

## WHAT IS REQUIRED FOR A REAL VICTORY FOR A REAL REPUBLIC?

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Can the Prime Minister be abolished? The simple answer is, yes. The office does not exist within the Constitution. The Prime Minister is only a creature of politics and of political convention; the person the majority party commanding the confidence of the House of Representatives chooses as its leader.

In theory, the absence of the Prime Minister from the Constitution makes the job of abolition easy. However, being the creation of politics makes the job of abolition difficult, if only because politicians will not easily give up the entrenched power base which the Prime Ministership represents. Yet, in truth, the Prime Minister has no exclusive executive power by virtue of holding that office alone. Executive power under the Constitution resides in the Governor-General and only indirectly in the collection of Ministers, of which the Prime Minister is only one, exercising their advisory power as members of the Federal Executive Council. In this strict sense I refer to the 'executive' power of Ministers and of the Prime Minister. The political power of the Prime Minister lies in the leadership of the majority party, the constitutional power to advise the Governor-General and the capacity, by constitutional convention, to advise the Queen to exercise her 'pleasure' under s2 of the Constitution to appoint a new Governor-General and to remove the incumbent Governor-General.

The subtlety of these relationships and the residence of actual day-to-day power in the Prime Minister and Ministers are generally taken for granted. It is the shock of dramatic constitutional events like the 1975 dismissal which sends people running off to the Constitution itself, to text books and precedents to find out just what are the true constitutional arrangements. Another like shock, more often than not

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\* The Honourable Ian Viner, AO QC, Francis Burt Chambers. This is a commentary on the paper delivered by Brian Galligan (Galligan, B. 'A Radical Alternative - An Executive Presidency: Can we abolish the Prime Minister?' (2001) 3 *UNDALR*, 45).

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overlooked, was the two-man government Whitlam and his deputy, Barnard, formed immediately following the 1972 election. They alone administered all the departments of State, constituted the Federal Executive Council and advised the Governor-General to exercise the executive power of the Commonwealth in the way Whitlam and Barnard wanted it exercised; from the peremptory withdrawal of troops from Vietnam to the establishment of a raft of new departments of State. Such events bring home to the public the not-so-subtle constitutional arrangements of the written Constitution and the unwritten constitutional conventions. Public reaction, of approval or disapproval, is ultimately reflected in Australia in the ballot box, thankfully, rather than in the streets or from the barrel of a gun.

Therefore, it is the 'executive' power of Ministers which must be abolished in order to produce a Radical Alternative by which the executive power of the Commonwealth resides in a republican President. Not simply in the sense of the present provisions of ss61, 62 and 63 of the Constitution, but in the actuality of the exercise of executive power. The change sounds, therefore, eminently possible. Indeed it is, but if politics is the art of the possible, is the Radical Alternative politically possible? That is a political conundrum rather than a constitutional one, because the political convention of politicians which sustains the primacy of the Prime Minister is itself sustained by the ultimate convention of public opinion.

I think the broad public understands where executive power lies without knowing exactly what it is and from where it is legally or politically derived. They equate executive power with political power and they know the Prime Minister - by virtue of the position itself in the political scheme of things - is a person of influence, a powerful politician. They know that person as the leader of the majority party and therefore the Prime Minister of the country. In basic terms, to the public, the Prime Minister's power derives from public opinion expressed in the ballot box but, in the ultimate, it is a ballot by political parties who choose, or dispose of, their own leader and not a direct popular vote for one person in whom will reside the executive power of the government of the nation.

Therefore, to change that expression of responsible government is a big leap for public opinion to take as well as a big leap for politicians. At present the power which politicians have to choose their leader, and hence the Prime Minister, as the political leader of the nation is a heady power. More so, ironically, for the backbenchers who cast their vote in the party room for their leader, than for Ministers in whom will reside 'executive' power under the Constitution. They could not be expected, therefore, to lightly hand over that power to the public; heaven forbid the voting public having the intelligence to directly choose the national political leader!

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Yet, that is precisely the misjudgement made by the Constitution Convention architects of the model for choosing a President put to the Constitution Referendum. They wanted to cut out the public from the exercise of power in choosing the President. The architects and, almost universally, contemporary federal politicians wanted to retain the power to choose the President. They all misread the public, as so often happens when politicians and pseudo-politicians come to decide what is 'best' for the public. So maybe the Radical Alternative, or some modification of it, is not so radical after all.

A good politician will learn to respect the public. A good political architect of a new Constitution will learn from the last referendum to respect the judgement of the people expressed in the 'No' vote: a judgement not so much against a republic but against the model put before them. Maybe, just maybe, the public will accept a model by which the 'executive' power of Ministers and the Prime Minister is transferred to a President, at least to a President directly elected by the people.

In reality, however, I would think there are two major stumbling blocks to public acceptance of an Executive President. They both reflect the realities of the two constituencies whose support would be required to make such a change: the constituency of Parliament itself and the constituency of public opinion. Parliament has to pass the Bill to hold the Referendum to make the constitutional changes. Those who hold power are unlikely to give away power. That was seen in the last Referendum amongst Liberal, National Party, Labor and Democrats alike. Therefore, there would have to be a tidal wave of public opinion to overcome the entrenched reluctance of politicians - Members of the House of Representatives in particular - to transfer actual executive power to an Executive President.

When it comes to public opinion the reality of Australian scepticism for the concentration of power in one place or one person would, I think, come to the fore. That reality was seen in the rejection of the Referendum Model with its concentration of the power of selection of the President in the Parliament and, paradoxically for the current discussion, the rejection of the Prime Minister's power to dismiss the President. Dismissals of the Prime Minister by the Governor-General, some say, are bad enough, but dismissal of the President by the Prime Minister, never! Thus, in my judgement, contemporary public opinion would be likely to see a concentration of actual executive power in a President as offending their innate political scepticism.

On the other hand, one can see this scepticism reflected in a readiness to embrace a Republic and a President who can be, or can appear to be, a counterbalance in a political sense to a Prime Minister without the

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President having day-to-day executive power. In other words, the public accepts the current constitutional model of responsible government, but the national mood is republican and for a President. In a directly elected President the public has a sense of ownership of the Office of Head of State and that very fact, together with whatever constitutional powers attach to the Office, would of itself provide the political counterbalance which Australians, sometimes mischievously, most times deliberately, bring to bear upon their political outlook.

Recognition of these realities is not to resign a future republic to a minimalist model. I suspect Australian scepticism might well like the idea expressed by Brian Galligan in his paper that, '[t]here is indeed a case for bolstering the powers of the President to re-balance the system and restrain prime ministerial dominance'.<sup>1</sup> Direct popular election of the President would certainly achieve that. Constitutional definition of the President's 'reserve' powers is the other way to create the counterbalance and satisfy the Australian public.

The Australian public, I believe, is ready to embrace the direct election of a President. It reflects the Australian political personality. The challenge for republicans is to define the President's constitutional powers and then have the Australian public carry the politicians along in accepting that model. Defining a republican President's powers will be the critical part of selling the new republic to the public. Section 61, in its terms, makes the Head of State a powerful executive figure; constitutional convention renders the office only a passive one. Is the retention of s61 as it is really what republicans want or what the people will accept? I think not! This is the great weakness of the 'minimalist' model for it relies on the retention of monarchical unwritten conventions to sustain the division of power between the Head of State and the Prime Minister as the political head of the national government. As Galligan writes, '[i]f the Monarchy is dead then we should discard it'.<sup>2</sup> Sections 61, 62 and 63 of the Constitution should be rewritten.

Defining a republican President's powers is a necessary challenge, difficult but not beyond the wit of persons of republic intent. A challenge indeed, but a challenge to be won for the future good of Australia. One could add a Bill of Rights to the model. That would be a real victory for a real Republic!

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<sup>1</sup> Galligan, B. 'A Radical Alternative - An Executive Presidency: Can we abolish the Prime Minister?' (2001) 3 *UNDALR*, 45 at 55.

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