

The People's Convention?

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Did the people really count or will the outcome merely entrench existing power structures irrespective of any referendum?

The 1998 Constitutional Convention was a great success. Not since Federation on 1 January 1901 has the Constitution received such sustained popular attention. While the Convention may not bring about an Australian republic, for this is uncertain and perhaps even unlikely, it did galvanise many Australians into thinking about and reflecting on their system of government. For the first time since the dismissal of the Whitlam Government on 11 November 1975, the Australian Constitution was centre-stage. From 2-13 February 1998 the Constitution fascinated the media and the public not due to a political crisis, but in the context of looking forward to the second century of Australian Federation.

Patriation of the Constitution

A key achievement of the 1998 Convention was that it began, to coin a Canadian word, the patriation, or bringing home, of the Australian Constitution. The Constitution that came into effect on 1 January 1901 was an Act of the British Parliament. Although also supported in referendums in 1899-1900 by people in the various Australian colonies,¹ it has continued to be a product of its era. In particular, the Australian Constitution is the outcome of the Constitutional Convention held in Sydney in 1891 and the subsequent Convention held over 1897-1898 in Adelaide, Sydney and Melbourne.²

There are some similarities between the 1998 and 1897-1898 Conventions. The low turnout of 45.3% for the election of delegates to the 1998 Constitutional Convention was disappointing. The same was true of the election of delegates to the 1897-1898 Convention, with 139,850 people out of 260,000 enrolled electors voting in New South Wales and 99,108 out of 238,000 enrolled electors voting in Victoria.³ The composition of the two Conventions was very different. At the 1897-1898 Convention, William Trenwith, a member of the Victorian Parliament and former bootmaker and trade union organiser, was the only representative of the Labour movement. There were no women,⁴ Aboriginal or youth delegates: 'It was for the most part the big men of the established political and economic order, the men of property or their trusted allies, who moulded the federal Constitution Bill'.⁵ As a consequence, the Constitution was not written as an instrument of the Australian people, but by drafters who, according to Manning Clark, 'wanted a Constitution that would make capitalist society hum'.⁶

The 1998 Convention encompassed a wide spectrum of the Australian community. Importantly, it enabled many of those groups who were absent in the framing of the Constitution in the 1890s, most particularly Australian women and indigenous peoples, to take part in the revision of the instrument 100 years later. It also allowed the participation of members of migrant and ethnic groups who had not formed a large part of the Australian population at the time of Federation. The 1998 Women's Constitutional Convention held over two days just before the main event demonstrated the importance of the Convention process to

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sections of the community that have felt excluded by the system of government created by the Constitution.⁷

The patriation of the Australian Constitution was begun in February 1998. The Convention generated enormous interest in the Constitution and its capacity to shape how Australians are governed. The 1998 Convention emphasised the sovereignty of the Australian people and the scope for them to change their system of government. However, the Convention only marked a beginning. It is too early to tell whether this process will ultimately prove abortive, and the Constitution impervious to change.

The models

The business of the 1998 Convention was set down by Prime Minister John Howard. The Convention was given the task of resolving three broad issues:

1. whether or not Australia should become a republic;
2. which republican model should be put to the electorate to consider against the status quo; and
3. in what time frame and under what circumstances might any change be considered.

On the first issue, the Convention voted by 89 to 52 to support 'in principle' Australia becoming a republic. Surprisingly, after two weeks of intense discussion and months of buildup, 11 delegates were unable to decide this question and abstained from voting. On the third issue, the Convention resolved that a referendum be held in 1999 to allow Australians to decide whether to make the move to a republic or to maintain the status quo, and that, if the referendum is in favour of a republic, the new republic should come into effect by 1 January 2001.

The second issue dominated the Convention. By the middle of the second week, four models had emerged.⁸ The most important differences between the models lay in the method of choosing a President and in the powers of the office-holder. On the latter issue, it was not the symbolic day-to-day functions of the President that were in question, but the reserve powers, and in particular the power to dismiss a Prime Minister. The reserve powers currently held by the Governor-General exist for times of political crisis or impasse. Normally, the Governor-General can only act on the advice of the Prime Minister, whereas the reserve powers can be exercised against such advice. The scope of the reserve powers is vague and uncertain. Sir John Kerr exercised a reserve power in sacking the Whitlam Government and dissolving the House of Representatives on 11 November 1975, as did Governor Sir Philip Game in dismissing the Lang Government in New South Wales in 1932. The most difficult problem in incorporating the reserve powers into a republican model is whether to remove the reserve power of the President to dismiss a Prime Minister in the event of supply (that is, the budget bills) being blocked by the Senate. This question raised the spectre of 1975 and the possibility of deadlock in the Convention between the Labor Party and the Liberal-National Party Coalition.

The first of the models before the Convention was the *Direct Election Model*, a blend of popular and parliamentary involvement in the selection of an Australian President. Under this Model, any Australian could nominate a person to be Head of State. A joint sitting of the Senate and House of Representatives would then, by at least a two-thirds majority, choose no fewer than three candidates from those nominated to stand for election by the people. Parliament would be required to make laws to regulate campaign expenditure by

and for candidates and to provide advertising and campaign support through a body funded by the Parliament. The election for President would be held simultaneously with that for the House of Representatives, with the President holding office for two terms of the House. The reserve powers would be partially codified as provided for in the 1993 Report of the Republic Advisory Committee.⁹ However, the Head of State would not have the power to dissolve the House of Representatives in the event of a rejection of supply by the Senate unless: (i) the High Court had determined that there had been a contravention of the Constitution, such as that the government had spent money without authorisation by law and thus in breach of s.83 of the Constitution; or (ii) an absolute majority of the House of Representatives had requested such dissolution.

The second model was proposed by Bill Hayden, a former Governor-General. The *Hayden Model* also allowed a popular election for the President. A person could stand if he or she had been nominated by one per cent of voters, or around 120,000 people. The powers of the President would be limited by a partial codification of the reserve powers of the President in line with the Report of the Republic Advisory Committee.¹⁰

The third model was put forward by Richard McGarvie, a former Governor of Victoria. The *McGarvie Model* proposed that the President be chosen by the Prime Minister and appointed or dismissed by a Constitutional Council bound to act as the Prime Minister advised. This Constitutional Council would consist of three 'elders' determined automatically by constitutional formula with places going first to former Governors-General or Presidents, with priority to the most recently retired, and unfilled places going, on the same basis in turn to former State Governors, Lieutenant-Governors (or equivalent), judges of the High Court or judges of the Federal Court. A temporary provision would operate for 30 years so that if there was no woman in the first two places filled, the third place would go to the woman with the highest priority among the eligible persons. The President would have the same reserve powers as currently held by the Governor-General.

The final model was the *Bi-Partisan Appointment of the President Model*, which was a model developed from one brought to the Convention by the Australian Republican Movement. It allowed for nomination by any Australian, with the names put forward to be vetted by a Committee established by Parliament and then a shortlist passed on to the Prime Minister. The Prime Minister would then present a single nomination for the office of President, seconded by the Leader of the Opposition, for approval by a Joint Sitting of both Houses of the Federal Parliament. A two-thirds majority would be required to approve the nomination. The powers of the President would be the same as those currently exercised by the Governor-General.

Each of these models has its strengths and weaknesses. The McGarvie Model could hardly be said to achieve a republic at all. It provides for no popular participation either directly by election or indirectly through appointment by parliamentary representatives. There would be no link between the people and their Head of State. The McGarvie Model would involve only the barest change to the current system of government.

The models providing for direct election, while receiving the support of the opinion polls, were said to involve too large a departure from current constitutional arrangements,

and in the case of the Hayden Model, an unwieldy nomination process. The direct election models gave rise to largely unfounded fears of a fracturing of the constitutional system. It was argued that a directly-elected President might possess a mandate that would allow him or her to establish a new centre of political power, potentially in opposition to the Prime Minister. This could erode the Westminster tradition followed in Australia that those exercising executive power should be answerable directly to the Parliament. The Direct Election Model met this objection by setting down careful limitations on the power of a President. By requiring that each person standing for election receive the support of two-thirds of the Federal Parliament, this model also alleviated the concern that direct election would inevitably lead to a politician as President.

In contrast to the models involving direct election, the Bi-Partisan Appointment of the President Model would involve very little direct participation by the people. It is an uncomfortable mix of popular participation and parliamentary choice, with the real power undoubtedly lying in the hands of the Prime Minister and the Leader of the Opposition. This was emphasised by an amendment to the Model which allows the names of persons nominated to be kept confidential. The main attraction of this Model is that it would be likely to produce a President with the support of the major political parties, or at least the Labor Party and the Liberal-National Party Coalition, and would be a far cheaper option than any model involving direct election.

The Convention delegates considered the four models though a process of exhaustive voting, where the model receiving the lowest vote in each round of voting was knocked out until only one model remained.¹¹ The first model eliminated was the Hayden Model. In the second round of voting the Direct Election Model was eliminated, receiving 30 votes as against the 31 votes for the McGarvie Model. In the third round the McGarvie Model was eliminated with 32 votes as against the 73 votes for the Bi-Partisan Appointment of the President Model, leaving the latter as the Convention's preferred republican option.

A people's convention?

The 1998 Convention has been described as a 'People's Convention'. The voting at the Convention suggests this is a misnomer. Only half of the 152 delegates to the Convention were elected by the people. The other half consisted of parliamentary representatives and people appointed by the Howard Government. This had a significant impact on the Convention. In general, the people appointed by the Government were either supportive of the current monarchical system or of very minimal change. This led to popular support for direct election of a President not being reflected in the voting at the Convention, while support for the McGarvie Model was exaggerated. Of the 32 delegates who voted for the McGarvie Model in the last round of voting, 30 were appointed delegates. The appointed delegates were successful in skewing the Convention towards a more conservative outcome and away from the community support for direct election.

The makeup of the Convention allowed the compromise model put forward by the Australian Republican Movement to clearly gain more votes than any other proposal. Although somewhat hopefully named a Bi-Partisan Model, it failed to gain significant support from Liberal or National Party delegates. It also alienated many of the delegates supporting a direct election model. This was clearly evident when the

following question was put before the Convention on its final day: Does this Convention support the adoption of a republican system of government on the Bi-Partisan Appointment of the President Model in preference to there being no change to the Constitution? Only 73 delegates, less than half of the Convention, voted 'Yes', 57 delegates voted 'No' and 22 delegates, including many of the supporters of a direct election model, abstained from voting. Despite a protest from one delegate over the fact that the Bi-Partisan Model had not gained the support of an absolute majority, or 77, of the delegates, the question was declared carried as more people had voted 'Yes' than 'No'.

Deeper issues

The Constitutional Convention was premised on a narrow view of what it means to be a republic. It assumed Australia would be a republic once there is an Australian as Head of State. The focus of the Convention was on change to the symbols and traditions of the Constitution, and not on deeper issues such as federalism and the financial problems of the States or the need to protect human rights. It was even beyond the scope of the Convention to discuss the Australian Flag or the Coat of Arms.

The boundaries of the Convention were rigorously policed by the Chair and Deputy Chair. Although some delegates had been elected with a mandate to push for wider change to the Constitution, such as the incorporation of a Bill of Rights, it became clear from the first day of the Convention that any such aims would be frustrated. This was not a forum that gave a voice to those who believed that Australia could not become a republic unless its Constitution recognised certain fundamental freedoms.

Nevertheless, the Final Communique¹² of the Convention did touch on some deeper issues. This occurred in two areas. First, the Convention recognised the need to incorporate a new preamble to the Constitution in the event of a shift to a republic. The Convention found the existing preamble and covering clauses of the British Act that brought the Constitution into effect should be left untouched. A new preamble should instead be inserted after these clauses and before the operative sections of the Constitution. It was agreed this preamble should include: introductory language in the form 'We the people of Australia'; reference to 'Almighty God'; affirmation of the rule of law; acknowledgment of the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders; recognition of Australia's cultural diversity; and affirmation of respect for our unique land and the environment. The Convention left open whether the following should also be recognised: affirmation of the equality of all people before the law; recognition of gender equality; and recognition that Aboriginal people and Torres Strait Islanders have continuing rights by virtue of their status as Australia's indigenous peoples. It was decided the preamble should be of symbolic relevance only, and should not have any legal effect. To this end, it was resolved that Chapter III of the Constitution should be amended to state that the preamble could not be used to interpret other provisions of the Constitution.

The second way in which the need for deeper change was reflected at the Convention was that the delegates supported an ongoing constitutional review process. The Convention resolved that, if a republican system of government should be introduced by referendum, at a date being not less than three years nor more than five years thereafter, the Commonwealth Government should convene a further Constitutional

Convention. This Convention would review the operation and effectiveness of the republican system of government introduced by a constitutional referendum, as well as address any other matter related to the operation of the Australian system of government under republican arrangements, including: the role of the three tiers of government; the rights and responsibilities of citizenship; whether the Commonwealth should have an environment power; the system of governance and proportional representation; whether the mechanism for constitutional change should be altered; constitutional aspects of indigenous reconciliation; equal representation of women and men in parliament; and ways to better involve people in the political process.

By this latter means, the Convention presented its vision of the Constitution as an evolving document, and not as an instrument frozen in time. This recognition amounted to no more than token acknowledgment of these further issues. The inability of the Convention to deal with these other constitutional issues, even those of pressing importance, does not mean the move to implement the model supported by the Convention should be resisted. Instead, the attempt to bring about the very modest change supported by the Convention should be seen as a hurdle that must be overcome if Australia is to tackle more significant constitutional revision.

The Constitution and the people

The Constitution is not truly a product of the collective will of the Australian people unless they have knowledge and some basic understanding of it.¹³ Unfortunately, Australians possess an appalling lack of knowledge about their system of government. The 1994 report on citizenship by the Civics Expert Group¹⁴ found that only 18% of Australians have some understanding of what their Constitution contains, while only 40% could correctly name both Houses of the Federal Parliament. More than a quarter of those surveyed nominated the Supreme Court, rather than the High Court, as the 'top' court in Australia. These results came as no surprise. A 1987 survey conducted for the Australian Constitution Commission found 47% of Australians were unaware that Australia has a written Constitution.¹⁵

The lack of civics education in schools and the prevailing apathy in the community towards politicians and the political process are largely responsible for the ignorance of the Australian people about the Constitution. The Constitution is also, at least at face value, an uninspiring document. As Lois O'Donoghue, former Chairperson of the Aboriginal and Torres Strait Islander Commission, has stated:

It says very little about what it is to be Australian. It says practically nothing about how we find ourselves here — save being an amalgamation of former colonies. It says nothing of how we should behave towards each other as human beings and as Australians.¹⁶

The model supported by the 1998 Convention will do little to change this. However, the Convention has contributed to a greater understanding of our system of government. This process will continue as the debate over an Australian republic continues to move forward. The next step will be for the Federal Parliament to pass a Bill expressing the broad principles supported by the Convention as precise amendments to the Constitution. Once this has been achieved, the Prime Minister has indicated the proposed changes set out in the Bill will be put to the Australian people in a referendum in 1999. Only if the Bill is successful at the referendum will

the model endorsed by the Convention form part of the Constitution.

To be successful, s.128 of the Constitution requires that a referendum be passed: (i) by a majority of the people; and (ii) by a majority of the people in a majority of the States (that is, in at least four of the six States). Even if 65% of Australians voted 'Yes', the referendum would fail if it failed to gain majority support in, say, Tasmania, South Australia, and Queensland. Forty-two proposals have been put to the Australian people under s.128. Of these, only eight have been passed.¹⁷ Most importantly, no referendum has succeeded except where it has had bipartisan support. The results of the voting at the 1998 Convention, and the strong support of the Prime Minister for the current monarchical system, suggest that support for the Convention's preferred model will not be forthcoming from the Liberal-National Party Coalition. If the Coalition actively opposes the referendum, it is very difficult to see that it will be passed.

The 1999 referendum is the last obstacle to a minimalist Australian republic. The referendum will test whether the model supported by the Convention has caught the popular imagination or whether it represents an attempt to impose a parliamentary election model on a reluctant Australian people. If the 1999 referendum is passed, it may then allow Australians to address some of the more significant constitutional issues such as the structural problems of Australian federalism and the possibility of a Bill of Rights.

References

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8. The models are fully set out on the Internet at www.dpnc.gov.au/convention/model112.html.
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