ARTICLES

The Reserve Powers of State Governors

PETER BOYCE†

In the last issue of The Review, Sir Francis Burt argued that the reserve powers of State Governors may have been terminated by the Australia Acts 1986. In this article, Professor Peter Boyce challenges that view and examines the implications of proposed constitutional reforms for Commonwealth and State Governments.

Sir Francis Burt's lucid and elegantly provocative paper to the Western Australian Constitutional Committee seminar on aspects of the office of Governor[1] enables us to focus discussion on several core issues relating to the current monarchical system at State level in Australia and its adaptability to a republican constitution.

Perhaps the most provocative opinion advanced by Sir Francis at the seminar was his suspicion that passage of the Australia Acts 1986 (Cth and UK) had effectively terminated any application of the Queen's prerogative in Western Australia, thereby eliminating the Governor's reserve powers.

It was not made clear in discussion whether the former Governor and Chief Justice of Western Australia had sought informal advice on this matter, but his view on the likely constitutional effects of the Australia Acts (with particular regard to section 7(2)) was not shared by several of the constitutional lawyers and State Government officials who participated in the seminar. Moreover, the Queen's former Private Secretary, Sir William Heseltine, indicated that it would not have been a viewpoint issuing from Buckingham Palace. It is not known whether other State Governors share

† Vice-Chancellor, Murdoch University.

1. See F Burt "Monarchy or Republic — It's All in the Mind" (1994) 24 UWAL Rev 1.

Sir Francis's doubts, but the Official Secretary to South Australia's Governor clearly holds a contrary view.[2]

I would have thought that the termination since 1986 of Royal Instructions to newly appointed State Governors could be interpreted as a removal of all restrictions on a Governor's exercise of the royal prerogative, except where limited by local statute or the wording of revised letters patent, and that the full delegation of a monarch's powers is implicit in the removal of conditions carried over from the colonial era, especially as such delegation is made explicit for the Governor-General in the Commonwealth Constitution at section 61. Indeed, it can surely be argued that section 7(2) of the Australia Acts represents a "patriation" of the Crown's prerogative powers, with the effect of making the Governor of Western Australia a "viceroy".[3]

The wording of letters patent issued at the time of a Governor's appointment is not uniform across all States. For example, paragraph 3 of the letters patent issued for Governors of Victoria in recent years specifically requires the Governor to act on advice tendered by the Premier on almost all matters, prompting one academic analyst to conclude: "That would seem to rule out any independent discretion for the Governor to exercise the so-called 'reserve powers'."[4] Letters patent covering the office of the Western Australian Governor make no reference to a Governor's reserve powers.[5]

The wording of a State constitution is also critical. An entrenched clause in the Queensland constitution, inserted at Sir Joh Bjelke-Petersen's behest in 1977, states that in appointing and dismissing officers of government the Governor "shall not be subject to direction by any person whatsoever nor be limited as to his source of advice". While the Western Australian constitution entrenches the office of Governor, it makes only partial (and thereby perhaps misleading) reference to the Governor's reserve powers.[6]

Some commentators discern in the Australia Acts "a remarkable potential ... for a revolutionary redefinition of the traditional relationship between State governors and their governments by executive fiat", and most would seem to agree that section 7 of the Australia Acts allows unrestricted opportunity for a State Parliament to reduce a State Governor's powers, excepting of course the opportunity to remove the Queen's own power to

2. See P Bassett "The Governor and the Constitution: A Practical Perspective" (1994) 53 Aust J Public Admin 49.
3. See J A Thomson "The Australia Acts 1986: A State Constitutional Law Perspective" (1990) 20 UWAL Rev 409, 424-5.
4. See discussion by B Galligan in D Butler & A Low (eds) *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth* (London: Macmillan, 1991) 81.
5. Letters Patent relating to the Office of Governor of the State of WA, 14 Feb 1986 *The WA Govt Gazette* 28 Feb 1986.
6. Compare s 74 of the Constitution Act 1889 (WA) with s 64 of the Commonwealth Constitution 1901.

appoint and dismiss a Governor.[7] It needs to be stressed, however, that the Western Australian Parliament has not yet moved to reduce the Governor's powers in this State; nor has there been any initiative in this direction by executive fiat.

That Sir Francis apparently believed himself to be totally subject to the advice of his Premier during his term as Governor of Western Australia could have occasioned some embarrassment had a constitutional crisis or deadlock occurred during his incumbency. One such crisis very nearly did occur in November 1989, when a coalition majority in the Legislative Council threatened to block supply.

Even prior to the passage of the Australia Acts, constitutional lawyers acknowledged the considerable diversity of opinion among commentators on the ambit of a vice-regal representative's reserve powers,[8] but the transfer of the Crown's prerogative powers from the Queen to State Governors effected by section 7(2) of the Australia Acts has apparently added to the uncertainties. While it is generally agreed that there are four reserve powers to be exercised,[9] when and how they should be used leaves ample room for conjecture or disagreement. Withdrawal of a Premier's commission is clearly the most problematic reserve power available to a Governor, but in recent years new potential scenarios which might justify at least the threat of dismissal have probably become obvious to an increasingly sceptical public. Serious corruption or suspected corruption must now be added to the standard textbook list of potential constitutional crises.

Sir Francis not only doubted his entitlement to exercise the reserve powers; he also suggested at the February 1994 seminar that the three traditional rights of a sovereign in his or her dealings with a Prime Minister — to encourage, to warn and to be consulted — were no longer relevant to a State governor. First identified by Sir Walter Bagehot in his classic text *The English Constitution*[10] 127 years ago, these three attributes of a monarch's role have over time been accepted by constitutional lawyers and political scientists as legitimate components of a Governor's job description also.

Had Sir Francis been Governor of Western Australia during the three years prior to his actual assumption of office, this self-denying interpretation of his powers would have required him to maintain total silence on any anxieties he might have harboured over alleged or perceived abuses of power by Premiers Burke and Dowding. Whether Governor Burt's predecessor,

---

7. See G Winterton "The Constitutional Position of the Australian State Governors" in G Winterton & H P Lee (eds) *Australian Constitutional Perspectives* (Sydney: Law Book Co, 1992) 274-335.
8. Ibid.
9. They are, as applied to WA: to appoint the Premier; to dismiss the Premier; to refuse a dissolution of the Legislative Assembly; and to force such a dissolution.
10. W Bagehot *The English Constitution* 2nd edn (London: Kegan Paul, 1872).

Professor Gordon Reid, did express concerns about executive improprieties or breakdowns in the processes of accountability to Parliament during that troubled period is not known. It is grimly ironic, however, that Professor Reid's most forceful and persistent message as an eminent scholar had been the urgent need for those Parliaments still operating within the Westminster system of "responsible government" to recover the authority they had ceded over time to Prime Minister and Cabinet.

That many Australian State Governors, because of their vocational background or limited tenure, will be unable to exercise these rights with the confidence or authority of the Queen herself is incontestable, but for as long as we retain the monarchy I sincerely hope that a State Governor will expect to be consulted fully by his or her Premier, and will feel entitled to "encourage" and if necessary "warn" the senior political executive.

I am not aware of any constitutional lawyer other than Sir Francis who doubts the appropriateness of a Governor exercising the three rights identified by Bagehot. In his wide-ranging 1992 essay, Professor George Winterton endorses a comment of Sir Ronald Wilson in a 1982 High Court judgment which would appear to be enjoying general acceptance:

> It would be absurd to suppose that the principle of responsible government requires the Governor to act purely as an automaton ... Bagehot's famous observation [recognising the three rights] is still good law and good constitutional practice.[11]

Sir Francis nevertheless acknowledges a role for the Governor as "the last line of defence of the parliamentary system" and accordingly highlights the need for his or her reserve powers to be spelled out. I agree with him. Given that it would no longer be acceptable for the monarch to identify the circumstances in which such powers could or should be exercised, it is surely time for the letters patent to confirm that such powers are vested in the Governor and for the State constitution to outline the conditions under which they could be exercised. Sir Francis believes that it should be possible "to identify in advance the circumstances under which the Governor should act to terminate a commission of a Premier who has the confidence of the Legislative Assembly",[12] and I share his view. Presumably the circumstances would be confined to illegal or improper behaviour by a Premier or Cabinet, though a definition of impropriety in this context might be difficult. It would no doubt encompass serious or persistent avoidance of accountability to Parliament.

The question of whether reserve powers are exercisable and whether they can be exercised with impunity is central to the case for or against an abandonment of monarchy. For if they are understood to have lapsed with

11. *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; quoted in Winterton supra n 7, 292-293.

12. (1994) 24 UWAL Rev 1, 6.

the passage of the Australia Acts, or indeed if they are interpreted so restrictively that a Governor cannot conceive of any situation when he would be unlikely to reject the Premier's advice, it is difficult to sustain the argument that a vice-regal representative is in any potent sense the guardian of our Parliamentary system.

There is, I think, a groundswell of public concern about the dominance of the political executive over Parliament at both national and state levels within the Australian system of governance, which may help explain the popular preference for an elected Head of State (in the event of a republican constitution). It is possible that most members of the public do not recognise that direct popular election would automatically ensure that the office was politicised and confer upon the office-holder an independent political power base, but it is also possible that many citizens are hoping for precisely that outcome.

Even if the Head of a republican State (at national and provincial level) were to be selected by a two-thirds majority of both houses of Parliament, a formula favoured by the Prime Minister's Republic Advisory Committee and likely to be preferred by most Parliamentarians of all political persuasion, it is obvious that the powers of the Head of State vis-a-vis the Parliament and Cabinet will need to be identified clearly in a republican constitution — and it is possible that the effect of such a clear identification will raise public expectations of a more activist role for the Head of State.

Within the United Kingdom a movement for fundamental political reform — "Charter '88" — which has attracted articulate recruits from across the ideological spectrum, is lamenting the loss of any monarchical check on executive authority — a loss concealed to some extent from public understanding by the executive's traditional capacity to act in the name of "the Crown". But, at least in the case of Britain itself, it could be argued that the monarch exerts or exudes a certain inherent authority, be it moral or political, which derives from the centrality of her office to the history and tradition of the British State. She, presumably, is not inhibited from exercising the three "rights" identified by Sir Walter Bagehot in her dealings with Prime Ministers — and her length of service compared with the short span of a Prime Minister's tenure must convey some sense of authority to even the least modest and most assertive Prime Minister.

In Australia, by contrast, such authority cannot inhere in the office or person of the vice-regal representative, and as the geo-political interests of Australia and Britain diverge and as members of the Queen's family are viewed less and less respectfully as moral exemplars, so a vice-regal representative must increasingly rely on his or her own popularity and personal qualities as the basis of vice-regal moral authority.

As it happens, most States, including Western Australia, have been reasonably well served by their Governors over recent years, and in the two

most recent situations where a Governor was called upon to exercise discretion to avoid a constitutional crisis, the incumbent performed admirably. Sir Walter Campbell refused to accept advice from Premier Sir Joh Bjelke-Petersen in 1987 that he should terminate the commissions of five ministers who had fallen from favour without allowing them to resign, and that he should accept the Premier's resignation to allow him to form a new ministry. In Tasmania in 1989, Sir Phillip Bennett confronted a hung Parliament after the State election, with Premier Robin Gray seeking to dissuade the Governor from commissioning a minority Labor government based on an "accord" with the Greens Party.

In assessing the arguments for and against the retention of monarchy, one likely consequence of a republican Australia has so far inspired little public discussion. Despite the reassurances of informed republican opinion leaders, including the Prime Minister's Republic Advisory Committee, that republican State Governors could be retained within a republican national framework, their powers defined by State constitutions, it seems likely that over time the disappearance of the Crown would have the effect of further subordinating the States to the Commonwealth, simply "because the sovereignty of the States within the Federation derives from an independent source of authority in the Crown".[13]

Were one or more of the States to retain their links with the Crown within a national republican constitution, a scenario which Professor Winterton finds constitutionally tolerable,[14] the scope for Commonwealth dominance might be reduced, or at least contained; but I imagine that such a constitutional oddity would not long endure.

If the Australian monarchy is to be retained, urgent action is required to clarify the powers and duties of State Governors, not with a view to politicising the office but certainly with a view to investing it with enough enforceable power to ensure that it becomes a genuine protector of the constitution and the proper processes of responsible government.

So far, lobbyists for the preservation of constitutional monarchy have evinced little interest in the issue, but it seems inevitable to this commentator that new Australian republican constitutions (national and state) will contain provisions which allow, possibly even encourage, a more activist interpretation of the Head of State's powers and duties than has ever been envisaged or approved for our twentieth century Governors.

---

13. Bassett supra n 2, 52.
14. See G Winterton *From Monarchy to Republic* (Melbourne: Oxford UP, 1994).