The Republic Referendum: Mere Symbolism or Substantial Change?

Professor David Flint

Those who are defending our present Constitution in this referendum of 1999 believe that our fellow Australians, all of our fellow Australians, should not only have a vote on the republic. They should be entitled to an informed vote.

Now we are told that the change is only symbolic – that it is simple. Well, Mr Tom Keneally has let the cat out of the bag on that one. In November on Channel 9 he revealed what we all know: that what is being proposed is the most substantial change to our Constitution since Federation. And one which the patron of the Australian Republican Movement (ARM), Senator Murray warns, has the potential to give the Prime Minister absolute executive power.

The point is, the change is neither symbolic nor simple.

Let me look at the referendum question itself and then the model, the Keating-Turnbull Republic.

First the question.

The question in the Constitution referendum in 1999 will be whether Australians approve of a change to a republic in which the President is chosen by a two-thirds majority vote of a joint sitting in Parliament. But it ought really to add that he will hold that office only at the whim of the Prime Minister. This will not actually appear in the question. But as it will be unique in the world, it ought to be there.

The Australian Republican Movement – in its "Don't mention the war" vein – is attempting to portray the question as, "Do you agree that an Australian citizen (later admitted, Mr Turnbull to be actually named the President) should replace the Queen as Head of State with the same powers as the Governor General?" They want to exclude reference to the words "President", and especially "Republic", in the actual referendum question. When however this attempt attracted national ridicule, the ARM changed their version of the question to include first the word "President", and the next day (6 July) the word "Republic".

Nevertheless, these words are being avoided in the campaign. In the ARM campaign the referendum is portrayed as only being about having an Australian as Head of State. This is in fact the very question Paul Keating proposed putting to the people in a plebiscite which would have had no legal effect. Plebiscites are usually framed – as they were by both Bonapartes – in such a way as to mislead voters and to obtain the equivalent of a blank cheque on the Constitution. The latest example was the failed Quebec plebiscite.

Here we had an Australian example. It did not proceed when Mr Keating first proposed it because Australians for Constitutional Monarchy said supporters would be advised to vote "Yes", as we already had an Australian as Head of State. And at the very same time, the Keating Government was holding out to all the world that the Governor-General *was* the Head of State. Nevertheless, considerable resources have been put into promoting this message – both private and taxpayers'. It was the core theme of the Report of the Republic Advisory Committee and the core of the ARM's TV advertising campaign for the Constitutional Convention. No doubt it will be at the heart of a taxpayer funded "Yes" campaign in October.

This argument is spurious. It is used to avoid debating the actual question which is being asked in the referendum. In effect the ARM is giving the term Head of State a constitutional

meaning and application never before known in Australia. There is an "Alice in Wonderland" flavour about this. I am referring to Humpty Dumpty when he said, in a rather scornful tone, "When I use a word, it means just what I choose it to mean – neither more nor less".[1] Head of State, like the word republic, is a term which lacks precision.

The modern state, as we know it, emerged with the decline of feudalism in Europe. Most were once ruled by monarchs, kings or princes, who had removed themselves from the higher authority of the Holy Roman Emperor, or the Pope. Relations between states at this time essentially involved personal relations between monarchs, represented by ambassadors. When republics emerged, international lawyers came to use the term Head of State to cover both monarchs and presidents.

It is not possible to generalise about what are or should be the functions of a Head of State. This is because international law does not provide the answer. As Lord Slynn observed last year in the House of Lords:

"The role of Head of State varies very much from country to country….".[2]

One cannot generalise even about the name of the Head of State. He can be a King, President, Grand Duke, Emperor or Pope. And you can have more than one. Andorra had two, the Soviet Union, 24, revolutionary France, under the Directory, five. Today, Switzerland has seven. A Head of State can even change to a monarch from being republican head or vice versa, as has happened in France, Albania, Iran and Cambodia. A Head of State can be head of more than one country, as was the case in Hanover and Britain, and is the case now in Canada, New Zealand and the UK.

A Head of State can be almost purely ceremonial (Ireland) or the head of government (USA), or a powerful executive President "cohabiting" with a parliamentary Prime Minister (France). He may enjoy absolute power, as in various dictatorships. Hitler was a Head of State, Stalin never was. And, as we have seen, it is possible to have more than one.

Deciding who is a Head of State is very important. It determines who sits where at official banquets – who gets a 21 gun salute. Perhaps the most important point is that, as Heads of State are equal, no Head of State can sit in judgment on another. This is expressed in the principle *par in parem non habet jurisdictionem.* For this reason, a Head of State is normally immune from the jurisdiction of a foreign court. But there are now exceptions to this in extraordinary cases, as we have seen with General Pinochet. In the unlikely event that the Australian Governor-General were charged with an offence while travelling overseas, there is not a shadow of doubt that he would normally be immune from the jurisdiction as our Head of State.

In the law of the Commonwealth and the United States, the term Head of State is reserved *only* for international law matters and in diplomatic relations. To ascertain who actually is a Head of State, we are normally informed by the Department of Foreign Affairs of our country or of the foreign country. When the Governor-General travels overseas he is, and for long has been held out by our government, and received by foreign governments, as the *Australian* Head of State, as was the case with the visit in 1999 to Turkey by Sir William Deane. It is worth stressing at this point that the term is not one known or used in the domestic constitutional law of the UK, Australia, New Zealand, Canada or indeed the United States.

Incidentally, the first principal usage of the term in foreign constitutional law in the twentieth century seems to have been in Spain, where the office of King was vacant and Generalissimo Franco became *Jefe d'Estado*. Similarly, Maréchal Petain became *Chef de*

l'État (as well as *President de la République*) in Vichy France. Not precedents which one would have thought Australia should follow!

To confirm that the term Head of State is not used in and completely unknown to Australian constitutional law, reference may be made to the federal and all State Constitutions; the *Balfour Declaration*; the proceedings of the *Imperial Conference*, 1930 as they relate to the appointment of Governors-General; the *Statute of Westminster*, 1931; the *Statute of Westminster Adoption Act*, 1942; the *Royal Powers Act*, 1953; the *Royal Style and Titles Acts*, 1953 and 1973; and the *Australia Acts*, 1986. In no section of any one of these acts does one find the term "Head of State". Which clearly confirms it is *not* a term used or known in our constitutional law or practice. It is actually in the Referendum Bill, no doubt to give some legitimacy to the insertion of this term into the debate.

And just as the term Head of State is not used in our constitutional law or practice, nor is it part of everyday English.

There is no mention of "Head of State" in the many entries in the 2,000 odd pages of the First Edition of the *Macquarie Dictionary,* 1981. You'll find "loose-head", from rugby. And "head" meaning a ship's toilet. There's the colloquial use of the word for a drug user. "Head-hunting", "head boy" and "heading dog" are there. As is "head and shoulder", "lose one's head"! As are the now politically incorrect terms, "headmaster" and "head mistress". And under "State" there is "State aid", "States righter", the American "Statehouse" (which is not to be confused, it seems, with the New Zealand "state house", a private dwelling built and owned by the State!) There is "state-of-the-art", "statesman" and "stateswoman". But no "Head of State".

Dictionaries, at least those of the English language, reflect usage. And the plain fact is that neither Australians (at least until recently), nor the British, New Zealanders, Canadians or Americans use the term "Head of State".

In 1998, the *Daily Telegraph* (London) commissioned the Gallop Organisation Inc. to conduct an opinion poll. The poll is described as nationally representative of the population of Great Britain. Among the questions asked was the following: "Could you tell me who is Head of State in the United Kingdom at the moment". Only 56 per cent gave the correct response, 15 per cent thought Tony Blair was, and 27 per cent did not know![3]

This poll demonstrates that even in the United Kingdom, where there is no debate between republicans and anti-republicans about who is Head of State, there still is confusion about the term "Head of State".

There is an illogical aspect of the ARM argument that the Governor-General is not the Head of State. So all of the powers of the Governor-General – and nothing more – are to be transferred to the President. Then the President becomes the Head of State. They do not mention that under the Keating-Turnbull Second Republic the Queen's powers are not to go to the President.

This is a second deception – namely, that the Queen is to be replaced by an Australian President. She won't! The Queen is to be replaced by the politicians, and especially the Prime Minister. For this Republic is essentially a politicians' republic. If, as the ARM says, the Queen is the only Head of State, and her powers go to the politicians and the key power to the Prime Minister, why and how does the President become the Head of State?

Whenever it is argued that the question is about having an Australian as Head of State, it is but an echo of Mr Keating's plebiscite inviting us to give the equivalent of a blank cheque on the Constitution. This is testimony to the continuing influence of Mr Keating in this

debate.

But let us come now to the second part of my address, the so-called 'bi-partisan model" for a republic which emerged from the Constitutional Convention – the model which even failed to command the support of the majority of all the delegates (only 73 votes out of 152).

The fundamental question for Australians in the coming referendum is whether this model is better than, or at least as good as, the present Constitution.

It is clear the last thing the ARM wants is a debate on the detail of the model. Mr Beazley says he would become "terribly depressed" if this debate were to be about the "minutiae" of the election of the President and the President's power.[4] The principal issue, he says, is about having an Australian Head of State and a republic. Whether or not we like the process that emerges, he argues we can deal with any problems down the road.[5] These mere details, he says, could be fixed up at future referenda! These details should not cloud the move to a more "mature" political system. But this is a Constitution, not a used car. Would anyone even buy a used car on this basis?

Let us look at the details of the model. How will the presidential candidates be nominated? How can he be removed? What are the President's powers? It begins with a nomination process so cosmetic that the shortlist can be completely ignored. It is worse than useless, as it will ensure that people of calibre who are willing to serve – unambitious achievers – won't let their names go forward.

Its sole purpose is to fool those who want to elect the President. Well, it didn't fool Ted Mack, Clem Jones, Phil Cleary or Martyn Webb.

The next stage in the process is for the Prime Minister to make a single nomination to a joint sitting. That nomination must be seconded by the Leader of the Opposition in the House of Representatives. The joint sitting must then approve the nomination by a two-thirds majority. This will normally require approval by the Opposition. This is presented as a good thing. It is not.

To believe that Opposition approval will be solely on the virtues of the candidate suggests a high degree of naiveté, and of unreality. That is just not how the political world operates. This is a world of deals and trade-offs.

Perhaps one of the best known deals was the Kirribilli House Agreement made before the 1990 election. Prime Minister Hawke agreed that after the election, and unbeknown to the electors, he would hand over the Prime Ministership to Paul Keating. Witnessed by TNT Chief Executive Officer Sir Peter Abeles and ACTU Secretary Bill Kelty, the agreement was kept secret. But when Mr Hawke changed his mind after the election, and Mr Keating went to the backbench to campaign against him, the agreement then found its way to the press.

The point was, of course, that the deal was of momentous public interest. The people thought they were electing a government to be led by Bob Hawke, not Paul Keating. It is either naive or deceptive to think that politicians will use the power to elect a President only for the purpose of choosing a President above politics.

In Australia the political deals and trade-offs surrounding the election of the President will not only be possible. They will be constitutionally entrenched.

Worse, the President will owe his office to these deals. He is just as likely to be a party to the deals.

As Ted Mack says, the President won't be one of us. He'll be "one of them".

We have yet to come to the third aspect of the way in which the Keating-Turnbull Second Republic will work. And that is the dismissal of the President.

Now most republics give the President a degree of tenure. Where he presides over a Westminster system, the President will ideally operate as a check and balance, an umpire and an auditor on the politicians. If she does not, then you have a system which leaves the same politicians in control of both the legislature and the Government – an excessive concentration of power.

Constitutional monarchs have proved best in this role, or in presiding over a system of Governors-General and Governors as in Canada. A Westminster President needs obviously to have a clearly defined role – that is, his powers should be codified – which can bring in the problem of justiciability. How do we know the precise boundaries of his powers without a court ruling on them? He also needs security of tenure, as does an executive President. Obviously, he should be removable for proven and serious breaches of the law or of his duties.

This is normally done through a three stage process of impeachment. First there is a formal charge, where the grounds to dismiss the President are clearly set out. So that this is not frivolously made, this usually has to satisfy, say, a House of Parliament, as in the United States, or a specified majority of Members of Parliament. This is, if you will, the committal stage. Then there is a trial; for example, before the Senate, as in the United States, or before a tribunal of five judges presided over by the Chief Justice, as in Singapore.

Finally, there is usually a vote in Parliament, or part of Parliament, almost always with a special majority (two-thirds in the United States, three-fourths in Israel and Singapore).

Under this second version of the Keating-Turnbull Republic, the President can now be removed without notice, for any reason or no reason, and without appeal. By the Prime Minister! The only additional step would be that the dismissal would need to be “approved” within 30 days. But not by a joint sitting of the Parliament, just the House of the Representatives! And in the unlikely event of the House not approving, what would happen? No one knows, except that the President would most definitely not be restored to office. The “consolation” is that he would be eligible for re-nomination! That is, his name could be considered by the President’s Nomination Committee. The exclusion of the Senate from the “approval” process is sinister – especially where the President is dismissed to stop him from acting as Sir John Kerr did in 1975.

When I first read the Bill, I had a sense of foreboding. A chill.

And under the Bill now before Parliament, the Prime Minister can actually sack each Acting President until he gets the man or woman he wants. In any event, he will have such Deputy Presidents, with such powers as he wants, standing-by ready to do his bidding.

This is hardly a symbolic change. We have now a constitutional system which ensures the constitutional umpire and auditor is above politics. This is achieved through the Australian Crown, an institution with established conventions and practices honed over the two centuries of modern Australia. At the federal level it is found in the conceptual basis of federation – an “indissoluble federal Commonwealth under the Crown”.

Both Keating-Turnbull republics suffer from the fundamental intellectual deficiency that while they would dismantle the Crown piece by piece, first federally and then at the State level, they offer nothing in its place. It is difficult not to come to the conclusion that the ARM just does not understand the role and nature of the Australian Crown. Not understanding, they wish to destroy that institution, without putting anything in its place –

except the absolute executive authority of the Prime Minister.

The proposition that the neutered office of President could be an adequate substitute for the Crown confirms an inability or unwillingness to accept the subtleties of the present constitutional arrangements.

This politicians' President will hold office at the whim of the Prime Minister. In fact, the politicians' President will be no more than the Prime Minister's pathetic poodle. But if he is cunning enough, he may try to remove a rogue Prime Minister first, and possibly throw the country into months of chaos. This is because the exercise of the President's powers will now be reviewable in the High Court.

Australians need to realise that no similar republic exists anywhere in the civilised world. No republic which makes it easier, as Reg Withers says, for a Prime Minister to sack the President than it is to sack his driver!

The very idea that the Prime Minister, who controls the Lower House, could sack the constitutional umpire, the constitutional referee and the constitutional auditor is an assault on the very basis of the Westminster system. It would make the Prime Minister more powerful than our wartime Prime Minister John Curtin was, or Ben Chifley was, or Robert Gordon Menzies was. Or, to their eternal credit, ever wanted to be. For all were constitutionalists. Just imagine. A future Australian Prime Minister – Mr Beazley, Mr Reith, Mr Costello, Mr Crean, Mr Evans – more powerful than any other Australian Prime Minister. More powerful than any Canadian, British, or other Commonwealth Prime Minister.

It is as if during a game of football, just when the referee is about to rule against him, the captain of the offending team could then send off the referee!

It is the genius of our tradition that we are demoncrats but we are also suspicious of potential abuses of power, even of power which is democratically granted. This is reflected in Mr Keating's Republic Advisory Committee, chaired by Mr Turnbull, which reported they had encountered an almost universal view that, regardless of the integrity of any Prime Minister, the Head of State should not hold office at the Prime Minister's whim, and must be safe from instant removal to ensure appropriate impartiality.

The need to protect the Head of State from arbitrary removal has particular force where the Head of State has discretionary powers which can be exercised adversely to the interests of the Prime Minister or the Government.[6]

The traditional view is most famously enunciated in Lord Acton's dictum, "Power tends to corrupt, and absolute power corrupts absolutely". Thomas Jefferson was once asked, "What has destroyed liberty and the rights of men in every government?" He answered, "The concentration of all powers into one body". And as we have noted, ARM patron Senator Andrew Murray warns that the Keating-Turnbull Second Republic gives the Prime Minister "absolute executive power".

When confronted with this, the proponents of the Keating-Turnbull Republic nowhere acknowledge their previous counsels against the President holding office at the Prime Minister's pleasure. Their knee-jerk reaction is to talk of the "mother of all scare campaigns". But, when pressed, they answer this critique in three ways – but thereby they accept that this fault exists. First, they say no reasonable person would behave so unreasonably. Then why risk giving him this extraordinary power? Then they say the Prime Minister will not be able to choose "the President's successor". This is wrong. Finally they claim this replicates the current system.

The strongest argument against the proposition that, under the current system, the Governor-General holds office at the Prime Minister's whim comes from Mr Gough Whitlam himself. He says the proposition is both "preposterous" and "ludicrous"!

In *The Truth of The Matter,* Mr Whitlam ridicules Sir John Kerr's fears that the Prime Minister would remove him by telephone. This fear was probably based on a flippant remark Mr Whitlam had made to Tun Razak in the Governor-General's presence:

"… To imagine that I could have procured the dismissal of the Governor-General by a telephone call to Buckingham Palace in the middle of the night – it was 2.00a.m. in London – is preposterous; to imagine that I would have tried to do so is ludicrous.

"…As to thinking it could be done by a telephone call, had I not, within that very month, had the experience of revoking Sir Colin Hannah's dormant commission as Administrator? That process took ten days. And, as I have stated, it was at Sir John Kerr's own suggestion that I, not he, should make the approach to the Queen".[7]

Mr Whitlam here refers to the removal of the Queensland Governor's "dormant" commission to act as Administrator of the Commonwealth. Sir Colin had publicly criticised the Whitlam Government, that is engaged in political controversy – an act normally thought to be incompatible with vice-regal status. And there is no guarantee that the Queen would immediately accept the advice. She has the time-honoured rights, according to Bagehot, to be consulted, to encourage and to warn. As Boris Johnson observes, the beauty of the Crown is that it is beyond the reach of the most grasping politician.[8]

It will, I think, be evident that to describe the proposed changes to our Constitution as symbolic is either an act of deception or one of ignorance.

You will be told tomorrow morning by Professor Craven that you had better vote for the Keating-Turnbull Republic because a worse model will be proposed later. This model will dare to propose that the people elect the President. It will, he will say, be a truly awful model. This argument assumes that, first the Parliament will put this truly awful model to a referendum, and then the Australian people will all lose their sanity and vote for it. Frankly, I prefer the view of Justice McGarvie – "Australians are a wise constitutional people".

On the basis of this argument, Winston Churchill should have surrendered to Adolf Hitler because Joseph Stalin was lurking in the wings. Well, Mr Chairman, Mr Churchill did not. He did his duty – as all constitutionalists will do theirs in this referendum.

That the Keating-Turnbull Republic would involve the removal of a significant check and balance on the power of the Prime Minister is a message which must be proclaimed loudly and clearly to the Australian people. It may well be that Australians wish to give more power to the politicians and to the Prime Minister. Frankly, I doubt it. But if they do, let them do so with the full knowledge of precisely what they are doing.

The Australian people have hitherto demonstrated, on constitutional matters, that they are a "wise constitutional people". As I said last year, Lord Falkland's dictum in the English civil war is a wise principle in matters relating to the Constitution:

" If it is not necessary to change
It is necessary not to change."

Endnotes:

1. Lewis Carroll, *Through the Looking Glass.*
2. *R v. Bartle (ex parte Pinochet),* House of Lords, 25 November, 1998.
3. *Weekly Telegraph*, 382, 18 November, 1998.
4. *The Australian*, 26 November, 1998.

5. *SBS News*, 27 January, 1999.
6. Report of the Republican Advisory Committee, Volume 1, p.77.
7. Hon Gough Whitlam, *The Truth of the Matter,* Penguin Books, Melbourne (1979), p.111.
8. *Weekly Telegraph,* 242, 13 March, 1996.