *An Australian Republic: the way forward*. Speech by the Prime Minister, 7 June, 1995 (Australian Government Publishing Service, 1995), pp.6-13. The italics are Mr Keating's.

2. Hancock, W.K., *Survey of British Commonwealth Affairs*, Vol.I. (Oxford University Press, 1937), p.264.

3. Smith, D., `Some Thoughts on the Monarchy/Republic Debate', in *Upholding the Australian Constitution: Proceedings of the Samuel Griffith Society Inaugural Conference* (The Samuel Griffith Society, 1992), p.171.

4. Cowen, Z., *Isaac Isaacs* (Oxford University Press, 1967), p.198.

5. Howell, P.A., `Australia, a Republic?', *Flinders Journal of History and Politics,* Vol.16 (1993), pp.7-8.

6. Todd, A., *Parliamentary Government in the British Colonies*, second edition (Longmans, Green, and Co., 1894), p.815, reproducing without change a passage from the now extremely rare (because superseded) first edition, which went to press in January, 1880.

7. O'Brien, P., `Sovereign Citizens, not Subjects', *Upholding the Australian Constitution: Proceedings of the Sixth Conference of The Samuel Griffith Society* (The Samuel Griffith Society, 1995), p.200.

8. Hancock, *op.cit.*, p.619.

9. Edwards, P.G., `The rise and fall of the High Commissioner: S.M. Bruce in London, 1933-45', in *Australia and Britain: Studies in a Changing Relationship,* edited by A.F. Madden and W.H. Morris-Jones (Sydney University Press, 1980), pp.49-50.

10. Mr Major was widely reported last year as having said, in response to a questioner, that if the Prince of Wales were to remarry after divorce, this would be no bar to his succeeding to the Throne. Since 1930, no United Kingdom Prime Minister has had the competence to make such a pronouncement without prior consultation with all the other countries acknowledging Her Majesty as Queen, unless he explicitly offers it as a private and personal opinion.

11. Bailey, K.H., `Introduction', in H.V. Evatt, *The King and his Dominion Governors,* second edition (F.W. Cheshire, 1967), p.xxxv.

12. *Official Report of the National Australasian Convention Debates* (N.S.W. Government Printer, 1891), pp.561-6.

13. Cited in Keating, *op.cit*., p.11.

14. *Op.cit*. (1891), pp.571-3.

15. Seetha, `India', in *Heads of State: a Comparative Perspective* (Constitutional Centenary Foundation Inc., 1993), p.26.

16. Lumb, D.R. and Ryan, K.W., *The Constitution of the Commonwealth of Australia Annotated* (Butterworths, 1974), p.25.

17. Quick, J. and Garran, R., *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901), pp.650-1.

18. *Convention Debates, Sydney Session* (N.S.W. Government Printer, 1897), p.252; Quick and Garran, *op.cit*., pp.350-1.

19. 134 ALR 289.

20. In 1965, the central Government in Kuala Lumpur compelled Singapore to quit the Federation of Malaysia, on the pretext that this was the only way to avert serious racial upheavals.

21. Galligan, B., *A Federal Republic: Australia's Constitutional System of Government* (Cambridge University Press, 1995), pp.12, 91-109, 142-3, 150.

22. Howell, P.A., `South Australia, Federalism and the 1890s', in *South Australia, Federalism and Public Policy*, edited by A. Parkin (Federalism Research Centre, Australian National University, 1996), p.86.

23. *Convention Debates, Adelaide Session* (S.A. Government Printer, 1897), p.17.

24. *Ibid*., pp.338-45.

25. *Ibid*., pp.50-5l.

26. *Ibid*., p.994.

27. See the speeches of Downer, Barton and Kingston in *Ibid.*, pp.993-7, and those by Barton, Douglas, Cockurn, Braddon and Symon, in *Convention Debates, Melbourne Session* (Victorian Government Printer, 1898), Vol.II, pp.1706-15.

28. Craven, G., `The Constitutional Minefield of Australian Republicanism', *Policy*, Spring 1992, p.35.

29. 28 CLR 129, at 146-7, 152, 159, 174-6.