THE PINK SLIP: REMOVING THE PRESIDENT

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The dismissal of the Whitlam government in November 1975 by Governor-General Kerr has shaped the debate over the nature of a republican head of state in many ways. One of the more perverse has been to generate a disproportionate concern with the way in which the tenure of a Presidential head of state could be terminated. If Whitlam had known in advance of the Governor-General's course of action, Whitlam might have been able to terminate Kerr's commission before Kerr dismissed him. This concern with the circumstances in which the offices of head of state and head of government might be cut short — amounting at times to an obsession — has directly resulted from the resolve of all Prime Ministers after 1975 not to suffer the same fate as Whitlam. Until debate over the republic, changing the constitutional rules in this area was seen to be too difficult and politically contentious. Hence, stability was achieved by selecting Governors-General of known phlegmatic and constitutionally unadventurous disposition and monitoring their behaviour closely.

The issue of the republic has raised the issue of terminating the tenure of the head of state and head of government in starker form. If the powers of the head of state were to remain unchanged any increase in the security of tenure of the office would reduce the ability of a Prime Minister to dispatch a President who threatened to act without or against advice of the government of the day. Worse than this, any increase in the popular legitimacy of the head of state, whether through parliamentary choice or popular election, might increase the chance of a Presidential head of state acting on his or her own initiative in circumstances where the President disagreed with the Prime Minister.

These fears explain the extensive treatment the Republican Advisory Committee[1] has given to the issue of the removal of the head of state. The Committee's recommendation — accepted in principle by Prime

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1 Australia. Republic Advisory Committee. *An Australian Republic: The Options*. Canberra: Australian Government Publishing Service, 1993.

Minister Keating[2] — was that the removal of the President should be by the same process as the President's appointment: on the motion of two-thirds of both houses of the Commonwealth Parliament. This may appear an eminently reasonable solution but it greatly underestimated the fears of Prime Ministers and opposition leaders. When the time came to put a scheme for a republican head of state to the people at a constitutional referendum, the power of the Prime Minister to remove the head of state had been maintained and the ease of administering the blow had been greatly simplified. This characteristic of the republican proposal was seen as one of its major flaws by those who argued against it at the referendum.[3]

AUSTRALIAN EXCEPTIONALISM

An assessment of the likelihood of arbitrary action by an Australian Governor-General as head of state would reveal a very low risk. It has only happened once in the hundred years of the Commonwealth's existence and even on that occasion the outcome was an election whose result could be seen as endorsing the Governor-General's actions. No Governor-General has been removed for manifest improper conduct; although, given the secrecy of the appointment and removal process, there may have been occasions when the term of office of a Governor-General has been shortened. There is good reason for specifying the procedures for removing the head of state, but there is no inherent reason why they should have the importance which they have acquired in debates about the constitutional design of Australia.

The explanation for this heightened concern can be found in two characteristics of Australia's constitutional structure: the almost complete lack of specification of the constitutional rules governing the exercise of executive power, and an unstable mix of power and legitimacy in the office of Governor-General and its relations with the head of government.

The first of these is easy to demonstrate. The Commonwealth Constitution sets out a structure of executive power under which the Governor-General has very extensive authority in every sphere of government activity, including critical areas in which the Governor-General can act without advice. No mention is made of the head of

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2 Keating, P. J. *An Australian Republic: The Way Forward*. Canberra: Australian Government Publishing Service, 1995.

3 See, for example, the issues canvassed in 'Argument against the proposed law to alter the Constitution to establish Australia as a republic' contained in Australia. Australian Electoral Commission. *Referendum '99: Your Official Referendum Pamphlet*. Canberra: Australian Electoral Commission, 1999; *Yes/No Referendum 99: Your Official Referendum Pamphlet*. Canberra: 1999 Government Publishing Service, 1993.

government, the cabinet or the rules under which executive offices and institutions are to be made accountable to parliament or to the people. The term of office of the Governor-General is not specified except in terms of 'her majesty's pleasure'.[4] Without specified rules, there is room for disagreement about appropriate action, as the debate over constitutional conventions demonstrates. Whitlam's view on what was constitutionally appropriate was clearly different from Kerr's view. The invisibility of the Prime Minister's office and absence of constitutional rules setting out executive accountability to parliament meant that Kerr's use of the constitutionally specified arbitrary power to dismiss the Prime Minister[5] was the version of the rules that prevailed. In addition, the power of the Governor-General to dismiss a Prime Minister at will, coupled with the ability of a Prime Minister to trigger the process by which a Governor-General is removed, have the potential to generate great uncertainty: a race to the escritoire in circumstances of high tension.[6] Lack of specificity about these rules is a further example of the corrosive and potentially explosive effect of constitutional silence on lines of accountability.

The second characteristic is also related to the democratisation of executive power. The founders of the United States of America chose to make executive power accountable by limiting its exercise through constitutional specification, the separation of powers and a range of checks on unilateral executive action. The President, as both head of state and head of government, has a fixed term of office and is dependent on popular election through an electoral college. Removal from office for high crimes and misdemeanours is through impeachment of the President. The lower house of the legislature acts as prosecutor and the upper house acts as judge; a procedure also applied for the removal of federal judges.

Most other democracies have chosen another route; that of maintaining a head of state separate from the head of government and focussing the procedures for democratic accountability on the head of government.[7] Under such a system, the head of state is relatively powerless and acts to personify the state on formal occasions and to symbolize the continuity of the state when governments change. Such a head of state may also have emergency powers, but these powers are not within the normal scope of executive activity.

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4 *The Commonwealth of Australia Constitution Act 1901* (Cwth) s2.

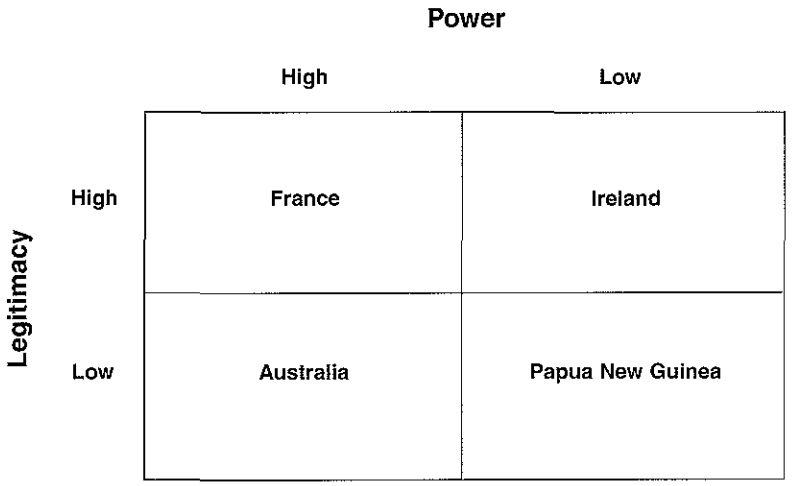
5 *The Commonwealth of Australia Constitution Act 1901* (Cwth) s64.

6 For an excellent study on the way in which the tensions between Kerr and Whitlam developed see Kelly P. *November 1975: The Inside Story of Australia's Greatest Political Crisis*. Sydney: Allen and Unwin, 1995.

7 Lijphart A. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. New Haven: Yale University Press, 1999, ch 7.

Australia's parliamentary democracy is clearly within the second camp, but Australia's Governor-General, as head of state, has anomalous characteristics. The relations between the head of state and head of government are affected by the relative powers of each and the legitimacy of both offices. Although there are several sources of legitimacy, in this context it refers to the degree of popular involvement in the choice of the office. As is shown in Figure 1 below, these characteristics give the head of state a matrix of four possible combinations of power and legitimacy: substantial power and high legitimacy (for example the French President), few powers and low legitimacy (for example the Governor-General of Papua New Guinea), few powers and high legitimacy (for example the Irish President)[8], and substantial powers and low legitimacy (for example the Australian Governor-General).

Figure 1 A matrix of power and legitimacy showing the relative position of the heads of state in four democracies



The combination of substantial constitutional power and low legitimacy of the Australian Governor-General means that if there is a dispute between the head of state and head of government the issue will become a constitutional one and threaten the stability of the system as a whole. Such a situation is greatly exacerbated by the lack of constitutional specification of the actual operation of executive power

8 The Irish comparison is a useful one for Australia; see Australia Republic Advisory Committee *An Australian Republic The Options* Vol 2, The Appendices Canberra: Australian Government Publishing Service, 1993, appendix 4; and note Ward A J The Irish Constitution and the Political Crisis of 1989 (1990) 43 *Parliamentary Affairs* 366

and the rules for terminating executive offices. For France and Ireland such disputes are likely to be political rather than constitutional. This is not to say they are unimportant, but they will be in the political rather than the constitutional realm in the sense that they will turn on debates over policy and influence and will not threaten the basic principles of the working of the Constitution. This is true even in France where the relationship between an executive President and the Prime Minister has evolved considerably since the creation of the Fifth Republic.[9] In Papua New Guinea the office of Governor-General is constrained in its ability to initiate executive action.[10] The office is so clearly a cipher, representing the political executive, that there is little scope for a clash between the Governor-General and Prime Minister, except in terms of publicly expressed differences of political opinion.

All this is testament to the fact that Australia's current constitutional arrangements for describing and constraining executive power are manifestly unsatisfactory and should not be the basis for the design of a Presidential head of state. It is also clear that the removal of the head of state is not something that can be separated from the rest of the constitutional structure. Australia's concern with the tenure of the head of state and head of government is an artifact of weaknesses in other parts of the Australian constitutional structure.

Selecting and Removing the Head of State

Given Australia's recent constitutional history, we must assume that the issue of the removal of the head of state, other than by the expiry of the President's term of office, will be a major focus in any new scheme for a republican head of state. It is also assumed that three issues will have to be dealt with in any future debate about a Presidential head of state for Australia. The first will be a discussion on what is expected of a head of state and the appropriate powers for the office. The second will be an examination of the relationship between the head of state and the other organs of executive, legislative and judicial power. Finally, there will need to be a discussion on the extent of popular involvement in the choice of a President and the form this involvement is to take. In the light of the previous debate on an Australian republic these are big assumptions, but the design of the rules to remove a head of state requires these issues to

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9 Elgie, R. and Machin, H. 'France: the Limits to Prime-ministerial Government in a Semi-Presidential System' (1991) 14 *West European Politics* 62; Machin, H. 'Political Leadership' IN Hall, P.A., Hayward, J. and Machin, H., (eds) *Developments in French Politics*. Revised ed. London: Macmillan, 1994; West, A., Desdevises, Y., Fenet, A. and others. *The French Legal System*. 2nd ed. London: Butterworths, 1998.

10 Brunton, B.D. and Colquhoun-Kerr, D. *The Annotated Constitution of Papua New Guinea*. Port Moresby: University of Papua New Guinea Press, 1984.

be faced. If the removal of the head of state is to be seen as a legitimate exercise of governmental power, the actors involved in the process must be clearly specified together with a recognized set of procedures which are consistent with the ethos of the rest of the Constitution.

There is a reciprocal relationship between the mode of selecting a Presidential head of state and the process of removal. A republican form of government based on representative democracy is not consistent with an appointed head of state. Significant popular involvement, even if indirect, is required to give the office sufficient legitimacy to perform its representative function. This was recognised by the fig leaf of parliamentary involvement in the endorsement of executive selection of the President in the republican referendum proposal of 1999.[11]

There are stronger reasons why the opportunity for arbitrary removal of the head of state by the Prime Minister is even less compatible with constitutional democracy. Removal from such a high office should follow a process of open adjudication and not be the result of furtive manoeuvrings. Further, if removal of the head of state is required in politically contentious circumstances it is highly likely that there is a difference of opinion between the President and the Prime Minister. The oldest principle of justice is that one should not be a judge in one's own case. To give the Prime Minister a significant role in the process of removing the head of state is a clear breach of this rule. Some suitable tribunal outside the control of the executive must be involved in deciding whether the President should be removed. Moreover, in turbulent times the head of state may be the last resort in defending constitutional processes, and to permit the head of government to dispatch the head of state may be to invite ill considered action by the political executive.

This means that the current Australian model of appointment of the head of state (that is, for an unspecified term on the recommendation of the Prime Minister) and removal (that is, on Prime Ministerial initiative) is not acceptable for a republic. Selection of a republican head of state needs to be by some process of direct popular election or by an indirect election for a fixed term. If the election is indirect the head of state needs to be selected by the national legislature or some Electoral College or convention composed of members of the national legislature and members of state legislatures. Germany and Italy use this indirect method[12] and it provides a surrogate form of popular endorsement. The combination of a specified term (with or without

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11 Constitution Alteration (Establishment of Republic) Bill (Cwth) 1999 modified s 60 of the Constitution.

12 The German Constitution 1949 Art 54; The Italian Constitution 1948 Title II Art 83.

the option of a second and subsequent terms) and popular endorsement defines the office and gives it its political legitimacy and authority.

Direct or indirect election also means that there is an automatic termination of the head of state's office. This, by itself, may defuse the need for removal of a President who is behaving inappropriately: the government of the day can simply wait until a President's term expires. Popular endorsement entails the possibility of the withdrawal of endorsement, and a head of state who loses public support loses the moral authority and legitimacy to have a significant effect on the political process. However, there may still be hard cases where there is a need to remove the President because of incapacity or the commission of acts which are inconsistent with holding the office of head of state. It is the second of these two situations that is the more pressing concern for constitutional design.

Options for Removing the Head of State

When a republican head of state needs to be removed before the expiry of the President's term of office the common solution for this removal involves the legislature acting either alone or in concert with judicial or quasi-judicial procedures. The range of procedures involving the legislature can be put into five categories and a sixth category is added giving non-parliamentary procedures.

1. Reverse appointment

If the head of state has been chosen by a vote of the legislature initiated by members of the legislature or the executive, removal can be by repeating the process but with a motion to remove the President. Such a procedure was suggested by the RAC.[13] This process has the advantage of simplicity but it can leave an element of arbitrariness in the initiation of the removal procedure. Nominating a candidate for selection to an office is a less serious process than initiating the removal of the holder of an office for reasons of serious misbehaviour. Such a procedure is used in Israel; however, the vote required to remove the President is three quarters of the Knesset on the initiative of twenty members of the Knesset compared with a majority vote on the initiative of ten members for selection of the President.[14]

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13 Australia Republic Advisory Committee *An Australian Republic: The Options*. Vol 1: The Report. Canberra: Australian Government Publishing Service, 1993; Australia Republic Advisory Committee *An Australian Republic: The Options*. Canberra: Australian Government Publishing Service, 1993, vol 1, 78-81.

14 Israel. *Basic Law: The President of the State* A (adopted June 1964 (Israel)) ss 6, 20.

2. Impeachment

Parliamentary impeachment is a procedure with a long history. Its essential characteristic is that, in a bicameral parliament, one house prosecutes a public officer for acting improperly and the other house acts as judge and jury. This was part of the repertoire of the British House of Commons and was adopted by the founders of the current United States Constitution for the removal of their President, other executive officers and members of the federal judiciary.[15] In this system the House of Representatives acts as prosecutor and the Senate determines the guilt by vote. The Irish Constitution has a similar provision[16]: however, either house may initiate a prosecution and the other house then investigates and makes a decision. Both Irish and U.S. impeachment processes require two-thirds support of the members at all stages.

Impeachment puts responsibility for removal of the head of state squarely with the legislature and is consistent with the current process of removal of superior court judges in Australia. For some, the dominant role of representatives of the people is seen as its greatest asset; however, for others the lack of a judicial component may be a concern.

3. Parliamentary referral to a constitutional court or special tribunal

This procedure can be seen as a form of impeachment supplemented by referral to a court. There is variation in the extent to which each of the houses of a bicameral parliament are involved. If both houses are involved, as in France, the resolution to impeach must have an absolute majority of both houses. If only one house is involved, as in Germany and Greece[17], the decision to impeach must have two-thirds support in the initiating house. The tribunal making the decision to remove the head of state may be an existing constitutional court, as in Germany, or a special tribunal containing both judges and other officials including members of the legislature, as in France.[18]

Such procedures reflect the seriousness of removing the President. The involvement of a range of actors and forums guarantees that there will be a broad consensus on the outcome.

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15 Berger, R. *Impeachment: The Constitutional Problems*. Cambridge: Harvard University Press, 1973; Gerhardt, M.J. *The Federal Impeachment Process: A Constitutional and Historical Analysis*. Princeton: Princeton University Press, 1996; Labovitz, J.R. *Presidential Impeachment*. New Haven: Yale University Press, 1978.

16 The Irish Constitution 1937, Art. 12(10).

17 The German Constitution 1949, Art. 61; The Greek Constitution 1975, Art. 86.

18 The Constitution of the Fifth Republic 1958, Arts. 67 and 68; and note West, A., Desdevises, Y., Fenet, A. and others. *The French Legal System*. 2nd ed. London: Butterworths, 1998, 149.

4. Parliamentary action to permit, or initiate, a criminal trial

For some systems, conviction by a court for an offence committed during the term of office is part of the removal procedure for the head of state. Parliamentary involvement precedes the trial so that a waiver of the President's immunity from prosecution can be passed by the legislature to permit the trial to take place, as in Austria[19], or to initiate a criminal trial, as in Portugal.[20] The assumption underpinning such procedures is that the only ground for removing a head of state is for criminal action. This may depend on the scope and definition of criminal activity; it can be an offence, for example, for a President to behave in ways that are inconsistent with holding Presidential office or are otherwise unconstitutional.[21] However, the problem remains of conduct which may be inconsistent with holding the office of head of state but which is not a crime.

5. Parliamentary initiation of a referendum

Iceland takes popular sovereignty seriously. The Icelandic Constitution provides for the removal of a President at a referendum that has been called by three quarters of the combined membership of both houses of the legislature.[22] This is consistent with the direct nature of the nominating procedure in Iceland which is open to electors directly rather than through parliamentary representatives. The advantage of this solution is that a representative institution acts as a filter before the process of removal can be initiated, coupled with the benefit of direct recourse to popular judgement on the actions of the President. Its disadvantage is that the reference to a referendum would appear unnecessary if three quarters of the legislature think that the President has a case to answer. If the referendum process acquits the President the Icelandic parliament is immediately dissolved.

6. Non-parliamentary procedures

There are two other sets of procedures for removing a President neither of which require action by the legislature or its members. The first of

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19 The Austrian Constitution 1929 Art 142.

20 The President of the Republic shall be answerable before the Supreme Court of Justice for offences committed in the performance of his or her duties. It is the duty of the Assembly of the Republic to initiate the proceedings on proposal of one-fifth that is supported by two-thirds, of the Deputies entitled to vote : The Portuguese Constitution 1997 s130.

21 In the US context, note the discussion over the changing criteria for inappropriate behaviour in Niall P. Legitimizing Impeachment (1999) 33 *Journal of American Studies* 343.

22 The Icelandic Constitution 1944 Art 11.

these is judicial. The Constitution could provide that a conviction for a serious criminal offence committed during the President's term of office would automatically remove the President from office. This could be supplemented with, or replaced by, constitutional provisions permitting either a citizen or another executive office to initiate specific constitutional offences to be tried before the High Court sitting as an impeachment tribunal.

The problem with leaving the dominant role in the removal process to the judiciary is the same problem with any form of judicial review of constitutional provisions: the decision may be seen as the legal justification of political preferences. Removal of the President for cause will inevitably be highly politicised. To that extent, it is appropriate that major political actors be formally involved in the process rather than the judiciary. Shielding the process of initiating the prosecution from malicious or politically motivated action would be complicated, and if the procedure permitted executive involvement there would also be the problem of conflict of interest as discussed above. Finally, in a system where judges are appointed by an elected President or chosen by parliament, there might be a question over the propriety of unelected officers removing elected ones.

The final category is at the other extreme: the use of the recall. The recall is a form of direct democracy available in several American states. It provides for a specified number of electors to sign a petition within a fixed period of time to require an appointed or elected official to resign or to stand for a special election before the end of his or her regular term of office.[23] This has all the advantages of direct participation but no influence from moderating representative institutions. As a sanction against public officials who stray a long way from what is politically acceptable the recall is commendable. However, the threshold for the number of signatures required can be high and this may reduce the effect of the recall as a practical restraint on improper action. In terms of its use to remove a President it could have a role in conjunction with other procedures in much the same way as the referendum is used in Iceland.

Only a few of these procedures for removing the head of state are mutually inconsistent; several can be provided for in the same constitution.[24] In 1988, the state of Arizona was in the unusual position of having its head of state — Governor Mecham — subject simultaneously to three procedures to remove him from the Governorship.[25] These were

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23 Walker, Geoffrey de Q. Initiative and Referendum: The People's Law. *CIS Policy Monograph no.10*, Sydney: Centre for Independent Studies, 1987.

24 For example, see The Austrian Constitution 1929.

25 McClain, P. "High Noon": The Recall and Impeachment of Evan Mecham. (1988) 21 *PS* 628.

the recall, removal from office for conviction on extortion charges and impeachment. He was impeached before the other two processes were complete, but a commentator noted that the existence of the recall process and its success in gaining signatures fortified the resolution of the legislature to impeach the Governor.[26]

A Procedure for Removing an Australian President?

This paper has argued that the Australian republican debate has been too concerned with the unlikely event of the need to remove a President before the expiry of the President's term of office. Such an eventuality should be provided for, but Australia's constitutional drama of 1975 and the resultant fears of subsequent Prime Ministers have made the removal of the President a major consideration in discussions over the shape of a republican head of state.

From the analysis above, it is clear that there are only two essential requirements for a removal procedure of an Australian President. These are that the procedures are fully described in the Constitution — both the actors and institutions involved and the forums in which the procedures take place — and that the process does not involve the head of government at any stage of the procedure. The first is simply a requirement for constitutional democracy, and the second reflects the fact that removing the head of state is an inappropriate task for another part of the executive. The job of removing a head of state for cause is a matter for the legislature, a constitutional tribunal, the judiciary, the electorate or some combination of these, but not the executive. Within these broad parameters, many of the options listed in this paper would work well in an Australian context.

The one that would best suit our traditions would be impeachment by parliament with the House of Representatives as prosecutor and the Senate as judge and jury, or as with the Irish example, either house initiating the process and the other house determining the issue. A similar procedure requiring a motion to be passed by both houses of parliament is already in place for the removal of judges and impeachment has a long history in the Anglo-American tradition of constitutionalism. It would confirm the central place of representative institutions in our system and would remove any suggestion of manipulation of the process by the executive.

Impeachment, as with the removal of judges, requires a preliminary assessment and setting out of the information on which the legislature

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26 McClain P. 'High Noon': The Recall and Impeachment of Evan Mecham (1988) 21 *PS* 628. McClain ibid.

may take action In the context of the removal of judges the Western Australian Commission on Government recommend that there should be a Parliamentary Commission that could be called upon by parliament to make such investigations and refer its findings of fact back to the parliament [27] Its members would comprise former superior court judges with dormant commissions to serve on the Commission Such a body could be specified in the Constitution to deal with cases involving federal superior court judges in addition to the President, and would remove the need for the creation of an ad hoc body or special prosecutor to carry out investigations The Commission would not limit the ability of either house from setting up its own procedures but would assist in the presentation of an agreed set of facts on which the parliament could act

The biggest hurdle is not the detail It is seeking acceptance of the principle that a Presidential head of state should have a fixed term of office that cannot be shortened by the Prime Minister As it is the Prime Minister who plays a critical role in any initiative for constitutional change, getting such a measure accepted will be no small task Yet, it is just possible that the incentive for acceptance might be the removal of the head of state's arbitrary power to dismiss a Prime Minister; a power that continues to bedevil any discussion of the reform of executive power and the move to an Australian republic

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27 Western Australia Commission on Government *Western Australia Commission on Government Report No 5* Perth: Commission on Government 1996 recommendation 259