

Chapter Two

The Republic and Our British Heritage

John Hirst

Copyright 1993 by The Samuel Griffith Society. All rights reserved.

In October last year an Aboriginal member of the Northern Territory Legislative Assembly died. With the concurrence of the House, his Aboriginal constituents mourned his passing by performing a sacred smoking ceremony in the chamber. Men and women wearing white ochre body paint burnt leaves and wailed in anguish around the spot where the dead legislator had sat. A Catholic priest who works with these Aborigines told the press: 'These people are a bit more reflective because their culture is much older and more sophisticated than ours'.

Why is it that as we acknowledge the richness of Aboriginal culture we must denigrate our own? So frequently we are now depicted as the savages, moved by a few base instincts, with an uncomplicated and shameful history which can be adequately described as a continuous flouting of the Equal Opportunity Act.

If we look not at the Aboriginal mourners, but at the Northern Territory Assembly, what do we find? A miniature replica of an ancient English institution. The English Parliament dates from the thirteenth century and the principle that a monarch should take counsel is very much older. This Assembly takes decisions by the counting of votes; the majority rules and the minority accepts the legitimacy of its defeat.

This is not a natural or universal system of decision making. It had to be invented. We first hear of it in the ancient Greeks over two and a half thousand years ago. The most amazing feature of this Assembly is that it contains a Government and an organized, official Opposition to it. Have we lost altogether our capacity to be surprised at this ingenuity? Is not this complex and rich beyond measure?

The members of The Samuel Griffith Society don't need me to remind them what a precious inheritance we have in English constitutional practice. You may not be so ready to recognize that we republicans are as committed to the preservation of our Constitution as you are. Our dissatisfaction is not with the working of our present Constitution. Our dissatisfaction is with the British monarchy as a symbol of the Australian nation. We need to deal with the Constitution only as a consequence of the removal of that symbol. Our task is to make those changes to the Constitution which are necessary to keep it the same when the Queen no longer plays a part in it. In essence we have to create from within Australia the office of Head of State, and so set it within the Constitution that its holder will act like a British constitutional monarch.

The rejection of the Queen may seem radical; the constitutional task is essentially conservative. Our patron saint is not the republican Tom Paine, but his great antagonist Edmund Burke.

Recently I have been travelling the country with the Prime Minister's Republic Advisory Committee and hearing the views of the people on what sort of president they want. These impressions are my own and you will understand that the views I express here are likewise my own and not the Committee's.

There is unanimity on the qualities presidents should possess – they must be eminent, worthy of respect, and above all free from party political associations. On this last point the people have been determined and emphatic. The great fear is that a former politician will be elevated into the position of Head of State. To exclude this possibility our informants have suggested that former politicians should be ineligible for the office, either permanently or until three or five years have

elapsed since they left the political arena. The most comprehensive prohibition was worded in these terms: the president should have had no connection 'with any party at any time from birth right up to the tenure as President' .

There have, of course, been good Governors-General who have moved from politics to the vice-regal office. In the light of this, the passion to avoid politicians might seem merely a prejudice. But this overlooks the fact that the Governors-General have been deputies for the Queen, whose position above politics and whose absolute impartiality have been the corner-stones of her success and that of her immediate predecessors. The removal of this element from our Constitution plainly worries many Australians. Republicans who are looking for a Head of State completely free from political associations are paying the monarch the tribute of wanting a president to imitate her.

How then should the president who is to be above party politics be appointed? The public opinion polls indicate a clear preference for popular election. Popular election can be defended on the grounds that citizens in a democracy should directly participate in the choice of the person who is to symbolise the nation. The people, we have been told, should feel they 'own' their president. However, it is my impression that the desire for popular election does not arise from these concerns; it is another expression of the determination to keep a politician out of the presidency. The suspicion is that reliance on any part of the present political structure for the election of president will inevitably produce an unsatisfactory result. To get the result they want, the people think they will have to take charge of the procedure themselves.

Paradoxically, popular election is the method which will guarantee that a politician or someone endorsed by a political party will be elected. At a nation-wide poll, only the political parties would have the organisation and resources to run a campaign . Political parties would be eager to secure the presidency, even though its functions are chiefly ceremonial, as a demonstration of their strength and a boost to party morale. A party may also consider that it does no harm to have one of their own in the presidency in case there is a constitutional crisis.

Apart from candidates brought forward or endorsed by the political parties, the only other candidates likely to succeed at a popular election would be wealthy people or candidates backed by them.

Several countries hold popular elections for a non-executive president of the sort we plan here. Their experience confirms that the political parties are very active in the election. The danger of popular election is that it would produce presidents who might consider they had an independent mandate from the people as strong or better than the Prime Minister's. This difficulty can be met by carefully stipulating the powers of the president – a matter I will deal with shortly. The countries which elect presidents by popular vote – I'm thinking in particular of Austria and Ireland – have experienced no problems with their presidents as rivals to the Prime Minister.

My own preference is for the president to be elected or endorsed by a two-thirds vote in a joint sitting of the federal Parliament. The two-thirds vote would ensure that a successful candidate would have to enjoy bi-partisan support. But I would be reluctant to see nominations for the president coming without restriction from within the Parliament. One can readily imagine how in this situation the presidency might become a matter of horse trading between parties. A minority party, for example, might offer to support the governmental candidate on condition that the government agree to accept its amendments to some piece of legislation. Or alternatively a minority party might give full support to the government's legislative program in return for governmental support for its own presidential candidate. This danger could be avoided by the nominations for the presidency coming from outside the Parliament.

Two sources of nominations suggest themselves. The first is the Prime Minister, who of course at the moment nominates the Governor-General for appointment by the Queen. Nomination of a

single candidate by the Prime Minister and endorsement by a two-thirds vote at a joint sitting is the nearest approximation to the present system of all the options usually canvassed and the simplest to implement. Since Prime Ministers would not want the embarrassment of having their candidate rejected, they would choose a candidate with bi-partisan support. To check on this before the parliamentary consideration they might well sound out the Leader of the Opposition. Such confidential consultations have sometimes occurred with the present system of prime ministerial nomination.

The second source of nominations might be a special nominating commission. During our consultations a good deal of interest has been shown in such bodies. Suggestions on how they might be composed include:

- (a) State Governors
- (b) Chief Justices of the High Court and State Supreme Courts
- (c) Presiding Officers of all Houses of Federal and State Parliaments
- (d) members of the highest rank of the Order of Australia.

Sometimes these bodies are proposed as electoral colleges which would actually elect the president rather than as nominating commissions, which is the role I'd prefer to see them play. I can understand the interest in taking the election of the president away from existing political institutions, but I believe the process of electing the president will carry sufficient legitimacy only if it involves the people themselves or their representatives in Parliament.

The disadvantage of an open election either in the electorate at large or in the Parliament is that good candidates would be deterred from offering themselves. Why should a person eminent in his or her field risk having their reputation besmirched in a contested election and then perhaps suffer the ignominy of a rejection? A nominating commission might produce one candidate for endorsement (or rejection) by Parliament, or a short list of candidates from which either the electorate at large or the Parliament would choose one. Candidates would not have to put themselves forward; they would be nominated by the commission. To be placed on such a short list would be an honour in itself – as it is with book and film prizes – and no dishonour would attach to those finally not chosen.

We want a system which will produce presidents of the calibre of Sir Zelman Cowen and Sir Ninian Stephen. That is the sort of president which the people want. The challenge for us is to establish the constitutional mechanism which will find and endorse such candidates.

The other chief task for republican constitution – makers is providing for the powers of the president. It is here that our critics consider us most vulnerable.

Firstly, we have been told that a minimalist approach to constitutional change would open the way for a president to assume dictatorial powers. The term 'minimalism' is now confusing rather than assisting our understanding. It was coined by republicans for good purpose. When we were in the wilderness we needed to explain that a republic could be established in Australia without a fundamental change to our structure of government. What impeded us then was the widespread assumption that to become a republic we would have to adopt an executive president of the American sort. Some republicans in their zeal to show how simply the change to a republic could be effected may have said that you only needed to create a president and then insert the word president for the words Governor-General in the Constitution. None say that now. The paradox of minimalism is that in order to keep the system of government the same a good deal of the Constitution needs to be changed.

The reason for this is that the Constitution vests huge powers in the Governor-General. Full executive power is given to the Governor-General together with the command of the armed forces. The Constitution provides that the Governor-General will choose ministers, but is silent on what principle shall govern the choice. Now if we created a president and left to him or her all

the powers of Governor-General, and if a president chose to use them, we would have a very different system of government. Arguably a president would be free to use them because he or she would no longer be constrained, as the Governor-General is, to use the powers according to the British constitutional conventions.

This problem can be very readily solved. The simple solution has been laid out by Professor George Winterton in his draft republican constitution published in *The Independent Monthly* of March last year. Wherever the Constitution gives a power to the Governor-General which in practice is exercised on the advice of ministers, Winterton makes the constitution read: 'President and Executive Council'. In addition he provides a new clause which reads in part:

"The President shall exercise and perform his powers and functions in accordance with the constitutional conventions which related to the exercise and performance of the powers and functions of the Governor-General, but nothing in the section shall have the effect of converting constitutional conventions into rules of law."

Such a provision would have the effect of carrying over the reserve powers of the Head of State into the new regime, but without defining what those reserve powers are.

Regrettably in my view, Professor Winterton also provided that the Parliament henceforth should be able to define and amend the president's powers by the normal processes of legislation. This in effect gives to the Parliament (and any government which controlled it) the power to alter the Constitution. I am pleased to note that in the next edition of his constitution Professor Winterton proposes that Parliament should only be able to exercise this power by two-thirds majority.

The alternative approach to the reserve powers is to codify them in the Constitution. The argument for codifying them is that their use would involve less controversy if they were clearly stipulated and widely understood. The argument against codifying is that it is difficult to define in detail all the circumstances in which the reserve powers might have to be used. To codify the powers as they are presently understood would inevitably freeze them and make them less serviceable in the future, which we can with certainty say is unpredictable. The reserve powers, it is alleged with some force, are a general power to protect the Constitution and no-one can say from what quarter threats to it might come. Codification of the reserve powers is one option which our committee is examining. The achievement of a republic does not depend on it.

On the reserve powers, our critics allege that we are embarked on a process which will either reduce the reserve powers or increase them. There is no prospect, we are told, of their remaining the same.

On the first count, the critics allege that the Labor Party is opposed to the reserve powers, and in particular to the power in the Head of State to dismiss a Prime Minister. They say that Labor's support for a republic is a disguised method of stripping the powers of the Head of State and taking revenge for the Whitlam dismissal of 1975.

I cannot of course speak for the Labor Party. I can speak of the terms of reference of our committee as laid down by the Labor Prime Minister. They read in part: 'How the powers of the new Head of State can be exercised and be made subject to the same conventions and principles which apply to the powers of the Governor-General'. In all the options for dealing with the reserve powers, we are retaining the power of the Head of State to dismiss a Prime Minister.

The second criticism is that, if we codify the reserve powers, inevitably we will entrench them and so make the president more powerful than the Governor-General has been. This mistakes the nature of the powers under discussion, namely they are reserve powers which are used only in exceptional circumstances. Most of our Governors-General have never once acted without the advice of ministers. If the politicians manage things properly a Head of State does not have the opportunity to use the powers. Stipulating the powers does not make it more likely that they will be used.

But let me concede that the move to a republic may make some change in the relation between Head of State and Prime Minister. I would predict that if there is a change it will be in the direction of more power to the president, who will have a more secure tenure than the Governor-General. This is not inappropriate given the removal from our Constitution of the stabilizing force of the monarchy. Of course, no guarantee can be given that the relationship between Governor-General and Prime Minister will remain unchanged under our present Constitution. If there is a change to this relationship under a republic, it will be minuscule compared to the change in the Constitution effected by the federal government's financial dominance and the High Court's use of the external affairs power. Given the limits on your time and resources, may I suggest you concentrate on these issues and leave the republic alone. As a force for constitutional change, we are very small beer.

As we plan the transition to a republic, we have many precedents to draw on. In every quarter of the globe there are British parliamentary systems which have transformed themselves into republics. Recently I have been reading the Irish Constitution and have been impressed by the elegant and concise way it deals with the reserve powers of the president. Take the example of the calling and dissolving of Parliament. First it declares the normal state of affairs:

"The President shall summon and dissolve the House when so advised by the Prime Minister."

Then it provides for the exceptions, the use of the reserve powers:

"The President may summon the Parliament on his own discretion.

"The President may refuse a dissolution to a Prime Minister who has lost the confidence of the House."

Refusal of dissolution is a vexed matter. A full codification of the circumstances in which a Head of State should and should not grant a dissolution is a complex exercise, which involves specification of the intricacies of parliamentary procedures. The Irish wisely avoided this and gave the president a broad discretion. In most circumstances no doubt the President would grant a dissolution to a Prime Minister even though he or she had lost the confidence of the House. The bias should be in the direction of following the advice of the Prime Minister. But in some circumstances it would not be appropriate to do so. The Constitution leaves the President to decide what those are.

We are accustomed to think of the Irish as anti-English, as rebels. And yet after their fight for independence was over, they recreated the English parliamentary system and established a president who was to act like an English constitutional monarch. This suggests how primitive is much of our thinking about the preservation of British heritage. Republicans in Australia are accused of denying our British heritage. But as the Irish case shows, British practice can be preserved when formal links are broken and even when they are broken in enmity. We will part from Britain on good terms, and in becoming a republic we will complete the process of making our British constitutional heritage our own. There will be an Australian Head of State who reigns but does not rule, a perpetual tribute to the British original.