

# Responsible Lawyers and the Republic Debate

*The Hon Richard E McGarvie AC*

## **Responsibility**

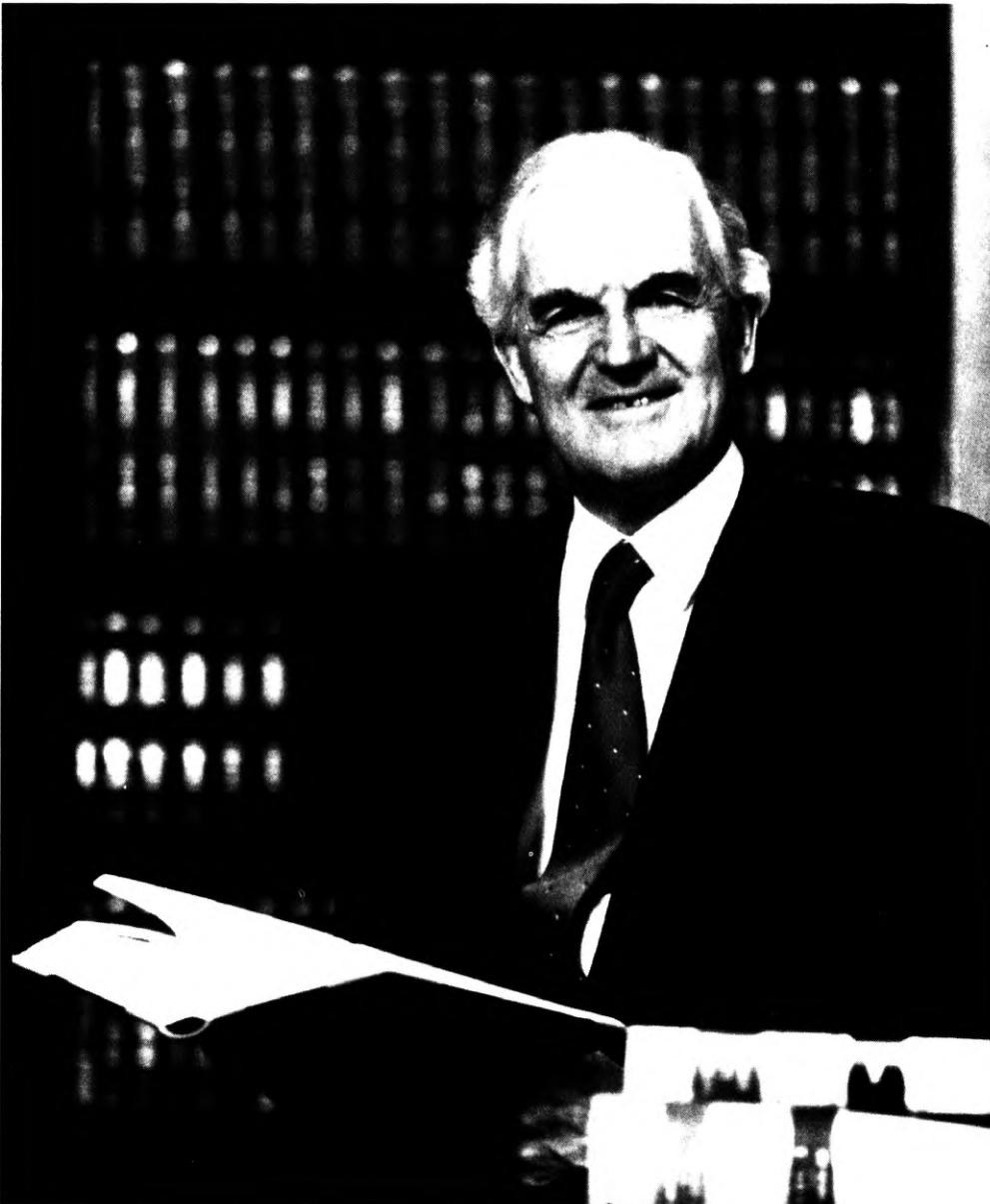
Our most priceless possession is one of the oldest, most stable and successful democracies in the world which Australians have built. It has been a large factor in attracting over the last fifty years excellent people from many countries who have contributed so much to the unique Australian culture of today.

Because democracy belongs to the people so does the responsibility for preserving it and making it work well. After some years of debate whether we should become a republic or

stay a monarchy a deprived community is hungering for the information resources that young lawyers could provide. They can only provide it if they are prepared to give the time and thought to qualifying themselves to do so. A legal education and the skills of practice are a good start but far from a sufficient qualification.

## **Three Questions**

The republic debate involves three questions; one easy, one hard and one technical.



*Former Governor of Victoria, The Hon Richard E McGarvie AC*

The easy question is whether as a matter of general preference you prefer a monarchy or a republic. I do not suggest that the answer is either unimportant or self-evident. One's feelings about history, the future, loyalties, aspirations and what is best for Australia have a large influence on one's answer. Most who have thought about it have at least a tentative preference. On this question neither lawyers nor former Governors have more expertise than others. I take no side on that question.

The second question, the hard one, is 'If we decided to become a republic, what form of head of state would continue and safeguard our democracy as well as the present system does?' That is not a question of law, it should not be a question of feelings, it is a question of fact. On it a legal background can be a great disadvantage or a great advantage. You can approach it like a black letter lawyer, concentrate on the paper description of our constitutional system, assume its essence to be that which is written in black constitutional text and that you go along to a court to have it enforced. Much of that approach has marred the republic debate so far. Or you can treat the constitutional provisions as necessary background material and concentrate instead on understanding the factual living reality of how our constitutional system actually operates. That involves careful investigation and

analysis of the realities of operation of the constitution, its conventions and Australian constitutional and political practice and culture.

The latter approach is the one required of lawyers as responsible citizens. A legal training of itself does not enable a lawyer to understand the way our constitutional system operates much more than it enables him or her to understand a complex manufacturing process. An understanding of either comes only from deliberate investigation and learning. Legal training does develop skills which assist in comprehending and analysing the way complex systems work.

The third question is the technical legal question of how constitutional change is to be made so that we will have the desired form of head of state. That is a question for lawyers but it can be deferred.

#### The Question of Fact

What evidence is there on which you can decide whether particular models for the head of state of an Australian republic would safeguard our democracy as strongly as at present. It is mainly in writings about what actually happens. That is not something often found in law books. In making a decision you finally rely on your own judgement and your knowledge of people, groups and communities and how they act.

I will put to you a number of propositions of fact which I regard as correct. Do not accept them because they are put forward. Do the reading, thinking and analysis to test them critically. Reach your own conclusions and pass them on to others.

1. There are three distinct kinds of head of state in modern democracies.  
'There is the Chief Executive, found in the United States where the head of state is also head of government and has and exercises extensive, important powers. That head of state should be elected. There is the Nominal Chief Executive, as in Australia, who has and exercises important powers which are not as extensive as those of the US President but which go to the heart of our system of government. The Constitution gives the Governor-General legal discretion to exercise them at choice or, in the case of powers of the Governor-General in Council which must be exercised only on Ministers' advice to decline to exercise them at choice. The glue that binds the Governor-General to the democratic process in exercising those powers and gives us responsible government is the basic constitutional convention. That convention binds the Governor-General to exercise the powers as advised by the Ministers of the government elected by the community in elections. A Nominal Chief Executive head of state should

not be elected by either Parliament or the electorate. There is also the Non Executive head of state as in Ireland and Sweden who has under the Constitution only a few powers of relatively minor importance. It does not matter much whether the Non Executive head of state is elected or not. Ireland has an elected President. Sweden has a King.

2. Our kind of system has vital requirements that its head of state:
  - (a) comply with the basic constitutional convention;
  - (b) should never become an alternative centre of political power and influence rivalling the Prime Minister and Government; and
  - (c) should be a person capable of exercising influence, building unity and remaining above politics.<sup>2</sup>
3. The present monarchic system and the republican equivalent of that system which I propose, both maintain the strengths and safeguard of our democracy. The republican equivalent system involves creating under the Australian Constitution a Constitutional Council to exercise the one power the Queen now exercises, appointing or dismissing the Governor-General; patriating to the Governor-General such powers of head of state as are now the Queen's rather than the Governor-General's; and making the Governor-General the actual head of state of Australia instead of the de facto head of state as now. That system would be reached by continuing the evolution of the distinctive Australian office of Governor a short distance along the same path which has been followed since Governor

Phillip arrived with the First Fleet in 1788. If the same was done at State level Australia would be entirely a republic.

4. With that exact substitution of the Constitutional Council to perform only the Queen's one constitutional function in the same way as the Queen has, the republican equivalent system will operate in precisely the same way as the present system has for years.

The propositions that follow are limited to those relevant to the requirement in proposition 2 (a) above.

5. The basic constitutional convention is not a law which can be enforced by the courts. A constitutional convention is a constitutional custom so uniformly followed and expected to be followed as to create a sense of clear obligation, and backed by so effective a sanction as to be binding in practice

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though not in law. The republican equivalent system will, like the present system, provide an extremely effective sanction that makes the convention binding. Exercise of the Governor-General's powers other than in accordance with ministerial advice would lead the Prime Minister to advise the Constitutional Council to dismiss the Governor-General. Within a couple of weeks or so the Governor-General would be dismissed with public approval and loss of reputation.<sup>3</sup>

6. The two models for a republican President elected by Parliament or the electorate and dismissible only by resolution of a two-thirds majority of a joint sitting of Parliament would dissolve the glue of the basic constitutional convention that binds the exercise of the head of state powers to the democratic process. The convention would cease to bind because usually the sanction of dismissal could not be imposed. No Government in Canberra has had a two-thirds majority of both Houses for 50 years. In Australian political culture Oppositions are not prone to come to the assistance of the Government to help it out of its difficulties and frustrations. If a President acted in a way that favoured the Opposition, refusing to assent to Government bills, to make regulations Ministers advised, or to proclaim Essential Services Act provisions in an industrial dispute, the response is predictable. The Opposition, of whichever side of politics, would be more likely to commend the President for his political sagacity than to join the Government in a dismissal. Even with a co-operative Opposition the President could prevent dismissal by exercising the President's constitutional power to prorogue (adjourn) or dissolve Parliament. In the Australian system it would be unworkable to convert the basic constitutional convention into a legal obligation and bring the courts into the political process. To go to either of the models for an elected republican President would fly in the face of history's lessons of the dangers of giving anyone great powers who is not under such democratic control as the convention gives.<sup>4</sup>

<sup>1</sup>The division into those three kinds of head of state is based on Jim Duffy, 'Ireland'; in the Report of the Republic Advisory Committee, *An Australian Republic*, 1993, vol 2, p109 at pp.154-5. The other parts of the proposition are mine.

<sup>2</sup>Reading: Walter Bagehot, *The English Constitution*, Fontana, London 1963 (This edition has an excellent updating introduction by RHS Crossman); Geoffrey Sawer, *Federation Under Strain: Australia 1972-1975 MUP*, 1977 (If any book should be compulsory reading that is it); Brian Galligan, 'Australia', in David Butler and DA Low (eds). *Sovereigns and Surrogates*. Macmillan, London 1991, p.61; R.E. McGarvie, 'Governorship in Australia today: The role and function of the Governor in a parliamentary democracy' *The Parliamentarian: Journal of the Parliaments of the Commonwealth*, vol. LXXV, 1994, p.149 and *Victorian Bar News*, No 90, 1994, p.45; R.E. McGarvie, 'The Constitutional Head of State as Guardian of Democracy' in S Rufus Davis (ed), *Citizenship in Australia: Democracy, Law and Society*, Constitutional Centenary Foundation, Melbourne 1996, p241.

<sup>3</sup>Reading: Sawer, *Federation Under Strain*, Ch.9, Laws Conventions and the Future, p.173.

<sup>4</sup>Reading: For an example of the difficulty in the political context of obtaining unanimity in proceedings relating to dismissal refer to the Senate Select Committee inquiries relating to Mr Justice Lionel Murphy: For the power to dissolve or prorogue see Commonwealth Constitution, S.5. For the consequences of adopting a constitutional provision without ensuring the basic constitutional convention would be binding in practice, see: James Manor, 'India' *Sovereigns and Surrogates* and A G Noorani, 'India', vol 2, Republic Advisory Committee Report, p.73.

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