Reviving the republic

By Anne Twomey[*]

Introduction

The Queen is not immortal. She will die. She turns 90 this year. While opinion polls show a clear majority of people support a republic after the end of the Queen's reign, there is no point waiting until it happens and then responding to the public pressure with thought bubbles and knee-jerk reactions. Nor is it really appropriate to hinge the country's constitutional development on the life of one person, or to personalise a republic in this way. However one regards the timing of a republic, the time for serious, methodical and rigorous work on building up republic models is now, before the whirlwind ensues.

Whether you support a republic or not, there is virtue in ensuring that any republic proposals that are put to the Australian people are well-considered, practical and will enhance the stability and effectiveness of our Constitution. While there is occasionally a Machiavellian tendency amongst monarchists to encourage dangerous republic models, on the basis that they will be easier targets to knock off during a referendum campaign, I take the more 'conservative' view that one should be very careful about *every* referendum proposal put to the Australian people. We all know that sometimes the joke proposal, the one that no one ever took seriously, wins. The risk is too high.

That is why I believe that it is incumbent on people who care about the Constitution, like me – and hopefully others – to work on building a range of republic models, all of which will enhance, rather than threaten, the operation of our Constitution and our political system. It is *not* about dictating choice – that will be up to the Australian people. But it is about ensuring that those models from which a choice is made have been meticulously drafted, assiduously examined and rigorously tested. It is about giving the Australian people the ability to vote with confidence that whichever model is chosen will be a good outcome for Australia.

Renovating the Constitution

Where to start? A republic proposal should not be obsessed with Queens and Crowns. Nor should its aim be doing minimal harm to the existing system of government. We should have a higher aim of *improving* the Constitution and making it better fit for purpose in the current age. The Constitution has given us stable and prosperous government for over a century, for which we are all grateful, but the reality is that it is a Constitution written for a British colony that no longer exists. We need a Constitution for the independent sovereign nation of Australia that keeps all the good functional parts of the existing Constitution, but discards the redundant, inappropriate and discordant parts of it.

One of the powerful arguments from 1999 was that 'if it ain't broke, don't fix it'. We need a more sophisticated approach to this proposition. Something doesn't have to be completely broken before you do something about it. No sensible person waits for their car to break down before servicing it and making any necessary repairs. How many of you wait for your mobile phone to cease working before upgrading it? Do you wait till the tree in your back-garden

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collapses onto your roof before you prune it? Do you persist in using your 15 year old computer simply because it still works?

The Constitution is far older and has many more redundant and inoperative parts than the old Apple Mac you keep in your shed awaiting the Council clean-up day. To start with the Constitution is s 9 of a British Act of Parliament – a fact that is singularly inappropriate now. The words in it no longer fit the reality, so that provisions in the Constitution that refer to 'subjects of the Queen' now have to be interpreted as meaning Australian citizens, and references to the Crown of the United Kingdom of Great Britain and Ireland (which also no longer exists in that form) have to be read as an Australian Crown, even though the words say otherwise. Judges have to screw up their eyes and squint at provisions just to make the text fuzzy enough so that they can read it in a way that is consistent with changed facts. That should be a sufficient justification for change. It makes no sense to argue that your Constitution has to become so dysfunctional as to be completely broken before you are prepared to fix it.

We are still working with a Constitution written in the 1890s. While it contains a sound structure, enduring principles of representative and responsible government, the separation of powers, federalism and the rule of law, all of which serve us well and should continue to do so under a republic, it also contains some provisions which are either completely redundant because they were transitional in nature, or that are simply no longer appropriate.

For example:

- Section 25 refers to the prospect of people being disqualified from voting on the basis of their race, which is no longer something that would be found acceptable.
- The power to make laws with respect to the 'influx of criminals' in s 51(xxviii) of the Constitution is a relic from the 1885 response to the prospect of the settlement of French convicts in the Pacific, which is no longer relevant.
- We don't need to specify in s 48 that Senators and Members shall receive an allowance of four hundred pounds a year.
- The power of the Queen in s 59 of the Constitution to disallow any Commonwealth law within one year of its assent really needs to go.
- Similarly, s 60 which deals with reserving Bills for the Queen's pleasure needs to be repealed.
- We no longer need s 65, which sets the number of Commonwealth Ministers as 7 until Parliament otherwise provides or the Governor-General directs.
- Similarly, s 66, which sets the initial salary of Ministers as not exceeding 12 thousand pounds a year, is no longer relevant – we don't even have the same currency anymore.
- We no longer need s 69, which deals amongst other things with the transfer of State lighthouses, lightships, beacons and buoys to the Commonwealth at a date after federation.
- Section 74, which provides for appeals from the High Court to the British Privy Council, should also go. The High Court refuses to allow such appeals, but the Constitution keeps the prospect of them lingering in form, if not substance.
- We don't need s 84 which deals with the transfer of public servants from the States to the Commonwealth after federation, or s 85 which deals with the transfer of State property to the Commonwealth upon federation.

- Nor do we need ss 87, 88, 89, 93 and 95 of the Constitution, which all deal with transitional financial matters at the time of federation.
- We could probably do without ss 101-104 unless we found a new role for the Inter-State Commission and were prepared to re-establish it.
- We probably don't need s 113 about 'intoxicating liquids', which was included to permit the States to impose 'prohibition' on alcohol within the States.

The point is that the Constitution was written at a different time, when racism was prevalent, convicts were being transported by other nations into the Pacific, the main forms of public transportation were trains and river-boats, the prohibition of alcohol was one of the major issues of the day and the British Government, through the Queen, could override any Australian laws. We live in a different world now.

Sir Earl Page, Leader of the Country Party, a former doctor and not the greatest radical this country has ever seen, said this about constitutional reform in 1961:

> In my profession, no doctor can live to-day if he is not using modern instruments, and yet we say, "Let the legislator have something which is 60 years old and which was brought into being before these modern instruments were known". It is too absurd for words.[1]

How much more absurd is it 115 years after the Constitution came into force? Australians need to understand that if they love and respect the Constitution and want it to stand for another hundred years, then they need to renovate and repair it. Petrifying it so that it becomes brittle and breaks does no favours to anyone. Scaremongering – that if you touch the Constitution it will self-destruct, is also unhelpful. If the people will not update the Constitution, then the judges do it for them through 'creative interpretation'. The mindset of rejecting all constitutional reform on an allegedly conservative ground that all change is bad, is a foolish one. It amounts to an abdication of the sovereign role of the people in constitutional reform and a shift of power to the judiciary, away from the public will.

Focus on Australian ownership of the Constitution

It seems to me that the focus of a republic should not be on the Queen or a new head of state, but upon reasserting and reinvigorating the sovereignty of the Australian people.

Back in 1999, the opponents to a republic better understood the Australian psyche by shifting the focus away from the concerns of the elites about Queens and Presidents to the concerns of the people and the objection to the imposition of a "politicians' republic". The 'No' case in 1999 very successfully pressed upon the button of political distrust. It did not seek at all to justify a system of hereditary monarchy. Instead it focused upon the fact that 'only politicians will be allowed to pick the President' and the 'Australian people will never get the chance to vote for the President'. It asked:

> 'Do we really want a republic that gives no power to the people in the appointment or dismissal of the President? Do we really want a republic that gives power solely to politicians?'

[1] CPD (HR) Vol 30, 13 April 1961, 816 (Sir Earl Page).

Ignoring the obvious point that the Australian people never get the chance to vote for who is King or Queen either, or indeed who is Governor-General, the argument seemed to resonate in the general community.

The 'No Case' also pressed the point that a politician may become President, stating: 'The proposed model allows a politician to resign from Parliament and his or her party one day and become President the very next day. Appointed by politicians, of course.'

I will discuss soon an alternative approach that would avoid the prospect of politicians being head of state but still allow public participation in the choice, but for present purposes I would like to suggest that there needs to be a major shift in the focus of the debate.

A better approach would be to concentrate on the Constitution itself and empowering the people (rather than politicians). The primary issue ought not be who gets to be head of state, but rather who owns and controls the Constitution.

Most people do not understand, and would be probably horrified to hear, that our Constitution is s 9 of a British Act of Parliament. We don't own it because it is not our legislation. In 1999, the republic referendum did not propose re-making the Constitution as an act of Australian sovereignty. It would have continued to be s 9 of a British Act of Parliament. The absurdity and incongruity of this was not seriously raised in the public debate at the time. Next time around, however, it should be the major issue in the public debate.

A republic campaign should focus on bringing the Constitution back home and enacting it as an act of the sovereign will of the people of Australia. The High Court talks of the political sovereignty of the people, but it is time to give this notion a firm constitutional foundation. The republic campaign could ask voters to become a founding father or a founding mother – to take their place in history as the people who made the Constitution and gave it force by their political will. This would be in contrast to our current Constitution which was given its force by the sovereignty of the British monarch and the Westminster Parliament over the colonies.

Participating in the enactment of our own Constitution would be something historic and something to be proud about. It would allow the voters to *make* history and be forever a part of the founding of the Australian republic. If the referendum succeeded, each voter could be given a copy of a birth certificate for the nation – something to keep and hand down to generations. In 100 years' time, the act of becoming a republic will seem as right and momentous to our successors as the achievement of federation appears to us today. Most importantly, the act of re-enacting the Constitution would give voters an active and participatory role, rather than a passive and powerless one.

The other advantage of re-enacting the Constitution as an act of sovereignty of the Australian people is that it would be fully inclusive – Indigenous Australians, women, immigrant Australians – even Western Australians (who were left out of the preamble in 1900) – would all participate in the re-making of the Constitution and be expressly identified as the sovereign source of power for it, unlike in 1901. There would be no more arguments about people being excluded or needing to be recognised. It would remedy the exclusion that marks, and perhaps even taints, the enactment of our Constitution.

An alternative model for choosing a head of state

While the narrative ought to be about the re-enactment of the Constitution, it will still be necessary to replace the Queen with a different head of state. The method of choosing the head of state remains one of the most contentious aspects of any republic proposal and is the key issue that needs to be resolved before a republic campaign can progress.

The reason why it has proved so difficult for republicans to come up with a model which has widespread support is that there are inherent contradictions in public attitudes towards the issue. On the one hand, people object to a politician being made head of state. On the other hand, they want to be involved by way of a direct election and don't want to leave it up to politicians to determine who is the head of state. This became plain in the success of the 'No' case in the 1999 campaign. The likely consequence of a direct election, however, is that the person elected *is a politician* – exposing the inherent contradiction. Moreover, those with a concern for how our political system operates tend to reject direct election for fear that it would give a mandate to a directly elected head of state and lead to conflict with the Prime Minister.

Despite these difficulties, there does appear to be a degree of consensus that we would like to have as our head of state the type of person that we have seen occupying the roles of Governor and Governor-General for some decades – people like Sir William Deane and Dame Marie Bashir, who have proved extremely popular in fulfilling the role. The question then is how do we continue to get the type of people we routinely have now as Governors and Governors-General, but in a new system with a level of popular involvement that does not give rise to the creation of a political mandate? That is the political dilemma faced by republicans.

There may be many ways of resolving this dilemma, but let me offer one to you today. This model is for the head of state to be directly elected by the people, but from amongst the Governors of the six States.

While this model would be unusual, it fits in quite nicely with the current Constitution and existing practice. On occasion, Governors-General, such as Quentin Bryce and Michael Jeffery, have been chosen from amongst State Governors. Why? Because they have already fulfilled the vice-regal role, they are experienced and trusted and one can anticipate how they will perform the role at the national level. State Governors also routinely fill in as Administrator of the Commonwealth when there is a vacancy in the office of Governor-General or the Governor-General is absent or incapacitated. It would therefore be impossible to find better qualified candidates.

State Governors have the appropriate experience and qualifications to fill the role and they understand its nature and limits. If a Governor did not wish to take on the burden of the office of Governor-General, he or she could exclude himself or herself from the election process. It might also be wise to have a qualification condition that a Governor must have served in the office of Governor for at least 12 months before he or she could participate in the national election. This would allow an assessment to be made about how the Governor has fulfilled the role, as this assessment would be the basis upon which the election would be held – not policies or promises as in a political election.

To reduce the costs and the political edge of a national election, the election for head of state could be held by postal vote and electronic voting over a two-week period. This would avoid the hype and hoopla that tends to attach to an election day. As the election would not be about

choosing a government and endorsing its policies, there would also be greater justification to hold it as a voluntary vote, rather than a compulsory one, if that was desired.

The idea is to have an election without campaigning, advertising or policies. This would be in keeping with the dignity of the office and the nature of the people who typically hold the office of State Governor, who would not ordinarily submit themselves for election and would regard campaigning as objectionable and inappropriate. Voters could be given a booklet with information about each eligible State Governor and could check the Governor's website for more information, such as speeches and functions.

The head of state would be chosen on the basis of who voters thought could best represent Australia to the world and to Australians themselves, acting as a unifying force with widespread support, rather than a political actor with divisive policies and affiliations. As all candidates would have already fulfilled such a role at the State level, voters would have evidence upon which they could make such an assessment. Governors who had behaved in a questionable or inappropriate way in their State role or who had attracted public controversy or were politically divisive (eg former politicians) would therefore be unlikely to be chosen.

Critically, as there would be no policies and no campaigning, the chosen head of state would have no mandate to rival that of the Prime Minister. This ought to assuage the legitimate concerns of those who oppose a direct election on the ground that it would give a mandate to the head of state, introducing an element of instability into our political system.

At the same time, however, it would put the final decision in the hands of the Australian people, rather than politicians. It would satisfy the fundamental democratic urge for the people to have a say – the ultimate say – in who represents them as a nation.

This proposal has the further advantage that the Prime Minister would have no say at all in determining who is the head of state. That is a vast improvement upon the current system that allows the Prime Minister to effectively choose the Governor-General. There is no chance of putting a mate or compliant person in the job, or using it as a reward for political services rendered or as a pay-off to a defeated rival. Further, the head of state is not in any way beholden to the Prime Minister. This is relevant, given the potential role the head of state might play in a constitutional crisis. Not only do the people choose the head of state, but the potential candidates are chosen by the States, rather than the Commonwealth Government.

It would be up to each State to decide how it choose its Governor and any qualifications for the office, but if it chose badly, the people would presumably look to the Governor of another State to be their head of state. This would pressure States to ensure that the type of people chosen to be Governor are those most likely to be esteemed and supported by the people.

Two further obvious advantages arise. First, eminent people from the smaller States would be in the mix as potential head of state, whereas under the current system political focus is often narrowed to those within the more populous States. Secondly, it would produce well-experienced heads of state who would have a great head-start upon anyone otherwise new to such an unfamiliar office.

From a constitutional point of view, it would fit in well with our existing system of government. This proposal has a federalist element, as it involves the States in choosing the potential candidates, as well as a populist element that arises through direct election. It therefore has

similarities to the way that we choose the Senate and change the Constitution, both of which involve direct voting by the people and special representation of the States, through equal representation of States in the Senate and approval by the people in a majority of States when it comes to a referendum.

Removal of the head of state

When it comes to removal of the head of state, it remains impractical to hold a direct election to do so, if for no other reason than the amount of time it would take to arrange an election and resolve what would most likely be an acute crisis. One way of dealing with it, however, would be to establish a 'Council of Governors', comprised of all State Governors, and provide that the Prime Minister would have to obtain the approval of the Council of Governors for the removal of the head of state, just as the Prime Minister must currently seek the approval of the Queen. The Council of Governors would be comprised of persons who are better qualified than most to assess whether the head of state has committed a serious breach of the standards of behaviour expected in the office or is no longer physically or mentally capable of fulfilling the role.

Under the current system, if the Prime Minister advises the Queen to remove a Governor-General, she does not do so immediately. She asks the Governor-General to respond to any allegations or complaints made about him or her, and although she ultimately acts upon ministerial advice, the process takes time. For example, the removal of the Governor of St Kitts took some months to achieve. Similarly, any attempt by the Prime Minister to remove the head of state under this proposed system would not take effect immediately. The Council of Governors would have to convene and be given the opportunity to ask questions and request further information (such as medical reports concerning a case of incapacity), just as the Queen may do today. It would not be possible for the Prime Minister to dismiss the head of state with immediate effect. This would counter the 1999 claim in the 'No case' that the head of state would be the puppet of the Prime Minister and could be dismissed more easily than the Prime Minister's driver.

Further, if the head of state were dismissed (or died, or resigned early), then he or she would be replaced on a temporary basis by the most senior State Governor until such time as a fresh election was arranged. Unlike under the present system, there would be no opportunity for the Prime Minister to secure the appointment of a crony or compliant substitute. This lessens the incentive of a Prime Minister to seek to dismiss the head of state in a crisis, as the head of state's replacement might prove equally difficult if the Prime Minister was pushing the edges of constitutionality.

It could also be stipulated in the Constitution that if the head of state exercised the reserve power of dismissing the Prime Minister, this would also automatically vacate the head of state's office, but that he or she could stand in the fresh election for head of state, along with the other State Governors, allowing the people to give their verdict on the head of state's actions, just as they give their verdict on the actions of the Prime Minister in any consequential general election flowing from his or her dismissal. In the meantime, the most senior State Governor would act as head of state until the fresh election of the head of state was held. This would provide incentives for both the Prime Minister and the head of state not to take rash action, and would appropriately vest the ultimate decision in the people.

In my view, this would be an improvement on the current system, which is what we should be aiming for in any constitutional reform.

Conclusion

This is just one possible model. There are many others. Elements from it might be used to build other hybrids or add to different models.

We are not obliged to follow what other countries have done. We can and should make our own way in developing a model that best suits Australia's history and fits in with our current system of government.

The most important point I wish to make, however, is that we need to be thinking through and working on these issues now – well before decisions on the issue are being made. None of us controls the timing of the Queen's death or when the republic movement will achieve high levels of popularity again – but we can at least be prepared, with sound, carefully considered proposals upon which government can draw, to ensure that any change is one that benefits the country as a whole.