A Victorian Republic?

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Introduction

The focus of the republic debate has understandably been on changes at the federal level. It is likely that Constitutional Convention in February 1998 will also approach the question from this perspective. Despite being largely sidelined, the State of Victoria has three options before it.

Option 1 - Remain a Constitutional Monarchy

No legal difficulties arise while a State remains a monarchy under the current federal arrangements. However, should the Commonwealth become a republic and adopt an Australian as head of state, new questions arise. Sir Harry Gibbs, a former Chief Justice of the High Court, described as "simply absurd"[1] the suggestion that some States might retain their status as constitutional monarchies in the event of a Commonwealth republic. However, there is no legal reason why this should not occur. Uniformity of constitutional structure between the States or between the Commonwealth and the States is not a legal requirement. According to Craven: "Although the prospect of a federal republic composed of a series of constituent monarchies might seem at first glance absurd, there is no reason in constitutional logic why such a hybrid state could not exist, or for that matter thrive."[2]

Option 2 - Tie the Fate of a State to that of the Commonwealth

It would be feasible for a State to remain a monarchy if the Commonwealth were to make the transition to a republic. However, there are cogent legal and political reasons why a State should follow any Commonwealth lead and thus why the status of the States should be considered by the Australian people at the same time as that of the Commonwealth. It would make sense for the States to cut their legal ties with the monarchy simultaneously with the Commonwealth. The transition of both the Commonwealth and the States could be considered, and voted upon, by the Australian people in the one referendum. This would obviate the need for any future federal or State referendums. Moreover, the history of referendums in Australia demonstrates that a Commonwealth move to a republic is unlikely to succeed without State support.[3] Accordingly, there are good reasons for trying to win the States over for a combined vote and transition.

"One difficulty... is that a State might be transformed into a republic despite a majority of the people in that State voting against such change"

Section 106 of the Commonwealth Constitution states that the "Constitution of each State of the Commonwealth [is] subject to this Constitution". Hence, the constitutional structures of the States can be modified by amendment of the Commonwealth Constitution. Amendment of the Commonwealth Constitution is provided for by means of a referendum under s 128. To be successful, such a referendum must be passed by both houses of the Federal Parliament, or by one house twice, and then by a majority of the people and by a majority of the people in a majority of the States: that is, in at least four of the six States. Under s 128, the Constitution might be altered to directly override the system of constitutional monarchy prevailing in the States, and to sweep aside any entrenched provisions in the State Constitutions or in the *Australia Act* 1986 without having to go through a separate referendum in each State. Alternatively, a referendum under s 128 might amend the Constitution to give the Commonwealth the power to indirectly achieve this.

It has been argued that a referendum under s 128 might be ineffective to amend the Constitution to sever the remaining links to the monarchy.[4] This might be, for example, because the s 128 mechanism is unable to amend the preamble and covering clauses to the Constitution. Section 128 states that it applies to "[t]his Constitution", which is set out as clause 9 of the Commonwealth of Australia Constitution Act 1900 (Imp).

It would seem likely that s 128 could be used to amend the preamble to and clauses 1 to 9 of that Act. They could either be amended directly by s 128, or s 128 could be used to give the Commonwealth Parliament the power to amend these itself. To find otherwise would require the High court to hold that the Australian people, voting as a whole, are unable to determine their constitutional future.

One difficulty with proceeding to entrench republicanism across Australia in a referendum under s 128 is that a State might be transformed into a republic despite a majority of the people in that State voting against such a change. A referendum under s 128 could succeed despite a majority of the people in two out of the six States voting against the proposal. However, this would be an unlikely occurrence as experience has shown that referendums tend only to succeed when they gain support across Australia. Of the eight successful referendums under s 128, only one, held on 13 April 1910 to amend s 105 of the Constitution to allow the Commonwealth to take over State debts, succeeded without gaining the support of a majority of the people in every State.

This problem may be avoided by careful drafting of the amendment to be made to the Constitution. An amendment need not dictate that each State abandon its link with the monarchy, but might merely pave the way for each State to choose to do so by, for example, a two-thirds majority decision of its Parliament or through majority support of the State's people at a referendum. By this means, any State that did not support the move to a republic could maintain its monarchical structure of government.

Option 3 - Make the Move to a Republic Now

If the need for republican government in Australia is accepted, there are strong arguments for the suggestion that the States should lead the way. One of the premises of Australian federalism is that the States provide a laboratory in which ideas of government might be tested. How then could a State become a republican State? The process is certainly more complex than that outlined under option 2. For a State to become a republic, it must seek to have the *Australia Act* 1986 (Cth) amended as well as amending its own Constitution.

The central legal impediment to a State republic in the absence of an Australia-wide move under s 128 of the Commonwealth Constitution is s 7 of the *Australia Act* 1986 (Cth). Together, ss 5 and 15(1) of the Act provide that State legislation cannot repeal, amend or be repugnant to the Act, including s 7. Section 7 at least assumes a continuing relationship between the monarchy (as personified in "Her Majesty") and the Australian States. Section 15 provides two methods for the amendment of s 7. Under s 15(1), the Act, including s 7, "may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States". Under s 15(3), "Nothing in subsection (1) above limits or prevents the exercise by the Parliament of the Commonwealth of any of the powers that may be conferred upon that Parliament by any alteration to the Constitution of the Commonwealth made in accordance with section 128". The first option is likely to be least fraught with expense and political difficulty. In any event, unless the concurrence of each State to an amendment of s 7 can be obtained, the history of referendums in Australia under s **128** shows that the second option is unlikely to succeed.

Accordingly, the key to changing s 7 to allow a State to embrace republicanism is to gain the concurrence of the States to an amendment of the section. It should be emphasised that amendment of s 7 need not in any way jeopardise the continuance of monarchical government in any State unwilling to change. Section 7 need only be altered so as to incorporate an amendment that would make it clear that each State may exercise a free choice as its own form of government, and need not be constrained to a monarchical system. Such an amendment would be consistent with the catch-cry of "State's rights".

The Commonwealth Constitution need not be amended to enable a State to become a republic. Indeed, s 110 of the Constitution makes it clear that in referring to the Governor of a State (see Constitution, ss 7, 12, 15, 21 and 84), the Constitution speaks not of the Governor as the representative of the Queen, but of "the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State". At the 1897 Adelaide session of the conventions that drafted the Commonwealth Constitution, a clause was put forward that would have provided: "In each State of the Commonwealth there shall be a Governor". However, the proposed clause was withdrawn, leaving the Constitution without such a requirement.

Once s 7 of the *Australia Act* 1986 (Cth) has been amended to allow a State to depart from the current constitutional arrangements, careful consideration would need to be given to amending the Constitution of the particular State to sever any final links with the Crown. The *Constitution Act* 1975 (Vic) directly entrenches monarchical government in Victoria. Section 15 provides that the legislative power of the State is vested in a Parliament, "which shall consist of Her Majesty, the Council, and the Assembly". Additionally, s 6 provides that: "There shall be a Governor of the State of Victoria" and that the appointment of the Governor "shall be during Her Majesty's pleasure".

Section 18 provides that it "shall not be lawful to present to the Governor for Her Majesty's assent" any Bill which repeals or amends sections of the Constitution including ss 6, 15 or 18 without the second and third readings of the Bill being passed by "an absolute majority of the whole number of the members of the Council and of the Assembly

respectively". A special majority in Parliament, rather than a referendum, is thus required for Victoria to move to a republican system. However, the significance of such changes might make it politically prudent to achieve the same result by referendum.

Conclusion

Victoria has the chance to provide a testing ground for Australian republicanism. The transition would, however, be greatly simplified if the States and the Commonwealth were to move towards an Australian republic together. If republicanism is the appropriate model for the States as we arrive at the second century of Australian federation the States should invigorate and initiate the process. If that course be too bold, or if it be deemed wiser to wait for the Commonwealth to take the next step, Victoria could test some of the indicia of republicanism, such as, for example, the election of its next Governor by the people or by a two-thirds majority of the Parliament. However, before any such changes are made the experience of constitutional reform shows that they must be grounded in community consultation and popular support.

[1]Barrister, Senior Lecturer in Law, The Australia National University. Adapted from Williams, G, "The Australian States and an Australian Republic" (1996) 70 Australian Law Journal 890.

[2]Sir Harry Gibbs, "The States and a Republic" in Stephenson, MA, and Turner, C (eds), *Australia: Republic or Monarchy?* (University of Queensland Press, Queensland, 1994), 298.

[3]Craven, G, "The Constitutional Minefield of Australian Republicanism" Policy (Spring 1992), at 35.

[4]See Blackshield, AR, Williams, G, and Fitzgerald, B, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 1996), 964-975. Only eight out of 42 proposals to alter the Constitution have been passed by the Australian people at a referendum held under section 128 of the Constitution.

[5]See Carney G, "Republicanism and State Constitutions" in Stephenson, MA, and Turner, C (eds), *Australia: Republic or Monarchy?* (University of Queensland Press, 1994),197.