
The Case for Adopting the American Model in an Australian Republic¹

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It appears from the outcome of the recent Constitutional Convention and the views of a majority of leading republicans, that the aim of the republican movement in Australia is to preserve the current constitutional system while replacing the monarch with a locally selected and largely ceremonial President. Although many republicans have serious reservations about the technically flawed model endorsed by the Convention, the republican movement as whole has turned its back on substantial constitutional reform as a means of progressing to the republican ideal and has opted for a form of cosmetic republicanism which leaves the constitution pretty much as it is. From the viewpoint of substantive republicanism, this outcome is deeply disappointing as it amounts to a missed opportunity for genuine republican reform in Australia.

In classical theory, a republic is a form of government designed to advance the public good (*res publica*). Public good in this sense did not mean the collective good in the modern socialist sense but the common good, as opposed to the good of the rulers or ruling classes. Thomas Paine remarked in the *Rights of Man*, that 'Republican Government is no other than government established and conducted for the interest of the public, as well individually as collectively'.² Some republicans also emphasised civic virtue, but the liberal republican tradition was to seek the advancement of the public good through means such as the rule of law, representative (as opposed to direct) democracy and checks on power by its dispersal both territorially and functionally. If the republican movement is serious about the republican ideal, it should look closely at the fundamentals of our constitution to consider ways in which the constitution could be more effective for the pursuit of the public good. In my view, the constitutional system, both at federal and state levels falls short of the republican ideal in a significant sense. In this paper I explain what I consider to be four major flaws of the current constitutional system and suggest ways of reform. In doing so, I propose that Australia should seriously consider adopting a modified version of the American constitutional model. It is not suggesting that such reform is politically feasible in the near term. While opinion polls consistently indicate that a majority of Australian people prefer to elect their President in a republic, there is no evidence that a majority supports a system where an elected President exercises actual executive power as opposed to the limited range of 'reserve' powers currently exercised by the Governor-General. There is virtually no support for this model from political parties. It is reasonable to assume that the current lack of public support for the American system may reflect, at least in part, the lack of public understanding of the nature and the detail of that system. The arguments made in this paper constitute a plea for informed discussion of this model and an attempt to provoke a debate concerning its suitability for qualified adoption in Australia as part of the republican agenda.

1 This is a revised version of a paper presented to the symposium on 'The Republic and the States' held by the TC Beirne School of Law, The University of Queensland, on June 11, 1998.

2 Thomas Paine, *Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution*, JM Dent & Sons, London & Toronto, 1906 at 174.

I hasten to clarify that this essay is not an argument against the kind of change proposed by the mainstream republican movement, namely, the retention of the existing system of government while transferring the monarchical functions exercised by the Governor-General to a President chosen by the Houses of Parliament. Rather, it is an argument for being more ambitious. In my view, the residual value of the constitutional monarchy is insufficient to justify the hereditary privileges it perpetuates. Given the fact that the Australian politicians and the public at this point of time wish to retain the existing system of modified Westminster democracy, the retention of the hereditary monarchy can be justified only if it is seen as an essential attribute of it. No one has claimed that it is. Elsewhere in the world, the model is seen to work, within its limits, with elected or appointed officials performing the functions of hereditary constitutional monarchs. The option produced by the Convention, imperfect as it is, is unlikely to seriously alter the constitutional status quo. It has the advantage of eliminating hereditary privilege.

However, it is hoped that this essay will demonstrate that the replacement of the hereditary monarchy by an official chosen by the Commonwealth Parliament should be regarded as the start, but not the end of the current constitutional reform movement in Australia.

In my view, the Australian constitutional scheme is flawed in four respects:

- (1) The system of responsible government which is central to the constitution fails to ensure that the executive is popularly elected. In other words there is no assurance under this system that the government of the day is elected to its term of office by a majority of the people.
- (2) The system makes Parliament subservient to the executive except in the uncommon situation where the government does not command a majority of the Lower House.
- (3) The system reduces the capacity of public opinion to have a decisive influence on specific legislative measures.
- (4) The system reduces the chances of the most able persons being chosen to perform executive functions.

I. The system does not ensure popular government

One of the most obvious and least talked about facts about the Australian constitutional system is that it can and does produce governments which are rejected by the majority of the people. It is almost as if there is a conspiracy of silence on this issue on the part of politicians and media commentators. In Australia, the executive government is formed by the leader of the party which has the confidence of the Lower House. After a parliamentary election, the leader of the party which is likely to command the support of a majority of Members in the Lower House is appointed as the Prime Minister and the Prime Minister chooses the ministry from within his own party ranks or from the ranks of coalition parties. Hence, the government is chosen or determined at parliamentary elections according to the number of seats won, not according to the number of votes gained. One does not have to be Einstein to work out that under the 'first past the post' single Member constituency system, a party could receive a minority of the popular votes and gain a majority of the seats in Parliament. What this means is that a party which lost the nationwide popular vote could end up supplying the executive government.

Before Tony Blair's election in 1997, the last British government to be elected by more than 50 per cent of votes was in 1935! In Australia, citizens are compelled by law to vote, but often elections produce governments rejected by a majority. This, in spite of compulsory preferential voting intended to ensure that the winning candidate in an electoral district is approved by more than 50 per cent of the voters in that district, where necessary, after counting their second and lower preferences. Mr Menzies in 1954 and 1961, Mr

MacMahon in 1969, and Mr Hawke in 1990 won government with a minority of the two party preferred vote. This happens all too often at State level. Three of the current State governments in Australia lack majority support.

It is also clear that a switch to proportional representation does not solve this problem. Indeed, it has the potential to make the executive government even less representative of the popular choice. While proportional representation makes a lot of sense with respect to the election of the members of the legislature, under the Westminster system of responsible government, it does not lead, necessarily, to majority government. In many European democracies which combine forms of responsible government with proportional representation, hardly ever has there been a government elected by a majority of the people. Tasmania, the only Australian State which has proportional representation in the Lower House, has a government which received very much less than fifty per cent of the popular vote.

Clearly, the problem is not with the electoral system but with the Westminster system of responsible government which entrusts executive power to the party which enjoys, for the time being, the express or tacit support of a majority of Members of Parliament. The distortion of the popular wish concerning who should rule the country is aggravated by the requirement of compulsory voting and the requirement of indicating preferences at federal elections. The compulsion to indicate preferences is particularly insidious. It forces many voters to grant preferences to parties they have no wish to support in order to validate their primary vote.

In contrast, a system which enables the public to directly elect an executive president by a preferential system of voting will ensure that the candidate who is most preferred by the electorate or, at any rate, the candidate who is least objectionable to the electorate is chosen as the head of government. It is true that the American system of presidential elections is capable of distorting the public choice owing to the absence of preferential voting and the intermediacy of the Electoral College. In the absence of preferential voting an election can produce a winner who may not be the most preferred or the least objectionable candidate. However, a system where the executive is directly elected on a preferential voting system or the French type 'run off ballot' system would produce a government preferred by a majority of the electorate, or least objectionable to the electorate every time.

II. The system makes Parliament subservient to the executive

The great virtue of the Westminster system is said to be its capacity to make the executive responsible to the elected House of Parliament. This responsibility is enforced by the convention which requires the Prime Minister, whose party is defeated on a confidence motion or on an appropriation bill, to tender the resignation of his government or to advise that Parliament be dissolved and new elections be held. The responsibility to Parliament is said to be reinforced by the ministers' duty to answer questions in Parliament relating to the conduct of their departments and their duty (observed mainly in the breach) of resigning when they are individually censured by Parliament.

Though this view of Westminster democracy was, perhaps, true of the English constitution during its classical era, it is no longer the case in England or anywhere else where the system is practised. Today, Parliament is subservient to the executive will except in the unusual instances when the government party does not have a majority in the Lower House. The reality now is that Parliament (or more accurately, the Lower House through which ministerial responsibility is supposed to be enforced) is confined to two functions. Firstly, after an election, it acts as an electoral college to pick the ministry and shadow ministry. Secondly, it provides two die hard and vociferous cheer squads for the government and opposition to liven the proceedings of the House. The great virtue of

Westminster democracy has become its fatal contradiction. How did this transformation occur?

Before the Reform Acts, the monarch was the executive both in name and in fact. Though Parliament was theoretically sovereign, the monarch was able to control it through ministers who used royal patronage to manipulate both the Members of Parliament and the electorate. Ministers held office during the king's pleasure, not Parliament's confidence. They were responsible to the king, not Parliament. All this was possible because the franchise was extremely limited and the electoral system was wholly corrupt as exemplified by the ill famous 'pocket boroughs' and the 'rotten boroughs'. The situation changed in the nineteenth century with the enactment of the Reform Acts of 1832, 1867 and 1884. These Acts extended the franchise, effected electoral reforms and established mass democracy, though women did not get their right to vote until well into this century. The extension of the franchise meant that it was much more difficult to manipulate the electorate. There were just too many voters to bribe! The reforms brought about a dramatic change in the nature of parliamentary democracy. The vestiges of ministerial responsibility to the king disappeared and ministers became fully responsible to Parliament and Parliament became accountable to the electorate. Politicians needed mass support to get elected to government and hence needed to promise people what they desired. It was more important to be popular among the voters than to be liked by the king. Hence, the ministers became independent of the Crown and replaced the monarch as the true executive.

The nineteenth century has been described as the classical period of the British constitution. Following the Great Reforms, it seems as though the electorate was supreme. The voters could count on their representatives to keep the government honest and to remove it when it misbehaved. But this situation could not last. While the monarch was the real executive, Parliament could chastise his ministry with impunity. Parliament could call ministers to account, impeach them or otherwise force them out of office without disruption to the administration of the realm. There was a real separation of powers between the executive monarch and the legislature and each balanced the other. In this sense, the classical British constitution resembled the current US constitution with the difference that the executive was chosen by heredity and not by the ballot. Indeed, one could say, that the fundamental feature of the classical constitution was entrenched for posterity in the written US constitution, even as it withered away in the unwritten constitutional tradition of Britain.

Once real executive power was transferred to the ministry and the convention was established that the ministry which lost the confidence of the Commons had to resign, Parliament for the most part, could not express its lack of confidence in the ministry without actually ending the government's life and that of the Parliament itself, as it would force a new general election for the Lower House.³

What occurred then was a classic case of Darwinian selection. The new reality meant that only political parties which could secure the unquestioning obedience of its parliamentary group could form an effective government. The party whip was born and the independent Member of Parliament became vestigial. Henceforth, intra-mural debate would be tolerated in the backrooms but not on the floor of the House where it mattered. It is one of the tremendous ironies of political history that the growth of Parliament's legal power to remove a government from office actually reduced its political power to hold a government to account. The institutional separation of the executive and legislative branches was obliterated and the executive regained its ascendancy over Parliament except

3 If an alternative government having the confidence of the Commons was available, the general election could be avoided.

in the unusual circumstances where no party secured a majority and the Prime Minister led a minority government.

Why did the electorate tolerate the subservience of its representatives to the will of government? Why did the people not insist on proper oversight of government? The reason is that it had no real choice. The system simply did not allow an undisciplined party to remain in power for any length of time, hence no party allowed its members any freedom in Parliament. The only alternatives to monolithic political parties were the independent candidates and they had no prospect of governing at all. As all the parties behaved in exactly the same way, the electorate had no real choice in this respect.

There was another reason for the electorate's impotence in enforcing parliamentary discipline on the government. After the Great Reforms, the electorate was clearly in a position to make demands which politicians could not ignore. Then something funny happened. Politicians discovered that they could turn the tables on the electorate by making offers which segments of the electorate could not ignore. They found a fertile marketplace where benefits and privileges could be traded for votes. Elections could be won through distributional coalition building, that is by putting together offers to a sufficiently large number of special interests. Politicians were helped in this enterprise by the absence of constitutional limits on parliamentary power. They were able to gather unto themselves vast powers with which they could create and dispense largesse to groups of voters, more often than not at the expense of other groups. As Professor Geoffrey Brennan notes, Parliament became 'a prize awarded to the winner of an electoral competition'.⁴ Brennan describes this view of parliamentary democracy as follows.

On this view, voters are rather like consumers in a marketplace; they desire policies from the government and they vote for those policy packages they prefer. Candidates or political parties are analogous to firms: they bid for custom by offering policies in competition with one another. In this way, electoral competition is analogous with market competition: politicians can be construed as offering alternative bids for office (like competitive tenders for a construction job) and the bid that is most preferred by the electorate is successful.⁵

There is much merit in Professor Brennan's description of the current state of Westminster democracy. He finds that Parliament today is 'just a piece of theatre' and the vote 'a pointless ritual',⁶ but argues that this theatre plays an important part in the bidding process of the political marketplace which constitutes the main game.⁷ Whether or not we put it as high as that, it seems reasonably clear that in the routine circumstances, Parliament today is very much the servant of the executive.

In contrast, where the executive is directly and separately elected by the people for a fixed term of office, the legislature is free to play an independent deliberative role. Since a vote against the government's policies does not threaten the life of the government or of the legislature, individual representatives act independently or in direct response to their constituency wishes.

III. The system reduces the capacity of public opinion to have a decisive influence on specific legislative measures

The most serious consequence of the subservience of Parliament to the executive is the incapacitation of the electorate to influence, directly and decisively, specific legislative

4 Brennan G, 'Australian Parliamentary Democracy: One Cheer for the Status Quo', (1995) 11(1) *Policy* 17 at 20. Professor Brennan's paper was earlier published in *Views on Parliamentary Democracy*, Papers on Parliament 22, Department of the Senate, Parliament House Canberra.

5 Note 4 at 20.

6 Note 4 at 17.

7 Note 4 at 20, 21–22.

measures. In the US model of separated powers, legislation proposed or favoured by the executive has no guarantee of approval by Congress. Even more importantly, Congress is able to pass legislation opposed by the President, although a special majority is required if the President chooses to veto the bill. In the Westminster model, for the most part, laws proposed by the executive pass and those opposed by the executive end up in the bin!

In Australia, the situation is mitigated somewhat by the existence of an elected Senate. The Senate succeeds from time to time in preventing the passage of laws proposed by the executive. However, this capacity should not be exaggerated. Owing to the nature of the system, Senators maintain party discipline in the Upper House. The executive will can be resisted only where the government does not have a majority in the Upper House and is unable to secure the support of minor parties. Even when opposition parties hold the majority of votes in the Senate, they are inhibited by Westminster convention from acting like the US Senate. Such a role is simply incompatible with the Westminster principles of responsibility to the Lower House. In any event, the Senate is powerless to enact any legislation which is opposed by the executive, for under this system, the Lower House remains necessarily under the control of the government.

Thus, under the Westminster system, accountability is enforced through the electoral process. The electorate votes for policy packages or comprehensive bids presented by political parties. These packages are designed strategically to appeal to a sufficient number of common and diverse interests which would deliver victory on the election night. Marginal constituencies become particularly important in this exercise. The theory is that the winner will be punished by the electorate at the next election, if it has failed to honour the promises contained in the package. There are two major problems with this theory.

Firstly, it overestimates the capacity of the electorate to monitor and pass judgment on a government's term of office in the context of a bargaining democracy. In implementing its program over a term of office, most governments would disappoint the expectations of some groups and fulfil those of others. Although the record in office is an important factor, a government may still win with the aid of a new or modified coalition of interests. Except when major errors or abuses are committed, elections are decided by the ongoing bidding process which allows parties to recoup lost support by new promises to the disaffected groups or to alternative groups. The accounting process is also undermined by the fact that a great deal of governmental activity cannot be monitored as it happens outside Parliament within bureaucratic structures which elude political and judicial scrutiny.

Secondly, this kind of accountability carries an unacceptably high prize. The 'Parliament as prize' model requires that we choose from among competing bids which constitute whole packages or programs to be pursued over several years. They contain things that we like and things that we don't like. We can only get the programs that we like by agreeing to many programs that we don't like. For example, a voter cannot say to a political party, I accept your tax policy, your privatisation policy and your tariff reduction policy, but I reject your media ownership policy and your immigration policy. Even if the voter says so, at the ballot box she cannot split her vote. If she takes one she also takes the other. It is not an unreasonable assumption that the decisive issue at the 1993 general election was the Coalition's proposed goods and services tax (GST). But, after the elections there were many fringe groups who claimed that Labor had mandates on a range of issues which, by themselves, would never have received majority support. Those groups cannot be blamed for making the claims nor the Labor Party for implementing them regardless of majority wishes. Our political system invites such claims and legitimises them.

It is true that in electing a Senator or Congressman, an American voter also cannot split her vote. She has to take her representative as she finds him, espousing some policies she likes and others she dislikes. However, the US voter is much better off, as her representative can be made to change his mind without endangering the lives of the executive and the legislature. Besides, the fact that a candidate for Congress is not

inextricably bound to a party policy package means that she can be far more responsive to her constituency in formulating her positions on individual issues. The flip side of this situation is that unlike in Westminster democracy, a US voter can punish an individual legislator for betrayal of a cause without punishing a government. The Australian voter cannot split her vote with respect to the executive and the legislature, because the executive belongs to the party that wins the legislature. The US voter can.

It is important to note this particular criticism of the Westminster system is not that it promotes the formation of political parties, but that it requires a degree of party discipline which destroys the principle of executive responsibility to Parliament. Political parties are a naturally selected phenomenon in any large democracy. Candidates who band together can offer voters more things than those who remain independent. So, there will always be political parties. In the US model, the degree of cohesion within political parties is dictated by voter sentiment. Obviously voters see advantages in their delegates being members of a powerful group. At the same time they would like their delegates to break ranks when they think that the group is making a wrong decision. Therefore, the American system tends towards optimality in party discipline as representatives constantly fine tune their performances between solidarity and independence. In contrast, Westminster democracy leaves no room for the evolution of an optimal party system.

IV. The system reduces talent in government

It would be tempting to accept the loss of the deliberative and supervisory capacities of Parliament if there was a return in the form of administrative excellence. Unfortunately, not only is there no such pay-off but the Westminster system is structurally handicapped from producing excellence in government. The system requires the great departments of government to be administered by ministers of state and for ministers of the state to be Members of Parliament. Undeniably, there are very able men and women in most Parliaments. However, Parliament by its very nature provides a very poor talent pool from which to select the administration of the state. Consider the following.

To begin with, for a Member of Parliament to get preselected by her party and then get elected at the poll, she must have a certain range of skills and attributes. However, they are not necessarily the skills and attributes which provide for excellence in administration. On the contrary, they may be impediments to good administration, which we associate with qualities like efficiency and fairness. Of those who get elected, only members of the government party are eligible for the ministry. Even from within this small group ministers are not necessarily chosen according to talent but according to a whole host of attributes such as seniority, factional support and loyalty to the leader. It is not uncommon in Australia, for a weak Prime Minister or Premier to keep a potential challenger in the obscurity of the backbench or a minor ministry. In the demographically smaller states of Australia, and in Queensland where there is only one chamber of Parliament, this means that the ministry must be drawn from an extremely small group of successful contestants at the election.

In contrast, under the US model, a directly elected executive President may choose the administration from a vast national pool of talent. Now, one may argue that administering a government department is very different to the management of a business. Ministers must not only make economic and managerial judgments, but also political judgments. This involves a balancing of interests of a kind which does not usually trouble business managers. However, it is easy to exaggerate this dimension. In practice, political judgment often translates into partisan strategy whereas, as governments all over the world are discovering, good economics and good management make good politics. In any case there is no reason to think that only incumbent Members of Parliament possess the political judgment needed in public administration.

The main theoretical reason for requiring ministers to be Members of Parliament concerns the need for individual and collective ministerial responsibility. In theory, ministers can be held accountable for their actions through questions and censure motions. The practice as we know is very different. A government which has a majority will use question time to its own partisan advantage. Censure motions have no chance of success in a House governed by party whips and dominated by a ruling party. The key to ministerial responsibility to Parliament is the capacity of Members to act independently of the executive. Unfortunately the Westminster system, as it has developed, leaves no room for such independence.

Westminster democracy is a magnificent achievement which marked the emergence of states from monarchic absolutism to democratic constitutionalism. The aim of this paper is not to belittle the historical contribution of this form of government but rather to show that like all institutions, its efficacy needs to be reassessed in the light of experience. The experience of the twentieth century shows that Westminster democracy no longer promotes its own ideal and that if we value this ideal, we must seriously consider alternative means for realising it.