CAN THERE BE A PLEBISCITE ON THE ROAD TO AN AUSTRALIAN REPUBLIC?

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This paper offers what I hope is a pragmatic and unsentimental defence of our current Constitutional arrangements. My contribution here is motivated by a desire to protect our system of government from well-meaning constitutional vandals.

I INTRODUCTION

The *Constitution* was the product of careful consideration and compromise over 100 years ago. Every citizen entitled to vote had the opportunity during multiple referenda to approve every word of it and ultimately it received the approval of a majority of voters in all of the Australian states.

In this paper I use the terms 'plebiscite' and 'referendum'. Neither term is used in the *Constitution*. I use them as the terms are used generally in the community.

A referendum is the term usually used to describe the process for a change to the *Constitution* mandated by section 128 of the *Constitution*.

A plebiscite, by contrast, is a word used to describe the process for the government obtaining the views of the community, which is not burdened by the discipline or strictness as to detail of the process required by section 128. A plebiscite is a non-legally binding opinion poll usually on a straightforward issue like: (i) Which song from a small number of choices do you want as the national anthem? (ii) Do you agree with same sex marriage (yes or no)?

However, it is significant that to the ordinary member of the community a plebiscite and a referendum seem to be deceptively the same because they both involve a poll of the community by the government which is attended with some formality.

In this paper I wish to advance two essential propositions.

Firstly, far too much ink has been wasted talking about an almost completely ceremonial and for reasons that I will develop relatively weak player in political terms under the Constitution, namely Australia's Monarch.

Not enough has been said about our current almost uniquely Australian arrangements that all adult citizens entitled to vote must decide any Constitutional change. I argue that these arrangements make the people the true sovereign under the Australian Constitution and ultimately sovereign over the Monarch and any so-called Head of State.

It is a special majority of those people and not a group of elites who must agree to change the Constitution on issues including abolishing the Monarch, changing the role of the Governor General, Parliament or the Judiciary or any other rules around the institutions of government created under the Constitution.

Secondly, I will argue that a preliminary vote via a plebiscite on whether Australia should become a Republic is unconstitutional and a perversion of section 128 of the Constitution. A general vote on any contentious policy issue is inherently dangerous as Brexit has recently demonstrated when that plebiscite did not identify the key elements of any withdrawal from the European Union.

II THE NEW PROPOSAL FOR AUSTRALIA TO BECOME A REPUBLIC

A *The Proposed Process of a Plebiscite before a Referendum*

It is fair to say that the Scott Morrison's 'silent' Australians would rather talk about football than whether 'Will and Kate' should be the future King and Queen of Australia.

It is interesting to note that the major high profile proponents of an Australian Republic in the last 25 years, Paul Keating, Malcolm Turnbull and Peter Fitzsimons, are all men (and they are all men) more renowned for their considerable egos rather than their deep understanding of what makes the common man or woman tick. But to them must be joined one other of their ilk.

At a speech at the annual dinner of the Australian Republican Movement in 2017, the then Federal Leader of the Australian Labor Party, Bill Shorten, said that:

> [B]y the end of the first term [of a Shorten ALP Government], we will put a simple straightforward question to the people of Australia: Do you support an Australian Republic with an Australian Head of State? And if the yes vote prevails then we can move on in a second term to discussing how that Head of State is chosen.

It is a matter of record that there is never likely to be a Shorten Labor Government or at least certainly not at any time in the near future. But, unless demonstrated to be wrong in law, this two-staged process is likely to be the preferred *modus operandi* for contentious constitutional change in the future — thereby making this paper of a broader relevance to any future changes.

There are a few immediate things that come to mind when considering Mr Shorten's proposed question. First, there is no reference in the *Constitution* to a 'Head of State'. Secondly, this two-staged question process to the community is a procedure unknown to the *Constitution*. And thirdly, the question treats the concept of a 'Republic' as if it is a term of art with an obvious meaning, which it is not.

Mr Shorten's proposed process of constitutional change involving a plebiscite carefully hides the kind of Republic which is proposed. Surely on matters like this the devil is in the detail and the Australian people are entitled to know (before they answer any question of the kind posed by so called Republicans like Mr Shorten) what kind of a Republic is being proposed?

But before I go into those issues, I want to make a few things very clear.

B *Is a Republic Justified?*

In setting the tone for a consideration of section 128 of the *Constitution* I should disclose my prejudices on whether Australia should become a Republic. I am not a sentimental royalist. I consider myself to have a pragmatic interest in political and constitutional matters.

What is called a Republican system of government has in practise turned out to be more autocratic than a European style Constitutional monarchy.

The authority and power that somebody like Donald Trump has, is a direct result of the Republican system of government which operates in the United States of America. It involves at least in some respects an autocratic President.

Very few advocates for an Australian republic would also want a figure like Donald Trump to be the President of Australia. But a person like Mr Trump is more likely to be President under an Australian Republic than the personality type that is likely to be a Governor General under our current arrangements.

I think a head of government like a Prime Minister or Premier accountable to Parliament and their party is preferable to an independent President or Governor accountable to a legislature in only certain and defined ways. This is because whatever the ultimate model of a Republic, the President or Governor will think of themselves as more important than the Prime Minister or Premier. In turn, this will likely create the potential for institutional conflict between the head of the executive government and the head of government which means greater political instability and less freedom than we currently have.

But, rather than having a sensible discussion about whether a Republic is the best form of government for Australia, an Australian Republic has become a proxy for the argument to remove the English Monarch as Australia's Monarch. This is a mistake and if there were good reasons to replace the Monarch, we should find pragmatic Australian solutions rather than just following the American or Chinese models of Republican government.

There are two essential reasons usually given for justifying the abolition of the Australian Monarch.

The first reason often cited by Australian Republicans is that having the Queen of England as also the Queen of Australia is a confusing national embarrassment. So, the argument goes, our current arrangements create an Australian identity crisis. It is said that people around the world are apt to believe that Australia

is still a colony of England and that England still exercises dominion over Australia.

The second reason usually given to justify the change is that every Australian should be able to become the country's Head of State, as if to do so (rather than become the Prime Minister) is some ultimate aspiration in a person's life. This immediately sees the role of Australia's Head of State as a political or occupational aspiration rather than a benign ceremonial role. The Governor General is currently non-political and not a role for political aspiration as it is usually filled by retired Judges, former military figures and occasionally retired politicians.

Most Australians have little or no knowledge of our *Constitution*. That is not surprising as it is a fairly impenetrable legal document. But it does explain the naivety of even educated people who advocate for an Australian Republic. The notion that people from other parts of the planet sit around considering who may or may not be the Australian Head of State is quite absurd.

If people around the world in fact have a mistaken view as to our constitutional arrangements it is curious that such people do not appear to say the same about Canada or New Zealand — there is no significant republican movement to remove the Queen in those two countries. Furthermore, if people in other countries or indeed Australia have the view that Australia is subordinate to the English Crown, it is a view that is entirely wrong in constitutional law and ill informed.

Why should our carefully crafted constitutional arrangements, which took decades of compromises to draft and multiple referenda to the Colonial citizenry to approve, be changed because of Australian fears about the ignorant views of people from other countries?

C *The Comparative Superiority of Constitutional Monarchies*

On my analysis, of the 193 member nations[1] of the United Nations, about 43 of those nations (22%) have constitutional monarchies and about 90 (46%) call themselves Republics. The rest are something else — probably some other form of totalitarian government of one kind or another.

Separately, the independent *Freedom House* ranks countries on their adherence to the Universal Declaration on Human Rights. In its 2019 'Freedom in the World' Report, *Freedom House* ranked the top ten most free countries in the world as Norway, Sweden, Finland, Canada, Netherlands, Luxenberg, New Zealand, Australia, Uruguay and Denmark.[2] None of these countries are a single party or totalitarian state.

Of the top ten free countries, only 2 (Finland and Uruguay) are Republics and the rest are all constitutional monarchies. These results are out of kilter with the proportion of these types of constitutions in the world as a whole.

But of the top ten free countries in the world, according to *Freedom House* in its 2019 report, 8 out of 10, or nearly 4 times the United Nations average, are constitutional monarchies.

Queen Elizabeth II is the monarch of three out of the top ten free countries — Australia, Canada and New Zealand as well as being Queen of the United Kingdom of England, Scotland, Wales and Northern Ireland which ranks highly but is not in the top ten (the United Kingdom may enter the top ten free countries if it ever manages to leave the European Union).

This basic but revealing analysis suggests that a constitutional monarchy is more beneficial to the freedom of its citizens than a Republic and is a very desirable form of constitutional government.

Such an analysis is completely devoid of any sentimental affection for the British Monarchy, Queen Elizabeth II or celebrity worship of Will, Kate, Harry, Meghan or any of their children and ignores their capacity to sell magazines.

Apart from the undeniably comparatively free country that Australia is and the risks of tampering with its constitutional arrangements, since 1965 the Governor General has been exclusively an Australian citizen and has performed most of the ceremonial and constitutional roles of the Crown since then with their appointment being on the sole advice of the Australian Prime Minister.

There is some confusion about whether the Queen or the Governor General is the Australian Head of State. As I have already said, the Head of State is not a term which is used in the Australian Constitution. Malcolm Turnbull and other prominent republicans have frequently used the term 'Head of State' to refer to the Governor General.[3]

If the desires of the Australian republicans can be satisfied by having an Australian Head of State, all that is required are simple constitutional changes making it clear that the Governor General is our Head of State and formalising the current practice that the Governor General must be a citizen of Australia.

As a Country which enjoys consensus and does not like conflict, why doesn't Peter Fitzsimons and his followers embrace this as a way forward? We can have an Australian Head of State and retain the Queen at the same time under this model.

Perhaps this should be suggested by the defenders of the current political balance in the *Constitution* as the best way to neutralise the possibility of Australia having a president and worse still, one that is elected. Changes to create an Australian President would seriously alter the mix of power in our

Constitution away from the people via their elected parliamentary representatives.

When we speak about Parliamentary sovereignty, we refer to the Parliament as the ultimate law-making body in our nation. Using the term 'sovereign' consistently must mean that the Australian people are the Sovereign under the Australian Constitution because as I will now examine it is the people through section 128 who must approve any change to the *Constitution*, including the institutions of the Crown, the Parliament and the Chapter III Courts created under the *Constitution*. The Australian Republicans never do but should acknowledge that Queen Elizabeth II holds her constitutional position only at the pleasure of a majority of the Australian people in a majority of its States.

III THE PEOPLE AS THE ULTIMATE SOVEREIGN UNDER THE AUSTRALIAN CONSTITUTION

A *The Terms of Section 128*

Section 128 of the *Constitution* gives ultimate power to the people of Australia and is in the following terms:

> This Constitution shall not be altered except in the following manner:
>
> The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.
>
> But if either House passes any such proposed law by an absolute majority, and the other House rejects or

fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any

> manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.
>
> In this section, Territory means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

B *Why was this Method of Constitutional Change Chosen?*

Section 128 was quite revolutionary as it allowed the *Constitution* to be changed without any reference to the United Kingdom Parliament.[4] This contrasts with, for example, the position in Canada which until 1982 had to request the Imperial Parliament for changes to the British North America Act.

In its current form, section 128 was the outcome of three different drafts which came into existence prior to 1901.[5] It is quite clear from the Constitutional Debates that section 128 was designed to make constitutional change difficult and not subject to the momentary sway of demagogues, that any changes had to be approved by the people who were also the approvers of the original version of the *Constitution* finalised in 1900, and that there was to be protection of the concept of Federalism through the extra requirement of approval by a majority of states.[6]

These objectives have been achieved. In the 118 years since Federation, only eight of the 44 proposed changes to the *Constitution* have been passed.

It is significant that the provision as drafted accepted the Swiss model of direct participation in constitutional change and rejected the more elite American model.

The framers of the Australian Constitution were significantly motivated by the desire to have the people own and decide any changes to the foundational document.

C *The Uniqueness of Section 128*

Most of our constitutional peers do not give the people, by a direct vote, oversight of proposed changes to their Constitution.

England does not have a written constitutional document like Australia. In England, constitutional changes can be made wholly by legislation passing both houses of Parliament.

In the United States, under Article V of its Constitution, there are two methods specified to change their Constitution. The only method that has ever been used is by the Amendment being ratified by two thirds of the House of Representatives and the Senate and then three quarters of the State Legislatures then also affirming the proposed Amendment. The other method, which has never been used, is for the Amendment to be agreed by two thirds of the Legislatures of the States calling a Convention for proposing the Amendment before it being also passed by three quarters of the State Legislatures affirming the proposed Amendment.

As I have already said, the Canadian Constitution was changed as late as 1982 in whole by the UK Parliament. The method for alteration since 1982 has been for a change to be approved by the Senate and House of Commons and at least two thirds of the Parliaments of the Provinces who have in total at least 50% of the total population contained within the consenting Provincial Parliaments.

In the case of England, the USA and Canada, constitutional change may be performed without any consultation with the people via a referendum, plebiscite or otherwise.

The New Zealand Constitution may also be changed by ordinary acts of Parliament (subject, I assume, to those changes being consistent with the Treaty of Waitangi) alone except section 17 of the Constitution. Section 17 of the New Zealand Constitution provides for a fixed three-year term of Parliament. By reason of the *Electoral Act 1993* (NZ), an ordinary Act of the New Zealand Parliament, section 17 may only be changed through a referendum agreed to by 75% of those who have voted.

Most nations of the world are also without any referendum requirement to approve constitutional change. There are a limited number of constitutions in the world which are required to be changed by referenda like Australia. However, voting in those countries is not compulsory like the referenda required under our *Constitution*.[7] Australia should therefore be considered quite unique in the world with regard to the democratic method required for constitutional change.[8]

This analysis of section 128 and comparison with other constitutions demonstrates the uniquely important role in theory and in practice which is exercised by the people in our *Constitution* including the power of the people over the Governor General and Monarch.

IV DEPARTING FROM THE PROCEDURE IN SECTION 128?

The High Court has never had to decide a case which has directly involved a question as to the correct method of performing a vote of the people under section 128 of the *Constitution*, let alone whether a preliminary plebiscite as to a proposed change to the *Constitution* is lawful. The best we can do is interpret the words of section 128 and borrow some of the reasoning of the High Court on cases involving democratic theory.

The process prescribed by section 128 is strict. The introductory words of section 128 ('This Constitution shall not be altered except…') appear to be a clearly mandatory code.

In *Attorney General (WA) v Marquet*, Callinan J observed that: 'Section 128 of the Constitution of this country is itself an example of a provision requiring compliance with a strict process for its operation.'[9]

The words 'referendum' or 'plebiscite' are not included in section 128. The method of voting is prescribed in section 128 and the process does not include a preliminary plebiscite devoid of detail as to the method of enacting the proposed constitutional change.

Furthermore, section 128 requires the full detail of any constitutional amendment — 'the proposed law for the alteration' — to be put to the people. I rhetorically ask, therefore, to what end is a generalised plebiscite directed?

If we take the question proposed by Mr Shorten as an example, it sought to interrogate the citizenry about concepts such as whether they wanted a 'republic' and the person who should be the 'head of state', neither of which appears in our *Constitution*.

A Republic is not a term already used or defined by the *Constitution*. There are many forms of republic. As I have already noted the Republic of the United States of America is a vastly different system of government to the People's Republic of China. But the proposed question treats them as one and the same.

As such the proposal to have a plebiscite on an Australian Republic and its head of state is a tricky way of avoiding the Constitutional strictures of section 128.

I argue that to do so is not only tricky but unlawful. I call in aid the joint judgment of the entire High Court in *Lange v Australian Broadcasting Corporation* which in the context of a defamation case said that:[10]

> Section 128, by directly involving electors in the State and in certain Territories in the process for amendment of the Constitution, necessarily implies a *limitation* on legislative and executive power *to deny* the electors access to information that might be relevant to the vote they cast in a referendum to amend the Constitution. (emphasis added)

The plebiscite proposed by Mr Shorten would withhold information as to the Republican model upon which their decision should be based. It can be thus seen as a tool to mislead and deceive the public by deflecting attention away from the detail of what is actually proposed as required in the later constitutionally mandated vote required under section 128.

At the later stage when there is a section 128 poll of the people and the detail is provided, the people will be excused for thinking that they have already answered and decided the question.

The two staged process is exposed as a tactic to achieve an end rather than a means of illuminating the issue at hand. What other justification remains for this process?

Section 128 was intended, as some of the framers said, to replicate the process which led to the creation of the *Constitution*. Measured against that criteria the plebiscite proposal also fails. Prior to 1901, the citizens of each colony were not asked in abstract, did they want a Commonwealth of Australia. Instead, the full proposed *Constitution* for the new nation was exposed and made public prior to the question being put to the people, so that they knew the detail of the whole

constitution for any Commonwealth of Australia that they were agreeing to and could debate its strengths and weaknesses. For any future Australian Republic, the same should apply and the proposed republican plebiscite will not do that.

For these reasons I argue that it is not constitutionally valid to put a general proposition for constitutional change on a topic to a plebiscite in advance of a referendum required by section 128.

In my view the High Court should upon a challenge, injunct any plebiscite anticipating a Constitutional change from proceeding and require only the manner and form of section 128 of the *Constitution* to be followed, with no preliminary or fake plebiscite to be allowed before it.

The integrity of our constitution should always be preserved and given the uniquely Australian requirement of a compulsory direct ballot under section 128, the integrity of that process should be protected by the High Court.

V CONCLUSION

The Australian Constitution is a bespoke document, deliberately framed with variations from the other constitutions then existing in the world. For example, its combination of the American federal system with an English parliamentary style of government has led the Australia constitution to be called a 'Washminster' system of government.

At its core through section 128 of the constitution is the ideal that the citizens of our nation must approve any constitutional change.

This is both radical and important. It requires information as to the proposed amendment to be given to the people under the constitutional provision allowing change.

The introduction of an office like the American President into the *Constitution* has in my view weak justification but is a change that will involve a substantial departure from the Washminster Australian constitutional model.

To achieve such a radical plan through a process which includes a plebiscite that glosses over the detail of the radical nature of the Constitutional amendment, is both apt to mislead and is also outside of the process prescribed by the *Constitution*.

It is regrettable that a major Australian political party would have supported such a tricky method of achieving Constitutional change. It should be roundly denounced. A constitutional mutation of process of this kind should never be allowed to be undertaken.

Endnotes

1 United Nations, *Member States* (Web Page, August 2019) <https://www.un.org/en/member-states>.

2 Freedom House, *Freedom in the World 2019* (August 2019) <https://freedomhouse.org/report/freedom-world>.

3 Tony Abbott, 'Problems with a Plebiscite for a Republic' (Conference Paper, The Samuel Griffith Society, 4 August 2018).

4 *Attorney General v The Colonial Sugar Refining Company Ltd* (1914) AC 237 at 256. See also *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 236-7 (per Murphy J).

5 Arthur Canaway, 'The Evolution of Section 128 of the Commonwealth Constitution' (1940) 14 *Australian Law Journal* 274.

6 Harry Hobbs and Andrew Trotter, 'The Constitutional Conventions and Constitutional Change: Making Sense of Multiple Intentions' (2017) 38 *Adelaide Law Review* 49.

7 *Referendum (Machinery Provisions) Act 1984* (Cth) ss 4, 45. A question not argued in this paper is whether as section 128 of the *Constitution* allows the referendum vote has to be compulsory. If section 128 is a code, would Parliament derive a power elsewhere under the *Constitution* to so specify by ordinary legislation that it is compulsory?

8 Turkey and Bolivia arguably have compulsory constitutional referenda also but in practice these are not the subject of the high voter turnout in Australia. Augmenting the compulsory method of direct democratic constitutional change in Australia, is the country's historically high relative voter turnout.

In Australia about 92% of those registered voted in the 2016 Federal election and although official figures for the 2019 election have not yet been published about 91% are thought to have voted notwithstanding the large number of newly registered electors (especially amongst the young) because of the Gay marriage plebiscite. About 80% of those eligible to vote had their say in the non-compulsory Gay marriage plebiscite. Only about 48% of eligible voters cast a ballot in the 2018 USA mid-term Congressional elections. This was down from the already low 60% at the 2016 Presidential and Congressional elections. In the United Kingdom, only 66% of voters cast a ballot in the 2015 general election and a slightly higher 69% at the 2017 general election. The Brexit ballot between them, by contrast, secured a slightly higher 72% of eligible voters. Of the eligible voters, 79% participated in the 2017 New Zealand election which elected the minority government now led by Jacinta Ardern. The situation is similar in Canada. There was a 68.3% turnout out for the 19 October 2015 Canadian General Election.

These figures suggest a strong level of participation in Australian elections and referenda produced by a combination of compulsory voting and a political culture that now sees political participation via the ballot box as important.

9 *Attorney-General (WA) v Marquet* (2003) 217 CLR 629 at [268].

10 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.