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CONSTRAINING A PRESIDENT - A
REPUBLICAN CHALLENGE FOR AUSTRALIA
AND NEW ZEALAND.

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ABSTRACT

Republicans in Australia and New Zealand argue that as independent nation states, it is no longer appropriate that our head of state is the Queen of the United Kingdom, even if she is known as the Queen of Australia and the Queen of New Zealand respectively. The final step in each country becoming a republic would be to replace the sovereign as head of state with a republican president. The sovereign, represented in Australia and in New Zealand by a Governor-General, has statutory, prerogative and discretionary reserve powers, the exercise of which is governed by constitutional conventions. If the sovereign is to be replaced by a republican President, perhaps directly elected by the people, what sort of powers should the President have?

This paper considers ways Australia and New Zealand could limit the powers of a directly elected President to preserve the constitutional balance and ensure the President could not exercise executive power independently of the government. Part I examines the shared constitutional evolution of Australia and New Zealand from colonies to Dominions to politically independent nations, and concludes that the shared nature of that evolution makes it worthwhile to compare republican options. Part II recognises some significant constitutional differences between Australia and New Zealand that might affect how each could become a republic, but suggests that these do not necessarily affect a President's powers. Part III analyses the symbolic, ceremonial and constitutional roles of our current Governors-General and finds significant similarity in those roles, notably in relation to the Governor-General's reserve powers. Part IV assesses a range of options to constrain the republican president's discretionary powers so as to retain the refined constitutional balance of our parliamentary democracies.

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 15,373 words.

Writing in 1966, the late Donald Horne, left wing intellectual and ardent republican complained:¹

But the Queen is in London and here we are in Australia. She is not really our Queen. She does not stand *for us*. She stands as a symbol of how derivative we are, how provincial and second-rate.

Although written nearly forty years ago, this comment neatly encapsulates the arguments for change propounded by republicans in Australia and New Zealand – our head of state is foreign and distant both physically and culturally, and having a distant monarch as head of state shows a lack of national pride and independence.

Australia and New Zealand were colonies of imperial Britain, and have inherited from Britain important elements of their constitutional frameworks. Australia, as a federation of states, also drew heavily from the American experience. Although there are some important differences, such as New Zealand having a unicameral Parliament, Australia and New Zealand share many aspects of their constitutional arrangements. For both countries, the key constitutional actors are the parliament and sovereign, the executive and the judiciary. Both Australia and New Zealand have a refined constitutional framework, based on the principle of responsible government, which attempts to explain the relationship between each of these constitutional actors and to balance their powers. The twentieth century saw for each a whittling away of direct British influence and its replacement with independent government, still strongly rooted in the Westminster tradition.

The process of independence from Britain has, to a great extent, already been achieved through imperial political declaration, political action and legislative change. For Australia and New Zealand finally to sever constitutional ties with Britain and become republics would require removing the monarch, currently Queen Elizabeth II, as our head of state. But removing one key

¹ Donald Horne "Republican Australia" in Geoffrey Dutton (ed) *Australia and the Monarchy* (Sun Books, Melbourne, 1966) 88

constitutional actor – the sovereign – raises the question of what should replace it. If the monarch is to be replaced by a republican head of state, let us call it a President, what should be the relationship of the President to the other elements of government and, more significantly, what powers should a President have? Should a President retain the same statutory powers, the exercise of the royal prerogative and the same discretionary power to act, in limited circumstances, without ministerial advice (the ‘reserve powers’)?

In Australia, the very fact of the controversial dismissal by Governor-General Sir John Kerr of the Rt Hon Gough Whitlam as Prime Minister in 1975 begs the question of what sort of powers a President might have, and shapes the constitutional debate, at least among constitutional experts. In New Zealand, debate about what to do with the powers of the Governor-General if New Zealand were to become a republic has been more muted. This might be because there has been no instance in recent New Zealand history to suggest the Governor-General would exercise his or her powers without Ministerial advice. However, Palmer and Palmer have articulated the need for consideration in New Zealand of what powers should be given to a President, saying “[w]e should not simply replace the Queen with a President. The legal powers of that person would be awesome and unacceptable unless an exercise were done to define and confine the powers”.² A move to a republic would require careful consideration of the powers to be granted to the President in order to ensure the constitutional balance is not skewed and that constitutional safeguards, often based on convention, are retained.

Consideration of how a President might be chosen, whether he or she should have secure tenure or, if not, how he or she should be able to be removed from office, are beyond the scope of this paper. However, the nature of the office will affect the sort of powers the holder of the office should exercise. If a President were to be appointed, then he or she should have no more personal discretion beyond that necessary to ensure the effective operation of parliamentary democracy. As Professor Bailey has pointed out, the only

² Sir Geoffrey Palmer & Matthew Palmer *Bridled Power – New Zealand’s Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004) 65

acceptable reserve powers for an appointed president would be those that are "the corollary of the democratic principle that political authority is derived from the people".³

If, as the Australian electorate appears to demand⁴, a President were to be directly elected, then he or she could claim a mandate from the entire electorate.⁵ There is a risk of creating a democratic power base to rival Parliament. The greater the office holder's personal democratic mandate, the greater would be the possibility of the independent exercise of his or her discretionary powers. In such circumstances, as New Zealand commentator Andrew Ladley has argued, the nature and extent of executive powers would need to be carefully defined.⁶

Given Australians want to elect their President, this paper takes up Professor Winterton's challenge⁷ to consider ways of limiting the powers of a directly elected President to preserve the constitutional balance and ensure the President could not exercise executive power independently of the government. The New Zealand public has not yet been asked for its opinion on the mode of election of a President. But ten years after the last major constitutional change - the introduction of the Mixed Member Proportional representation system (MMP) - it is timely to consider which ideas and solutions proposed in Australia might be relevant for New Zealand, and which ideas from New Zealand might illuminate options for Australia.

Part I of this paper examines how Australia and New Zealand have, to a great extent, already achieved constitutional independence from the United Kingdom. Legislative, executive including prerogative and judicial powers have already been transferred to each country. This independence from Britain has been achieved through political agreement, imperial declarations and the passage

³ in George Winterton *Parliament, the Executive and the Governor-General - A Constitutional Analysis* (Melbourne University Press, Melbourne, 1983) 153

⁴ George Winterton "A Directly Elected President: Maximising Benefits and Minimising Risks" (2001) 3 *UNADLR* 29, 29

⁵ Winterton "A Directly Elected President" above n4, 34

⁶ Andrew Ladley "Who Should be Head of State" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Victoria University of Wellington, 2000) 275

⁷ Winterton "A Directly Elected President" above n4, 41

of legislation rather than by bloodshed or revolution. Significant constitutional changes such as the complete transfer of the prerogative power to conduct external affairs have occurred with no amendment of the constitutional instruments. Both Australia and New Zealand have shed the vestiges of Empire in amicable ways. The shared nature of our constitutional development emphasises the value of taking a comparative approach to addressing the republican challenge.

Part II identifies some key constitutional differences between Australia and New Zealand, which might affect the likelihood and ways in which each could become a republic.

The main step in becoming a republic would be to remove the monarch as head of state. The monarch is represented in each of Australia and New Zealand by a Governor-General, appointed by the monarch on the advice of the Prime Minister. The monarch is further divisible in Australia, in that she also has a constitutional role in each of the states, but this paper will focus solely on her role with respect to the Commonwealth of Australia. Part III considers the Governor-General's symbolic, ceremonial and constitutional roles and the sources and content of the various powers exercisable by the incumbent of the office. In Part IV, the paper turns to consider what powers a republican President should have.

This paper concludes that there are some important differences in the constitutional arrangements of Australia and New Zealand. Nevertheless, the similarities of our constitutional development and of the existing powers of the Governor-General mean that ideas formulated in each national context for ensuring that the current constitutional balance is maintained if the monarch were replaced as head of state, are worth considering in the other country.

I A SHARED CONSTITUTIONAL EVOLUTION

Australia and New Zealand have valued their historical and political links with Britain. In the 1880s, the Australian and New Zealand colonies might have been insistent on their own autonomy but, as McLean writes, they were “far too conscious of the economic and political advantages of operating within the British system to want to throw it aside”.⁸ In 1906, for example, the High Court of Australia held there was no Australian nationality distinguished from a British nationality.⁹ Australians were British citizens and felt British.

Interestingly, given the current economic integration between Australia and New Zealand, these links with Britain were more important than the links between Australia and New Zealand. For New Zealand, perhaps still aware of having been governed from New South Wales from 1831 to 1840, its link to Britain helped avoid the perception of being subsumed by Australia. Commenting on Prime Minister Seddon’s decision not to join the Australian federation, French observer André Siegfried noted that by retaining its attachment to Britain, New Zealand could avoid:¹⁰

Australian suzerainty ... which would wound the New Zealanders pride to its very roots ... In this way may be explained, quite naturally, the line of conduct followed by Mr Seddon’s Government: resistance to Australia by drawing closer to England.

This practice of determined separateness was long standing. During the 1930s, Australia and New Zealand dealt with each other in relation to defence through the Committee of Imperial Defence in London; and during World War II, made no attempt at a joint assessment of their shared regional concerns.¹¹ And yet, paradoxically, Australia and New Zealand share an intensely nationalist moment in the rhetoric of the birth of nationhood as stemming from involvement in the Gallipoli campaign. There is an irony in the fact that Australia’s pride in

⁸ Denis McLean, *The Prickly Pear – Making Nationalism in Australia and New Zealand* (University of Otago Press, Dunedin, 2003) 69

⁹ *Attorney-General for the Commonwealth v Ah Shung* (1906) 4 CLR 949 per Higgins CJ at 951

¹⁰ McLean *The Prickly Pear* above n8, 86

¹¹ McLean *The Prickly Pear* above n8, 110-112

the iconic tall, lean, tanned and independent soldier fostered by official war historian CEW Bean, was based on a creation by English writer Ellis Ashmead-Bartlett.¹² There is a further irony in the fact that both Australia and New Zealand celebrate a sense of separateness and independent nationalism drawn from the same experience.

Despite the shared nationalist experience of Gallipoli, different episodes have affirmed Australian and New Zealand independence from Britain. For Australia, Prime Minister Curtin in 1941 rejected British demands to keep troops in the Middle East and announced that Australia looked to America for its security “free of any pangs as to our traditional links or kinship with the United Kingdom”.¹³ More recently, there was the public insistence that an Australian declare open the Sydney Olympics. For New Zealand, Britain’s entry into the Common Market in 1974 emphasised that Britain’s economic focus was no longer on the Commonwealth. The bombing of the Rainbow Warrior in 1985 has also been seen as a defining event in the development of a more assertive New Zealand identity.¹⁴ These nationalist moments have been accompanied by a quieter but ongoing constitutional revolution. Australia and New Zealand share what Professor Cheryl Saunders has called the British tradition of an “evolutionary approach to constitutional change”.¹⁵ This approach has seen the gradual, and mostly parallel, acquisition by Australia and New Zealand of completely independent legislative, executive and judicial powers.

A Legislative Powers

The power of the Australian colonies and New Zealand to independently legislate resulted from the passage of legislation by the British parliament. In 1850, the Australian Colonies Government Act transferred effective power to the

¹² Richard White *Inventing Australia: Images and Identity 1688-1980* (Allen & Unwin, Sydney, 1992) 128-9

¹³ Stuart McIntyre *Oxford History of Australia Volume 4, 1901-1942* (Oxford University Press, Melbourne, 1990) 332

¹⁴ Noel Cox & Raymond Miller “Monarchy” in Raymond Miller (ed) *New Zealand Government and Politics* (3 ed, Oxford University Press, Melbourne, 2003) 53

¹⁵ Cheryl Saunders “The Australian Experience: Lessons, Pointers and Pitfalls” in James, above n6, 281

Australian colonies, allowing them to set up local legislatures and regulate the franchise and qualifications for membership of those legislatures.¹⁶ By the New Zealand Constitution Act 1852, the British parliament established a General Assembly in New Zealand and granted it powers to make laws for New Zealand. In 1865, the Colonial Laws Validity Act, which applied to New Zealand and the Australian colonies, ensured colonial legislation was no longer invalid solely because of inconsistency with English law, although the common law rule giving supremacy to British statutes continued.

In the 1890s, a series of Constitutional Conventions¹⁷ worked out the features of a nation state to be formed by the federation of the Australian colonies. On 5 July 1900, the British Parliament passed the Commonwealth of Australia Constitution Act 1900 (Australian Constitution). On 17 September, Queen Victoria proclaimed that the Australian Commonwealth would come into existence on 1 January 1901. A British statute royally proclaimed, created the nation state of Australia. In 1907, New Zealand was proclaimed a Dominion and the British government withdrew its last instructions for the mandatory reservation of bills. The later passage of the New Zealand Constitution (Amendment) Act 1947 in the United Kingdom and the New Zealand Constitution (Amendment) (Request and Consent) Act 1947 in New Zealand allowed New Zealand to amend its constitution by passage of its own legislation. For the Australian colonies and for New Zealand, British legislation determined the acquisition of legislative power exercisable independently of Britain.

The next evolutionary steps towards political independence for New Zealand and Australia were achieved by declarations of Imperial Conferences. The Resolution of the 1917 Imperial Conference recognised the Dominions, including Australia and New Zealand, as autonomous nations of an Imperial Commonwealth. The Imperial Conference of 1926 declared the Dominions to be “autonomous communities within the British Empire, equal in status, in no way

¹⁶ Geoffrey Sawer *The Australian Constitution* (2nd ed., Australian Government Publishing Service, Canberra, 1998) 2

¹⁷ The capital ‘C’ distinguishes these meetings about the future of the constitution from the constitutional conventions that are practices shaping the operation of constitutional arrangements.

subordinate one to another in any respect of their domestic or external affairs".¹⁸ The Conference accepted as a conventional rule that all surviving British legislative and executive powers directly bearing on Dominion affairs were to be used only as requested by the relevant Dominion governments.¹⁹

The next major realignment of legislative powers towards Australia and New Zealand resulted from the Statute of Westminster Act 1931. The Act had to be adopted by legislation in Australia and New Zealand to come into effect in those countries. In Australia, the Statute of Westminster Adoption Act was passed in 1942, although the preamble noted that it took effect on 3 September 1939, the "date of commencement of war between His Majesty the King and Germany". New Zealand passed its Statute of Westminster Adoption Act in 1947, thereby, like Australia, adopting key sections of the British statute. As of the date of commencement of each Statute of Westminster Adoption Act, the Colonial Laws Validity Act 1865 no longer applied, and no law made by the Parliament of a Dominion was to be void on the basis that it was repugnant to the law of England. The Parliament of a Dominion had full power to make laws having extra-territorial operation; no act of the British Parliament made after the commencement of the Act was to be extended to a Dominion unless so requested; and the Dominion Parliament had powers in relation to the courts of admiralty.²⁰ The British Parliament restricted its own powers to legislate for New Zealand or Australia.

In 1986, separate local statutes brought an end to British parliamentary supremacy over Australia and New Zealand. The Australian Parliament passed the Australia Act 1986, terminating the power of the United Kingdom to legislate for Australia and finally establishing the full independence of the Australian political and legal system.²¹ The New Zealand Parliament passed the Constitution Act 1986, which revoked the application of the Constitution Act

¹⁸ Article 4, Imperial Declaration 1926 in Sawyer, above n16, 71

¹⁹ Sawyer, above n16, 71

²⁰ Statute of Westminster Adoption Act 1942 (Australia), Statute of Westminster Adoption Act, 1947 (New Zealand)

²¹ Professor Zines' commentary to HV Evatt *The Royal Prerogative* (The Law Book Co, North Ryde, 1987) C9

1852²² and provided that United Kingdom legislation passed after 1986 would not extend to New Zealand as part of its law.²³ As Professor Zines has said in relation to Australia, but which is equally applicable to New Zealand, the development of political independence:²⁴

... was achieved merely by construing those constitutions in the light of the changing and evolving status of the countries concerned evidenced by political action, conference declarations, intra-imperial agreements and recognition of the international personality of the Dominions by other nations.

Australian and New Zealand legislative independence was peacefully, although perhaps paradoxically, achieved by Imperial pronouncements and the passage of British legislation.

B Executive Powers

The transfer of executive powers from the United Kingdom to Australia and New Zealand mirrored that of legislative powers. The 1926 Imperial Conference declared that British executive powers bearing on Dominion affairs were from that time only to be used as requested by the relevant Dominion governments.²⁵

The royal prerogatives - a bundle of miscellaneous rights and powers of executive government²⁶ - were similarly transferred. In Australia, the prerogative is exercisable by the executive by virtue of Section 61 of the Australian Constitution. Considering leave to appeal from a decision of the High

²² Constitution Act 1986 (New Zealand), s26

²³ Constitution Act 1986 (New Zealand), s15

²⁴ Professor Zines' commentary to HV Evatt, above n21, C2

²⁵ Cheryl Saunders & Ewart Smith *A Paper Prepared for Standing Committee D Identifying the Conventions Associated with the Commonwealth Constitution* (Australian Constitutional Convention, 1980) 5

²⁶ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 585

Court in 1920, Viscount Haldane said of section 61:²⁷

...does it not put the sovereign in the position of having parted, so far as the affairs of the Commonwealth are concerned, with every shadow of act of intervention in their affairs and handing them over, unlike the case in Canada, to the Governor-General?

In his 1927 analysis of the prerogative powers, HV Evatt confidently asserted that “our powers of self-government in this respect are complete”.²⁸ Perhaps this demonstrated something of the confidence of a doctoral student, because he was slightly more circumspect as Attorney General, about whether the Australian executive could exercise the prerogative power to declare war. In 1941, Evatt as Attorney General advised King George VI to assign to the Governor-General the power to declare war on Japan, Finland, Hungary and Romania. The cautious assignment was to ensure the Australian executive had the power to declare war. By 1951, the Governor-General was clearly perceived to have the authority to declare peace with Germany without any specific delegation by the King.²⁹ The High Court conclusively established in *Barton v Commonwealth*,³⁰ that the prerogatives were part of Australian law.

In his analysis, Evatt considered the case of New Zealand and concluded that, as in Australia, there was no legal obstacle in the way of the government exercising the full prerogative of the king.³¹ In New Zealand, Clause III of Letters Patent Constituting the Office of Governor-General of New Zealand S/R 1983/225 (Letters Patent) delegated to the Governor-General the exercise of executive, including prerogative, powers.³² The transfer of the prerogative power then, was determined by political practice, legal commentary and judicial pronouncement in both Australia and New Zealand.

²⁷ Evatt, above n21, 190

²⁸ Evatt, above n21, 191

²⁹ Professor Zines' commentary to HV Evatt, above n21, C6

³⁰ *Barton v Commonwealth* (1974) 131 CLR 477 See also *Victoria v Commonwealth* (1975) 134 CLR 338, *NSW v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337

³¹ Evatt, above n21, 195

³² Andrew Stockley “Becoming a Republic: Issues of Law” in Luke Trainor (ed) *Republicanism in New Zealand* (The Dunmore Press, Palmerston North, 1996) 82

That the relevant Governor-General and not the Queen exercised the executive powers for Australia and New Zealand was made explicit in the Queen's response to a request by the Speaker of the House that she intervene following Whitlam's dismissal:³³

... the Australian Constitution firmly places the prerogative powers of the Crown in the hands of the Governor-General as the representative of the Queen in Australia. The only person competent to commission an Australian Prime Minister is the Governor-General, and the Queen has no part in the decisions which the Governor-General must take in accordance with the Constitution ... Her Majesty, as Queen of Australia, is watching events in Canberra with close interest and attention, but it would not be proper for her to intervene in person in matters which are so clearly placed within the jurisdiction of the Governor-General by the constitution.

The Queen similarly refused to intervene in Fiji at the time of the military coups.³⁴ Where the executive and prerogative powers of the constitution vest in the Governor-General, as they do in Australia and New Zealand, those powers are exercisable by the Governor-General and, as the Queen's actions have shown, will not be exercised by the monarch.

C *Judicial Powers*

The transfer of the ultimate court of appeal was achieved in each country by the passage of domestic legislation. In Australia, Section 11 of the Australia Act 1986 terminated appeals to the Privy Council. In New Zealand, the Supreme Court Act 2004 not only withdrew appeals to the Privy Council, but also established a superior court of final appeal in New Zealand. As of 2004, the final court of appeal in each country was situated in its own country and staffed by judges nominated by its own Attorney General.

³³ in LJM Cooray *Conventions, the Australian Constitution and the Future* (Legal Books, Sydney, 1979) 146

³⁴ Andrew P Stockley "Becoming a Republic: Matters of Symbolism" in Trainor, above n32, 70

D *Our Own (shared) Sovereign*

The evolution of the British monarch as the Queen in right of Australia and separately as the Queen in right of New Zealand occurred at roughly the same time. The power of the Australian and New Zealand executives to advise the sovereign devolved from imperial declarations and legislation. The 1917 Imperial Conference established that the powers vested in the Queen by the Australian and New Zealand constitutional instruments were exercisable by her on the advice of her Dominion, not British, Ministers.³⁵ In 1927, British legislation was passed to affirm that the monarch related directly to the Dominion governments, not indirectly through the British government. Australian and New Zealand legislation provided that the Queen would be known as Queen of Australia and Queen of New Zealand, respectively, and removed from the Queen's formal title references to the United Kingdom.³⁶ As the High Court later held, the "allegiance which Australians owe to Her Majesty is owed not as British subjects but as subjects of the Queen of Australia".³⁷

There was a similar evolution in the office of Governor-General being filled by Australians and New Zealanders rather than the British-born. In 1930, Australia's Labour Prime Minister Scullin proposed Isaac Isaacs as Governor-General, a choice criticised by JG Latham (later Chief Justice of the High Court of Australia) as showing a "lack of enthusiasm" for the British Empire.³⁸ As a result of Scullin's proposal and the King's demur, the 1930 Imperial Conference resolved the Dominion government should tender advice on the appointment of a Governor-General, after informal consultation with the King. Isaacs was duly appointed by George V.³⁹ Prime Minister Menzies reverted to recommending British aristocracy to become Governor-General until Australian Lord Casey was appointed in 1965. In New Zealand, New Zealand-born Sir Arthur Porritt was appointed Governor-General in 1967. Since Porritt had spent most of his

³⁵ Saunders & Smith, above n25, 5

³⁶ Royal Styles and Titles Act 1973 (Australia), Royal Titles Act 1974 (New Zealand)

³⁷ *Pochi v Macphee* (1982) 151 CLR 101 Gibbs CJ (with whom Mason and Wilson JJ agreed) at 109

³⁸ Sir Zelman Cowan "The Constitution and the Monarchy" in Dutton, above n1, 49

³⁹ Cowan in Dutton, above n1, 49; See also Winterton, above n3, 20

working life in the United Kingdom, he was a 'transitional figure', to use Cox and Miller's phrase, who paved the way for New Zealand born and resident Dennis Blundell to be appointed Governor-General in 1972.⁴⁰ The person who is the British monarch remains the head of state of Australia and New Zealand but there has been an evolution in her separate roles as the Queen of Australia and the Queen of New Zealand, and in the appointment of Australians and New Zealanders to act as her vice-regal representatives. The Queen of Australia and of New Zealand might be the same person but, constitutionally, they are distinct entities whose roles are determined by separate constitutional instruments.

E The Republican Debate

In addition to the evolutionary transfer to Australia and New Zealand of the powers of the key constitutional actors, there have been numerous symbolic changes that highlight the increasing independence of Australia and New Zealand from Britain. In New Zealand, *God Defend New Zealand* was named the second national anthem in 1977, Maori became an official language in 1987 and a New Zealand honours system was instituted in 1996.⁴¹ In Australia, *Advance Australia Fair* was proclaimed the national anthem in 1984⁴², the basic qualification for membership of Parliament was changed from British to Australian citizenship,⁴³ and an Australian honours system was instituted.

The establishment of non-British national identities has not necessarily translated into a strong push for a republic. WC Wentworth commented in the 1960s that:⁴⁴

[t]here is virtually no republican sentiment in Australia. We do not wish to believe that our political leaders are the tops – they are more tolerable if we can maintain the feeling that somehow, somewhere, there is something above them. We assert our independence but we would rather not face its

⁴⁰ Cox & Miller "Monarchy", above n14, 52

⁴¹ "A Timeline of New Zealand's constitutional evolution to 2004" Appendix A *Terms of Reference – Inquiry into the New Zealand Constitution 2005*

⁴² www.pm.gov.au/aus_in_focus/net_symbols/anthem.html (last viewed 3 September 05)

⁴³ Sawyer *The Australian Constitution* above n16, 110

⁴⁴ in Don Whittington "The Liberal Party and the Monarchy" in Dutton, above n1, 149

ultimate consequences. It is not so much the abstract idea of an Australian President which is repugnant to us – rather it is the idea of an actual Australian as President. The Monarchy helps us to resolve this innate dilemma.

This sentiment no doubt continues to resonate for many Australians. The complaint from some that New Zealand should not have its own court of last appeal because it could not guarantee sufficient quality of judges, suggests the sentiment also resonates in New Zealand.

Catalysts for recent Australian republican activity have been Whitlam's dismissal, the personal leadership of Prime Minister Paul Keating in promoting an Australian republic, and the marker of the year 2001 as the Centenary of Federation. In 1993, the Republic Advisory Committee found that it was both legally and practically possible to achieve a viable federal republic of Australia.⁴⁵ The republican discourse reached its moment of truth on 6 November 1999, when a referendum to amend the Australian constitution was held – and defeated.

There has been less prominent republican activity in New Zealand. New Zealand commentators have cast the shift to MMP as itself an assertion of independence from the Westminster system, claiming that the move from first past the post “end[ed] the dependence on an inherited outlook, policies and institutional arrangements, and ma[de] a move towards an indigenously crafted style of governance appropriate to a more mature New Zealand identity.”⁴⁶ In 1994, Prime Minister Jim Bolger asked in Parliament whether New Zealand should “continue to have an appointed Governor-General as our Head of State, or should we move to an elected President? ... [T]he big reason will be that we want to be independent New Zealanders”.⁴⁷ Political colleagues and opponents distanced themselves from the call, some attributing it to Bolger's Irish ancestry. Perhaps the move to MMP was deemed sufficiently to reflect the changes in

⁴⁵ Republican Advisory Committee *An Australian Republic: The Options – An Overview* (Canberra, 1993)

⁴⁶ Jonathan Boston, Stephen Levine, Elizabeth McLeay, Nigel S Roberts *New Zealand Under MMP – A New Politics?* (Auckland University Press, Auckland, 1996) 2 See also Bruce Jesson “Republicanism in New Zealand” in Trainor, above n32, 56

⁴⁷ (8 March 1994) 539 *New Zealand Parliamentary Debates (NZPD)* 121

political and social life in New Zealand, and so there was no perceived need to become a republic.

There is probably a symbiotic relationship between the lack of an informed republican debate in New Zealand and the lack of support for New Zealand becoming a republic. A survey of opinion leaders conducted in 1995 elicited that 44 per cent of people thought a New Zealand republic was likely in the next ten years.⁴⁸ A poll conducted in March 2005 found that just under 50 per cent of respondents opposed New Zealand becoming a republic, with 35 per cent in support. Asked whether New Zealand would become a republic, 58 per cent thought yes, 29 per cent thought no and the remainder were unsure. One journalist thought it would be best to see what Australia would do before determining what sort of republic New Zealand should have.⁴⁹ The republican debate in New Zealand is fledgling and republican scholarship is limited.

While the journey towards robust republican debate has differed in Australia and New Zealand, the journey towards constitutional independence from Britain has been remarkably similar. Independence was achieved through imperial declarations, political decision-making, judicial interpretation and the passage of legislation. Australia and New Zealand have shared catalysts for major constitutional changes from the Colonial Laws Validity Act 1865 to the Statute of Westminster 1931 and the coincidental but parallel 1986 abolition of British legislative powers over Australia and New Zealand. This shared constitutional history and parallel constitutional evolution from colony to Dominion to independent nation state, highlights the value of a comparative study of republican options.

⁴⁸ Boston, above n46, 38

⁴⁹ Nick Bryant "Wise up and wait for Australians to lead" (11 March 2005) *The National Business Review* Auckland 16

II OUR CONSTITUTIONAL DIFFERENCES

Despite our similar constitutional evolution, there are some distinctive constitutional features which will shape how a republic might be adopted in each country. The key differences are the existence of the Treaty of Waitangi and of MMP in New Zealand, and of federalism and a bicameral Parliament in Australia.

In New Zealand, the fact the Crown was a co-signatory of the Treaty of Waitangi has raised the spectre that the Crown must be retained in order to honour its Treaty obligations. Andrea Tunks argues the removal from New Zealand's constitutional framework of a co-signatory would remove the personal relationship that carries the potential of justice and the enforcement of Treaty guarantees.⁵⁰ While there may be some emotional significance in the retention of the Crown, legally and politically the obligations have passed to the Queen in right of New Zealand.⁵¹ As Prime Minister, Jim Bolger accepted that "the Treaty imposed obligations on New Zealand and New Zealand will have to honour these obligations irrespective of who or what we select or elect the head of state".⁵²

But while the government might intend to honour its Treaty obligations, the different interpretations by Pakeha and Māori of the concept of *tinorangatiratanga* is likely to challenge how New Zealand can adopt a republican head of state as a constitutional sovereign. Moana Jackson asks "how can this country establish constitutional frameworks that recognise the equally legitimate sovereign rights of Māori and the Crown to exercise governance?"⁵³ The idea of one sovereign, Jackson argues, is only possible by denying the possibility of any contending Māori constitutional reality. Mason Durie suggests the chance of New Zealand becoming a republic is quite high, with the colonial partnership having outlived any usefulness it might have had for Māori, but he too noted the

⁵⁰ Andrea Tunks "Mana Tiriti" in Trainor, above n32, 117

⁵¹ *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 Lord Woolfe at 517

⁵² in Stockley "Becoming a Republic: Issues of Law" in Trainor, above n32, 101

⁵³ Moana Jackson "Where does sovereignty lie?" in James, above n6, 197

nervousness of the Crown about recognising any sense of residual Māori sovereignty or right to self-determination.⁵⁴

It is not clear how these questions about sovereignty, still rankling in the current system of constitutional monarchy, might be dealt with in a republican constitutional debate. Andrew Ladley thought that “how to constitutionalise the relationship between Māori and others” would in fact be a bigger constitutional hurdle for New Zealand than determining the powers of a head of state.⁵⁵ There are possible ways of acknowledging different forms of sovereignty authority, some forms of which might be Māori. Durie, for example, proposed Māori participation in governance might be about the establishment of Māori governing bodies to control Māori resources and to interact with the Crown.⁵⁶ Alternatively, there could be some form of devolution of authority as in Scotland.⁵⁷ It is worth considering whether constitutional sovereignty must be territorial. The Anglican Church in New Zealand has provided an example of parallel leadership through the creation of the Diocese of Aotearoa. Ensuring the sovereign rights and expectations of Māori as protected by the Treaty are included in any form of New Zealand republic might challenge a framework developed by Pakeha, but would be a vital step in New Zealand becoming a republic. Both Māori and Pakeha acknowledge that the very existence of the Treaty alters the republican discussion about the place of the sovereign in the constitutional framework.

Another difference between the Australian and New Zealand constitutional frameworks is apparent in our parliamentary systems, and their checks on executive excess. In New Zealand the main check to the unconstrained power of the executive is the MMP electoral system.⁵⁸ The prospect of coalition government foreshadowed by MMP seemed a desirable alternative to unrestrained executive power that had characterised previous

⁵⁴ Mason Durie *Ngā Kāhui Pou Launching Māori Futures* (Huia Publishers, Wellington, 2003) 111-113

⁵⁵ Ladley in James, above n6, 275

⁵⁶ Durie, above n54, 140

⁵⁷ Durie, above n54, 169

⁵⁸ Boston, above n46, 19

decades.⁵⁹ MMP was seen as an important check on excesses of the executive. In Australia, the executive is constrained by the existence of the Senate and by the fact that executive power is more diffuse, with much of it resting with the states. While these constitutional differences change the nature of our politics, they act in much the same way in controlling the executive within the parliamentary system. But these features do not directly affect the relationship between the sovereign and the parliament or the sovereign and the electorate. The differences in our parliamentary systems do not of themselves alter the possibility or practicability of Australia and New Zealand becoming republics.

A more significant difference is the fact that Australia has an entrenched constitution, a major feature of which is that it gives power to the High Court to invalidate legislation as 'unconstitutional'. This judicial scrutiny was necessary in a federal system to referee disputes between the states and the commonwealth as to which had power to deal with certain aspects of government. The Court is therefore constitutionally able to constrain certain excesses of the executive. In New Zealand, parliamentary sovereignty has been touted as a central feature of New Zealand's parliamentary democracy.⁶⁰ The supremacy of the Parliament and the intention of the executive to retain that supremacy would of itself weigh against any unconstrained presidential powers appearing in a New Zealand republic.

Finally, it is worth noting the different ways the constitutional frameworks of Australia and New Zealand might be amended. Ironically, it would be easier for New Zealand, where there has been less republican momentum, to become a republic, simply by altering its non-entrenched constitutional legislation.⁶¹ Although legally the constitution might require only legislative change, political commentator Colin James has assessed that, politically, direct democracy has become more important in people's minds and therefore no major constitutional changes could occur without a public

⁵⁹ Boston, above n46, 30

⁶⁰ See Dr Michael Cullen "Parliament Supremacy over Fundamental Norms" Address to the Public Law Conference, Legislative Council Chamber, 29 October 2004

⁶¹ See Palmer & Palmer, above n2, 62

referendum.⁶² In Australia, the entrenched constitution itself demands a referendum to amend the constitution. Moreover, to be successful, the referendum must be passed by a majority of voters in a majority of states.⁶³

These constitutional differences will affect the nature of the republican debate, most notably as to whether it could be limited to considering the role of the President or, as Lord Cooke has suggested for New Zealand, whether it would need to engage the whole republican agenda.⁶⁴ But it is reasonable to assume that given the evolutionary nature of constitutional change in Australia and New Zealand, it is likely that the preferred republican model would be close in style to the current constitutional model. There is an argument that a move from a constitutional monarchy should open up greater opportunities for an executive president role such as in the United States or France, but it is more likely that a future republican head of state would inhabit an office very similar to that of the Governor-General. Having examined our shared constitutional evolution and identified key constitutional differences, this paper now turns to examine the office of the Governor-General in Australia and New Zealand and the possible powers of a future President.

III THE OFFICE OF GOVERNOR-GENERAL

In Australia and New Zealand, the constitutional instruments declare the Governor-General is the head of state, and constitute the office of the Governor-General.⁶⁵ The Australian and New Zealand Governors-General are appointed by the sovereign on the advice of, respectively, the Australian and New Zealand Prime Ministers. The office of Governor-General is similarly constituted and the Governor-General has been granted similar executive powers in Australia and New Zealand. This part of the paper examines the current roles – symbolic,

⁶² Colin James "The Political History and Framework since 1980" in James, above n6, 166

⁶³ Australian Constitution, s128

⁶⁴ Ladley "Who Should be Head of State?" in James, above n6, 267

⁶⁵ Constitution Act 1986 (New Zealand), s2; Letters Patent Constituting the Office of Governor-General of New Zealand S/R 1983/225 (Letters Patent), Clause I; Australian Constitution, s2

ceremonial and constitutional – of the Australian and New Zealand Governors-General.

A A Symbolic Role

New Zealand Governors-General have emphasised the symbolic nature of their roles. Dame Cath Tizard saw it as a responsibility of the Governor-General to acknowledge a sense of community spirit and affirm those civic virtues that give New Zealand a sense of identity and purpose.⁶⁶ On another occasion she suggested the position existed in order to “proclaim – literally – the mana, the spirit and the ideals of our country”.⁶⁷ Her successor, Sir Michael Hardie Boys, similarly highlighted the importance of the national symbolic, he used the term ‘community’ role, calling the Governor-General “someone in whose office the diverse threads of national life can be brought together and expressed”.⁶⁸ Similar sentiments exist in Australia, where an advisory committee on constitutional reform found Australia needed a head of state because it brought the individual into relationship with the nation as a whole. The Committee recommended the maintenance of a head of state separate from the head of the government, precisely because of its importance as a symbol of national identity.⁶⁹

B A Ceremonial Role

The Australian and New Zealand Governors-General also fulfill ceremonial roles - at the Opening of Parliament, in receiving the credentials of diplomatic representatives, in hosting visiting heads of state and in visiting other countries.⁷⁰ Stockley properly suggests that one virtue of the Governor-General rather than the head of government fulfilling these ceremonial roles is that it effectively deprives the Prime Minister of at least the symbols of ultimate

⁶⁶ Cox & Miller “Monarchy” above n14, 53

⁶⁷ in Andrew P Stockley “Becoming a Republic: Issues of Law” in Trainor, above n32, 85

⁶⁸ Sir Michael Hardie Boys “‘Nodding Automaton?’ Reflections of the Office of Governor-General” (2002) 8 *Canterbury LR* 425, 437

⁶⁹ Advisory Committee to the Constitutional Commission *Executive Government* (Commonwealth of Australia, Canberra, June 1987) 3

⁷⁰ Hardie Boys, above n68, 434

power,⁷¹ thus reinforcing through ceremony the fact that the executive is responsible to the Parliament. A republican President could continue to fulfill these important ceremonial responsibilities.

C A Constitutional Role

The Australian and New Zealand Governors-General each exercise the executive powers of government, which stem from statute, the royal prerogative and reserve powers. In Australia, the executive powers are vested in the Queen and exercisable by the Governor-General.⁷² The Governor-General exercises the powers and functions the Queen is pleased to assign to him.⁷³ It is now accepted that the Governor-General exercises all the powers previously exercisable by the Queen and that no further assignment of powers is necessary. In New Zealand, every power conferred on the Governor-General is a royal power exercised by the Governor-General on behalf of the sovereign.⁷⁴ The Governor-General is authorised and empowered to exercise the executive authority of New Zealand.⁷⁵

1 Powers Deriving from Constitutional Instruments

In New Zealand and Australia, the constitutional instruments designate powers exercisable by the Governor-General. The Governor-General can summons Parliament to meet⁷⁶ and may prorogue or dissolve Parliament.⁷⁷ These powers are exclusively exercised by the Governor-General but other provisions of the constitutional instruments circumscribe their exercise. For example, Parliament must be summoned in each country within a certain period after the return of the writs following an election – six weeks in New Zealand⁷⁸ and 30 days in Australia.⁷⁹

⁷¹ Stockley "Becoming a Republic: Issues of Law" above n32, 103

⁷² Australian Constitution, s61

⁷³ Australian Constitution, s2

⁷⁴ Constitution Act 1986 (New Zealand), s3

⁷⁵ Letters Patent, Clause III

⁷⁶ Constitution Act 1986 (New Zealand), s18(1); Australian Constitution, s5

⁷⁷ Constitution Act 1986 (New Zealand), s18(2); Australian Constitution, ss5, 28

⁷⁸ Constitution Act 1986 (New Zealand), s19

⁷⁹ Australian Constitution, s 28

The Governor-General assents to bills passed by the Parliament, in order for them to become law. In Australia, the Governor-General declares he assents in the Queen's name.⁸⁰ A bill may be reserved for the Queen's assent, although it must be assented to within two years.⁸¹ The Australian Constitution even allows for the Queen to disallow a law once it has received the Governor-General's assent.⁸² This power has never been used. In New Zealand, either the sovereign or the Governor-General may assent to the bill.⁸³

Each set of constitutional instruments provides that Parliament shall not pass a bill providing for appropriation of public money, unless the purpose of appropriation has been recommended to the House (in Australia, the House in which the proposal originated) by the Crown.⁸⁴ This power appears to be exercisable by the Governor-General but the recommendation to the House is in fact made on the advice of the government. The power's original purpose was to ensure the government had control over the spending process, by preventing Houses from passing spending laws without government approval.⁸⁵

The Australian and New Zealand constitutional instruments provide that some powers are exercisable by the Governor-General in Council, that is, the Governor-General acting on the advice of the Executive Council.⁸⁶ The Governor-General appoints members of the Executive Council⁸⁷ and Ministers of the Crown⁸⁸ including the Prime Minister, a role that is not explicitly defined in either constitutional framework.

Specific powers designated by the Australian Constitution as exercisable by the Governor-General in Council include the power to cause writs to be issued

⁸⁰ Australian Constitution, s58

⁸¹ Australian Constitution, s60

⁸² Australian Constitution, s59

⁸³ Constitution Act 1986 (New Zealand), s16

⁸⁴ Constitution Act 1986 (New Zealand), s21; Australian Constitution, s56

⁸⁵ Cheryl Saunders *The Australian Constitution – Annotated Text* (Constitutional Centenary Foundation, Victoria, 1997) 63

⁸⁶ Australian Constitution ss62, 63; Constitution Act 1986 (New Zealand) s3(2); Letters Patent, Clause VII

⁸⁷ Letters Patent, Clause X; Australian Constitution, s63

⁸⁸ Letters Patent, Clause X; Australian Constitution, s64

for general elections,⁸⁹ to issue a writ for a by-election if the Speaker is absent,⁹⁰ to establish departments of state of the Commonwealth and appoint officers,⁹¹ to appoint public service officers,⁹² and to appoint Justices of the High Court and other courts created by parliament.⁹³

The Australian Constitution also sets out a number of other roles for the Governor-General, often in a secondary capacity should the main constitutional actor in certain situations be unavailable. The Governor-General is the person to whom the Speaker and the President of the Senate may resign;⁹⁴ to whom a Member of Parliament or Senator may resign in the absence of the Speaker or the President of the Senate respectively;⁹⁵ to whom a Justice of the High Court may resign;⁹⁶ before whom oaths of office can be taken by Senators and members of the House of Representatives;⁹⁷ who can certify the names of Senators chosen for each state;⁹⁸ and, if the President of the Senate is absent, who can notify the Governor of a State of a Senate vacancy.⁹⁹

The Australian Governor-General has some further distinct roles that result from specific features of the Australian constitutional frameworks. For example, the section that sets out the procedure for amending the constitution provides that if the House is deadlocked on a proposed law for altering the constitution, the Governor-General may submit the law to the electors of each State and Territory.¹⁰⁰

The delineation of the powers of the Governor-General differs because of the more detailed Australian constitution, but the Australian and New Zealand Governor-General exercise similar statutory constitutional powers.

⁸⁹ Australian Constitution, s32

⁹⁰ Australian Constitution, s33

⁹¹ Australian Constitution, s64

⁹² Australian Constitution, s67

⁹³ Australian Constitution, ss72, 73

⁹⁴ Australian Constitution, ss35, 17

⁹⁵ Australian Constitution, ss37, 19

⁹⁶ Australian Constitution, s72

⁹⁷ Australian Constitution, s42

⁹⁸ Australian Constitution, s7

⁹⁹ Australian Constitution, s21

¹⁰⁰ Australian Constitution, s128

2 *Royal Prerogatives*

The royal prerogatives are similarly exercisable by the Governors-General of Australia and of New Zealand.¹⁰¹ It was settled early that the Dominion legislatures could validly legislate to restrict the powers of the Crown,¹⁰² giving parliament control over the exercise of the prerogative and constraining any excesses of the executive. Most prerogative powers are now constrained by the “gradual march of statute law”¹⁰³, to use Alfred Deakin’s phrase.

While some prerogative powers may appear to remain vested in the Governor-General, they are in fact exercisable by the Governor-General in Council. For example, Clause X1 of the Letters Patent authorises and empowers the Governor-General to exercise the prerogative of mercy but section 406 of the *Crimes Act 1961* incorporates the prerogative power into statute in terms which make it clear it is in fact exercised by the Executive Council.¹⁰⁴ Although in Australia and New Zealand the prerogative powers appear to be vested in the Governor-General, they are in fact exercised by the executive.

3 *The Reserve Powers*

The way in which executive powers are exercisable by the Governor-General is curtailed by constitutional conventions. These conventions are “binding rules of political practice”¹⁰⁵ or “constitutional obligations”¹⁰⁶ that are understood by the Governor-General to govern the exercise of his or her powers. The purpose of constitutional conventions is to ensure that legal powers are

¹⁰¹ See for example Evatt, above n21; Alison Quentin-Baxter *Review of the Letters Patent 1917 Constituting the Office of Governor-General of New Zealand*, issued by the Cabinet Office, June 1980

¹⁰² *Hirsch v Zinc Corporation* (1917) 24 CLR 34

¹⁰³ Evatt, above n21, 41

¹⁰⁴ Hardie Boys, above n68, 432

¹⁰⁵ Philip Joseph “The Legal History and Framework of the Constitution” in James, above n6, 169

¹⁰⁶ in Saunders & Smith, above n25, 4

exercised consistently with democratic principles, by stipulating how such powers should be exercised.¹⁰⁷

The cardinal convention of both the Australian and New Zealand (and indeed British) constitutions “enjoins the Queen and the Governor-General to exercise their prerogative and statutory powers on Ministerial advice”.¹⁰⁸ In a constitutional monarchy where the monarch reigns but parliament rules, the monarch’s personal discretion must of necessity be highly circumscribed. As Viscount Esher, adviser to the Edward VII and George V, said:¹⁰⁹

If the Sovereign believes advice to him to be wrong, he may refuse to take it, and if his Minister yields, the Sovereign is justified. If the Minister persists ... a constitutional Sovereign must give way.

This convention effects responsible government.¹¹⁰

While the convention is that the Governor-General’s powers are exercised in accordance with Ministerial advice, in both Australia and New Zealand the Governor-General retains a personal discretion in relation to some of his or her powers. That is, in certain limited circumstances, the Governor-General can exercise his or her power without Ministerial advice. This remaining discretion tends to be called the ‘reserve powers’. Although these powers are exercised at the discretion of the Governor-General, they are ringed by conventions. These conventions are not universal and static, but are specific to each power and to each constitutional entity and have developed over time.

There has been some suggestion in Australia that the Governor-General retains a personal discretion to protect the constitution. This argument is based on the fact that Section 61 states that the executive power exercisable by the Governor-General “extends to the execution and maintenance of this Constitution”. This formulation of the executive powers provision in the

¹⁰⁷ John McGrath QC “The Crown, the Parliament and the Government” 7 *Waikato LR* 1999, 1, 3

¹⁰⁸ Joseph “The Legal History and Framework of the Constitution” in James, above n6, 170

¹⁰⁹ in Winterton, above n3, 156

¹¹⁰ *Victoria v Commonwealth* (1975) 134 CLR 81 Gibbs J at 155-6

Australian Constitution differs from that in Clause III of New Zealand's Letters Patent, which authorises the Governor-General to "exercise on our behalf the executive authority of Our Realm of New Zealand". The view that the Australian formulation gave a personal discretion to the Governor-General was given some judicial credence by Dixon J in the *Communist Party Case* when he said "forms of government may need protection from dangers likely to arise from within the institutions to be protected".¹¹¹

However, the subjective interpretation of such 'dangers' is itself a threat to the constitution. Constitutional expert de Forsey, for example, thought moves towards socialism constituted one such danger from which the constitution would need protecting.¹¹² Sir John Kerr suggested he was exercising a power to maintain the integrity of the constitution in dismissing Whitlam. Defending Kerr's action, Sir Garfield Barwick, at the time of the dismissal Chief Justice of the High Court, argued that for Kerr to have allowed Whitlam to continue to govern without supply would have put Kerr in breach of his duty to maintain the constitution.¹¹³ The better view, persuasively argued by Winterton, is that it cannot be the function of the Crown to protect the constitution and there can be no independent vice-regal power to maintain the constitution.¹¹⁴

It has also been suggested that the Governor-General has some discretion as to whether or not to assent to legislation.¹¹⁵ Viscount Esher's formulation above suggests this cannot be so, and former New Zealand Governor-General Sir Michael Hardie Boys more recently stated categorically that this should not be the case.¹¹⁶

Most commentators agree that the only extant reserve powers are the power to appoint the Prime Minister, the power to dismiss a Prime Minister, and the power to dissolve (including the power to refuse to dissolve) the House of

¹¹¹ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1

¹¹² Stockley "Becoming a Republic: Issues of Law" in Trainor, above n32, 86

¹¹³ Sir Garfield Barwick *Sir John Did His Duty* (Serendipity Publications, Wahroonga, 1983) 96

¹¹⁴ Winterton, above n3, 28-37

¹¹⁵ See Geoffrey Marshall *Constitutional Conventions – The Rules and Forms of Political Accountability* (Clarendon Press, Oxford, 1986) 22

¹¹⁶ Sir Michael Hardie Boys "The Role of the Governor-General under MMP" (1996) 21NZIR4, 3

Representatives.¹¹⁷ In Australia, the Governor-General has a further power to dissolve both Houses of Parliament.¹¹⁸ This power mirrors that to dissolve the House of Representatives, so need not be separately considered in this analysis.

(a) Appointment of Prime Minister

In determining the appointment and dismissal of his or her Ministerial advisers, the Governor-General is by convention advised by the Prime Minister. The Governor-General appoints as Prime Minister the person with the confidence of the House of Representatives. As Professor Sawyer has described the process for Australia, the political party machinery provides for the election of party leaders whose identity is notorious. The Governor-General then calls on the leader of the party with a majority in the House of Representatives to be Prime Minister.¹¹⁹ Sawyer's emphasis on the leader of the party with a majority reflects the Australian political reality of a two party system, where the party with a majority of seats is usually also the party that commands the confidence of the House. In New Zealand, the convention is framed slightly differently. The 2001 Cabinet Manual phrased the convention as requiring the Governor-General to appoint as Prime Minister the person who has or appears to have the support of a majority of members of the House, and concludes that "[t]he Governor-General will therefore accept the decision of the party or group of parties that has the support of the House as to which individual will lead the government as Prime Minister".¹²⁰

This wording of the convention reflects the reality of MMP, under which the leader who is able to command the confidence of the House may not necessarily be the leader of the party with the majority of seats. Prior to the commencement of MMP, there was some suggestion that the Governor-

¹¹⁷ See for example Winterton, above n3, 17; Cooray, above n33, 44; Joseph, above n26; Electoral Commission *Everything You Need to Know About Voting Under MMP – New Zealand's Electoral System* (GP Publications, Wellington, 1996) 81

¹¹⁸ For a discussion of the parameters surrounding the possible exercise of this power, see Professor Ryan *The Power of the Governor-General to Dissolve the House of Representatives and Both Houses of Parliament* (Australian Government Printer, Melbourne, 1980)

¹¹⁹ Sawyer, above n16, 1

¹²⁰ Cabinet Manual (2001) para 4.10 in Palmer & Palmer, above n2, 59

General's personal discretion would need to be exercised more frequently, given the likelihood of coalition and minority governments.¹²¹ However, Sir Michael Hardie Boys, Governor-General at the time of the introduction of MMP, said it was clear that the responsibility for forming a government rested with the political parties: "It is political parties which, through negotiation, must find a viable government in the Parliament. No-one else can arrive at the solution for them or impose an outcome on them".¹²² While conceding that determining future political intentions from politicians' public statements could be risky,¹²³ he emphasised that:¹²⁴

In a parliamentary democracy such as ours, the exercise of the powers of my office must always be governed by the question of where the support of the House lies. If that is unclear, I am dependent on the political parties represented in the House to clarify that support, through political discussion and accommodation.

The Australian and New Zealand Governors-General have a power, exercisable without Ministerial advice, to appoint the Prime Minister. The reality in practice is that each Governor-General appoints as Prime Minister the person who commands the confidence of the House of Representatives.

(b) Dismissal of Prime Minister

The circumstances in which the Governor-General could exercise his or her reserve power to dismiss a Prime Minister are less settled. De Smith suggested, in relation to the United Kingdom, that if a government lost its majority in the House of Commons, yet insisted on remaining in office, the Queen would be justified in requesting the Prime Minister to advise a dissolution, and if the Prime Minister were to refuse, to dismiss him.¹²⁵ Dicey's proposition that it was right for the Crown to appeal from Parliament to the

¹²¹ See for example Caroline Morris "The Governor-General, the Reserve Powers, Parliament and MMP: A new era" (1995) 25 *VUWLR* 345; Boston, above n46, 37

¹²² Sir Michael Hardie Boys "Continuity and Change: The 1996 General Election and the Role of the Governor-General" (1997) 5 *Waikato LR* 7

¹²³ Hardie Boys "Nodding Automaton" above n68; McGrath, above n 107, 13

¹²⁴ Hardie Boys "Continuity and Change" above n122, 10

¹²⁵ in Cooray, above n33, 131

electors when there was good reason to believe the House of Commons had ceased to represent its constituents,¹²⁶ also suggests support for a ready dismissal of a Prime Minister.

In Australia, the exercise of this power by Governor-General Sir John Kerr was highly controversial. Kerr, believing the Senate would not pass the budget bill that had been referred to it by the House of Representatives, dismissed Gough Whitlam as Prime Minister and appointed the leader of the opposition party, Malcolm Fraser, as caretaker Prime Minister. Fraser informed the House of his commission as caretaker Prime Minister and the Senate passed the budget bill. Whitlam moved, and the House of Representatives carried, a vote of no-confidence in Fraser. The Speaker informed the Governor-General of the vote of no-confidence. The Governor-General took no action on the House's Resolution. Fraser sought and was granted a double dissolution of the Parliament.

Sir Garfield Barwick claimed the constitutional crisis arose because the Prime Minister refused to resign and seek a double dissolution.¹²⁷ He advised, and has since vigorously defended the position, that discretionary powers were exercisable by the Governor-General without the concurrence of the Executive Council. Other constitutional writers¹²⁸ have argued with more coherence that Kerr acted precipitately in dismissing Whitlam, given there was evidence the apparent constitutional deadlock would be resolved by the passage of the supply bill.

The better view is that the power of a Governor-General to dismiss a Prime Minister must be limited to those circumstances where the constitutional infringement is clear and no judicial remedy is available. Professor Ryan has argued that if the orderly working of government established under the constitution could only be upheld by dismissing Ministers, the Governor-General

¹²⁶ in Ryan, above n118, 4

¹²⁷ Barwick, above n113, 5

¹²⁸ Cooray, above n33, 144; Winterton, above n3

could do so.¹²⁹ On this reasoning, New South Wales Governor Philip Game's dismissal of Premier Jack Lang for defying a federal proclamation might have been a case where dismissal was warranted. But as Professor Joseph has posited, any assessment of illegal behaviour is not one that should have been made by the Governor alone.¹³⁰ If the Governor could make that assessment, then the jurisdiction of the state and federal courts could effectively be substituted by the Governor's personal discretion.¹³¹

Marshall was wisely more circumspect than Ryan in concluding that Commonwealth precedents are consistent with the view that dismissal might properly be used as an act of last resort if a government were acting unlawfully in a way for which no conceivable legal remedy could be found.¹³² Taking this approach, Premier Lang's proclamation should have been reviewed by the High Court for inconsistency with a federal law, a legal remedy more consistent with democratic governance than Game's precipitate action. The constitutional criticism that followed the dismissals of Lang and Whitlam suggests the Marshall formulation most accurately reflects the current constitutional situation in Australia and New Zealand.

(c) Dissolution of the House of Representatives

The Governor-General also retains a reserve power to dissolve the House of Representatives. In 1923, Asquith asserted the King's discretion to refuse a dissolution to a Prime Minister defeated in a Parliament which could provide an alternative ministry.¹³³ King George V regarded himself as exercising an unfettered discretion in granting a dissolution to Ramsay Macdonald.¹³⁴ The reserve power in relation to requests for dissolution has been held to exist in the Dominions. In 1872, Lord Canterbury's refusal to act on the advice of the Premier of Victoria to dissolve the Victorian parliament demonstrated, according

¹²⁹ Ryan, above n118, 4

¹³⁰ Joseph, above n26, 685-6

¹³¹ RQ Quentin-Baxter "The Governor-General's Constitutional Discretions: An Essay Towards a Redefinition" (1980) 10 *VUWLR* 298

¹³² Marshall, above n115, 28

¹³³ RQ Quentin-Baxter, above n131, 295

¹³⁴ Sir William Dale *The Modern Commonwealth* (Butterworths, London, 1983) 137

to Evatt, that the sovereign's representatives in Australia retained the sovereign's discretionary power.¹³⁵ More recently, former Australian Governor-General Sir Paul Hasluck thought it was the Governor-General's solemn responsibility to make a judgment about whether a dissolution was needed to serve the purpose of good government.¹³⁶ This last occurred in the United Kingdom in 1834.¹³⁷ Despite Hasluck's statement, it is no longer the case that the sovereign retains a discretion to dissolve parliament against the wishes of a Prime Minister with the confidence of the House.

However, the reserve powers in relation to the dissolution of Parliament include the right to refuse to grant a dissolution when requested by the sovereign's Ministerial advisers. The power to refuse to accept a Prime Minister's advice to dissolve the House and instead seek an alternative government was exercised by Governor Byng in Canada in 1926. Prime Minister Mackenzie King lost a vote of confidence in the House and so sought its dissolution and an election. Governor Byng refused to dissolve the House, instead accepting King's resignation and commissioning the leader of the opposition as Prime Minister. However, the newly commissioned Prime Minister was unable to command a majority in the House and so in turn sought a dissolution, which was granted. This approach aligns with Churchill's view that "a new House of Commons has a right to live if it can and should not be destroyed until some fresh issue or situation has arisen to place before the electors".¹³⁸

Professor Ryan has argued that in Australia, the correct test to ascertain whether a Governor-General should exercise his or her reserve power to refuse a dissolution is that enunciated by Higgins CJ in 1914 – that the Governor-General "must be personally satisfied, after independent consideration of the case, that the circumstances were such as to require a dissolution, and he must form his

¹³⁵ in Ryan, above n120, 9

¹³⁶ Sir Paul Hasluck *The Office of Governor-General* (Melbourne University Press, Melbourne, 1979) 15

¹³⁷ Dale, above n134, 137

¹³⁸ in Marshall, above n115, 39

own judgment as to the existence of these circumstances".¹³⁹ A condition of the exercise by the Governor-General of the power to refuse a request for dissolution then, would be that the Governor-General has reasonable grounds for believing an alternative government would carry on with the existing House. No Australian Governor-General has refused a request for dissolution.

In New Zealand, it is generally accepted that if a Prime Minister retains majority support in the House, the Governor-General might question the need for a premature dissolution, but must grant it if the government persists in its advice.¹⁴⁰ There does not appear to be any proviso that the Governor-General must satisfy him or herself that no other party could command the confidence of the House. For example, in June 1984, Prime Minister Robert Muldoon requested a dissolution of parliament, on the basis that following the resignation of National MP Marilyn Waring he could not be sure of maintaining a majority in the House. The Governor-General granted the request; despite the fact the government's authority had not been tested in a vote of confidence in the House.¹⁴¹ The Governor-General complied with the Prime Minister's request, without ascertaining whether another party had the confidence of the House.

Although no discretion was exercised in 1984, Prime Minister Jim Bolger seems to have accepted that where it is not clear who has the confidence of the House, the Governor-General retains a discretion in relation to dissolution. Speaking at the time of the Selwyn bi-election, Bolger said:¹⁴²

[S]ome believe that would enable me to ask the Governor-General for her consent to call a general election. I could ask, but that consent may or may not be given. She could judge it appropriate to call on the leader of the next largest party – Labour – to see whether she was able to form a government.

¹³⁹ in Ryan, above n120, 10-11

¹⁴⁰ See for example Stockley "Becoming a Republic: Issues of Law" in Trainor, above n32, 86

¹⁴¹ Elizabeth McLeay *The Cabinet and Political Power in New Zealand* (Oxford University Press, Auckland, 1995) 28

¹⁴² Stockley "Becoming a Republic: Issues of Law" in Trainor, above n32, 94

While, as Stockley argues, the Governor-General would be advised to grant a dissolution in cases where the government has lost majority support,¹⁴³ there does not in New Zealand seem to be any obligation on the Governor-General to consider whether an alternative government could command the majority of the House.

Some of the literature dated immediately prior to the advent of MMP suggested that following the defeat of a Prime Minister in the House on a vote of no confidence, the leader of another party might be invited to try and form a government *or* Parliament might be dissolved and a general election held.¹⁴⁴ It seemed possible that a Governor-General might refuse a request for dissolution and instead ask another member to prove he or she had the confidence of the house. This suggested the Governor-General might have to determine whether there was a likelihood an alternative coalition of parties might command the confidence of the House. Commentators' fears were assuaged by Hardie Boys who, as with the appointment of a Prime Minister, made it clear the Governor-General would be guided by political parties in determining whether another grouping could command the confidence of the House. In 2002, the Governor-General had no hesitation in granting Prime Minister Clark a dissolution before the expiry of the term of the Parliament.

Part III of this paper has shown how similar are the constitutional roles of the Australian and New Zealand Governors-General. In both countries, the office of Governor-General is constituted by constitutional instruments setting out a range of statutory powers. These powers are exercised by the Governor-General on the advice of his or her Ministers, except in the very limited circumstances where the Governor-General retains a discretion to exercise power without advice. The Australian and New Zealand Governors-General retain a personal discretion, albeit ringed by constitutional conventions, in relation to the appointment of Prime Minister, the dismissal of a Prime Minister and the dissolution of the House.

¹⁴³ Stockley "Becoming a Republic: Issues of Law" in Trainor, above n32, 86

¹⁴⁴ Electoral Commission, above n117, 23; Boston, above n46, 100

IV POWERS FOR A PRESIDENT

The 1987 Australian constitutional reform projects asked whether the constitutional powers of the Governor-General should be curtailed and the office left as purely ceremonial and symbolic, as in Sweden. It concluded that the constitutional role be maintained.¹⁴⁵ Given the similarities in the powers of the current Governors-General of Australia and New Zealand, it is relevant to share ideas and options about the appropriate powers of a republican head of state. Although the nomenclature for a republican head of state has not been determined – perhaps *kaumatua* or *elder* might be appropriate – the term ‘President’ will be used, to distinguish the republican office from the current vice-regal one.

A Statutory Powers

On their face, the constitutional instruments appear to grant all executive power to the Governor-General, sometimes advised by the Executive Council. In practice, executive power is exercised by the Prime Minister and a group of senior Ministerial advisers that form the Cabinet, from which are chosen the members of the Executive Council. Firstly, then, the constitutional instruments should be amended to state that the President shall appoint an officer to head the government, to be known as the Prime Minister.¹⁴⁶ The explicit mention of the office of Prime Minister would allow the Executive Council to be more clearly identified as a body that includes the Prime Minister and selected other Ministers. This would put these key constitutional actors into the parlance of political reality. Given that the Cabinet is an informal body subject to different permutations under different Prime Ministers, it should not be specifically identified in the constitutional instruments. Amending the constitutions to provide for the office of Prime Minister would lead to greater transparency of government and constitutional recognition that while the President might be head of state, the Prime Minister is the head of government.

¹⁴⁵ Advisory Committee to the Constitutional Commission, above n69

¹⁴⁶ Advisory Committee to the Constitutional Commission, above n69, 15

Secondly, various sections of the constitutional instruments could be amended to reflect the reality that executive power is exercised by the President on Ministerial advice. During the Australian Constitutional Conventions of the 1890s, Sir Edmund Barton opined that the executive powers derived from the royal prerogative should, as a matter of constitutional form, be vested in the Governor-General, while those derived from statute should be vested in the Governor-General in Council.¹⁴⁷ Winterton argues that it was taken for granted that all powers vested in the Governor-General were subject to the principles of responsible government and would be exercised on Ministerial advice.¹⁴⁸ When the Australian constitution was drafted then, it recognised the difference in source of the sovereign's powers, rather than that those powers would be exercised in accordance with responsible government. But as Alison Quentin-Baxter stated in her review of New Zealand's Letters Patent, the constitutional instruments should signpost that the Executive Council advises the head of state.¹⁴⁹ In order to avoid confusion and to limit expressly the powers of a President, the convention that certain powers are to be exercised by the President in Council should be made explicit.

A 1987 Australian advisory committee on constitutional reform recommended amending Section 64 of the Australian Constitution to make it clear the President appoints and dismisses Ministers on the advice of the Prime Minister (except where the Prime Minister is also to be dismissed).¹⁵⁰ There is no reason why such a formulation would not also work in New Zealand.

The power to assent to bills is another area where by convention the Governor-General acts on Ministerial advice. Given that for the bill to have passed the parliament it must invariably have been supported by the government, there is no valid reason for the power to assent to vest exclusively in the President. This power should be explicitly made exercisable by the President in Council. The power of the Queen to assent to bills or to disallow bills previously assented to, would by necessity become obsolete in the case of Australia

¹⁴⁷ in Winterton *Parliament, The Executive and the Governor-General*, above n3, 14

¹⁴⁸ in Winterton *Parliament, The Executive and the Governor-General*, above n3, 14

¹⁴⁹ Alison Quentin-Baxter, above n101, 20

¹⁵⁰ Advisory Committee to the Constitutional Commission, above n69, 15

becoming a republic, since the Queen would no longer have any constitutional role with respect to Australia. Sections 59 and 60 could therefore be removed from the Australian Constitution. Other sections, including sections 5, 56, 57 and 61 of the Australian Constitution should also be amended to provide explicitly that they are to be exercised only in accordance with Ministerial advice.

Thirdly, the provisions in the Australian and New Zealand constitutional instruments providing that the Governor-General must send a message to the House authorising an appropriation bill¹⁵¹ should be removed. As the advisory committee found, such a requirement conflicts with parliamentary independence by making the parliament dependent on the executive for its funding, for example, of parliamentary committees.¹⁵² This largely symbolic change would clarify the actual role of the President, as separate from that of the Parliament.

Fourthly, the role of Commander in Chief could be better defined. Sir Ninian Stephen considered in 1984 that “no question of any reserve power lurks within the terms of section 68 and practical considerations make it essential, even were constitutional ones not to require it, that the Governor-General should have no independent discretion conferred upon him by that section”.¹⁵³ In reality, control and administration of the defence forces is exercised by the Ministers of Defence. The Advisory Committee recommended Section 68 could be amended to provide that the Governor-General’s powers were purely ceremonial, and make it clear that the provision confers an office of titular head of the defence force, not a power.¹⁵⁴ Such an amendment would be equally applicable in the New Zealand context and would indeed be critical in limiting a President’s powers in the event of Australia and New Zealand becoming republics.

There are some duties currently exercised by the Australian Governor-General that are of constitutional significance – for example accepting the

¹⁵¹ Australian Constitution, s56; Constitution Act 1986 (New Zealand), s21

¹⁵² Advisory Committee to the Constitutional Commission, above n69, 29

¹⁵³ Sir Ninian Stephen “The Governor-General as Commander-in-Chief” (1984) 14 *Melb Univ LR* 563, 570

¹⁵⁴ Advisory Committee to the Constitutional Commission, above n69, 35

resignation of judges of the High Court – but do not allow much scope for the exercise of discretionary or, in extreme circumstances, arbitrary power. These duties could be transferred to a President without altering the balance of the constitutional framework.

These proposed amendments to the constitutional instruments would give prominence to the role of the Prime Minister as a key constitutional actor and head of the government, make it abundantly clear that the powers of the President as head of state were exercisable on the advice of Ministers rather than independently.

B Royal Prerogatives

A republican government would no doubt wish to retain the flexibility and powers of the royal prerogatives, notably for example the prerogative to declare war and to conduct foreign affairs, while ensuring that such powers were not exercisable by an independent President. The royal prerogatives could be adapted into a republican system in several ways.

An attempt could be made to define the prerogatives, in order that they vest in the republican executive. But their very complexity weighs against this option. Each thorough analysis of the royal prerogatives, from Chitty in 1820¹⁵⁵ to Evatt in the 1920s¹⁵⁶ to Joseph in the 1990s¹⁵⁷ has identified them differently. Trying to define the prerogatives could only serve to limit their flexibility and adaptability.

Alternatively, the prerogatives could remain unidentified, but the courts could review the manner of the exercise of the power.¹⁵⁸ In New Zealand, the High Court has in fact held that the exercise of the prerogative power is subject to review by the Courts. In *Patel v Chief Executive of the Department of*

¹⁵⁵ Evatt, above n21, 29

¹⁵⁶ Evatt, above n21, 30

¹⁵⁷ Joseph, above n26, 595

¹⁵⁸ Winterton *Parliament, The Executive and the Governor-General* above n3, 137

Labour,¹⁵⁹ the Court held that the principles of the rule of law provided the norms for superintending the exercise of prerogative powers.

But while making the powers subject to review by the courts would constrain their oppressive use by a President, there is no certainty that a republican constitution would be interpreted as transferring the exercise of the powers from the sovereign to the President. It would therefore be appropriate for the republican constitutional instruments to include a savings clause, preserving the prerogative powers. In Ireland, Article 49 of the constitution transferred the prerogatives from the British state to the Irish people.¹⁶⁰ Winterton has proposed, as a formulation for Australia, a provision to preserve "any power, function, right, privilege, immunity or prerogative derived from the royal prerogative."¹⁶¹ It is submitted that such a formulation would also fit the New Zealand context. A savings provision would ensure that the prerogatives were transferred to the republic. Their exercise by the President could be limited by a formulation as in Ireland, transferring the powers to the people, or by explicitly noting that the powers were exercisable by the President in Council. An additional safeguard would be to make explicit that any exercise of the powers would be subject to judicial review.

C Reserve Powers

In Australia, the fact of Whitlam's dismissal shapes much of the thinking about the reserve powers. The possibility that a President would retain such powers and could exercise them in a similarly arbitrary manner supports the proposition that the powers of a President need to be restricted in some way. Anecdotally, it seems that New Zealanders do not hold the same fears of the exercise by the Governor-General of his or her personal discretion. Historically, this may be the case and politically, it seems unlikely. But constitutionally, as this paper has shown with respect to the head of state's powers, there is little

¹⁵⁹ [1997] 1 NZLR 102

¹⁶⁰ Article 49 Irish Constitution

¹⁶¹ Winterton in Stockley "Becoming a Republic: Issues of Law" above n32, 109

difference between the Australian and New Zealand situations. This section examines ways of controlling the reserve powers of a President.

1 *Articulate the existence of the constitutional conventions*

Under the republican proposal put to the Australian people in the 1999 referendum, the President, who was to be appointed by the Parliament, was to be given the same powers as currently held by the Governor-General. The Attorney General told Parliament:¹⁶²

The President would have the powers, including the reserve powers, that the Governor-General has now. And the constitutional conventions that now apply to the exercise of the reserve powers by the Governor-General would apply to the exercise of those powers by the President.

Under this model, the powers of the President were to be checked in two ways. Firstly, the Prime Minister could remove the President by no more formal means than a letter in writing. Such a method would grant the Prime Minister unchecked power to dismiss a President, removing even the current moral, if not legal, safeguard that the Prime Minister must consult with the Queen prior to removing the Governor-General.¹⁶³ In any event, the Australian public demanded an elected President who would not be able to be removed so easily. If the President were directly elected, leaving the reserve powers unchanged is not a viable option.

Secondly, the reserve powers were to be "exercised in accordance with the constitutional conventions relating to the exercise of that power".¹⁶⁴ But as former Chief Justice of the High Court Sir Gerard Brennan has argued, importing the constitutional conventions into the constitutional instrument would require

¹⁶² Hon Daryl Williams AM QC MP, Second Reading Speech of Constitution Alteration (Establishment of Republic) Bill 1999 (www.republic.org.au, last viewed 12 May 2005)

¹⁶³ See for example Campbell Sharman "The Pink Slip – Removing the President" (2001) 3 *UNADLR* 83-94; Linda Kirk "'Til Dismissal Us Do Part – Dismissal of a President" (1998) 21 *UNSWLJ* 3, 892-902

¹⁶⁴ proposed s59 para 3 Constitution Alteration (Establishment of Republic) Amendment Bill (1999) in Sir Gerard Brennan "Reserve Powers in a Republican Constitution" (2004) 7 *Const Law and Policy Review* 3, 51

judicial review to be imported, to enforce observance of the conventions. And yet, judicial interpretation of the conventions would be fraught. Simply picking up the existing conventions would leave them frozen in time; ascertaining the content of the conventions at the time of the commencement of the republic would become more difficult over time; and the Court would inevitably be called upon to determine a political issue.¹⁶⁵ In New Zealand, a further difficulty would arise if the Chief Justice were acting as Administrator in the President's absence¹⁶⁶ at the time of the exercise of his or her reserve powers, putting the Chief Justice in a conflict situation.

In order to avoid subjecting the court to making a political determination, the wording could specify that the constitutional conventions would not be justiciable. Professor Winterton proposed as wording for an Australian provision:¹⁶⁷

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

While this formulation might satisfy the proponents of the 'if it ain't broke don't fix it' school of constitutional reform, it remains unsatisfactory if there were an elected President. It reinforces that the President has a personal discretion, which could lead to an alternative power base to Parliament. Furthermore, if the President had no constitutional knowledge or background, then this wording provides no clear idea of what the constitutional conventions constraining his or her powers might be. Simply stating in constitutional instruments that the President should act in accordance with undefined constitutional conventions would not either clarify or control the exercise of the reserve powers of an elected President.

¹⁶⁵ Brennan, above n164, 51

¹⁶⁶ Under Letters Patent, Clause XII, in the absence of the Governor-General, his or her duties and functions are performed by the Chief Justice of New Zealand.

¹⁶⁷ Winterton in Stockley "Becoming a Republic: Issues of Law in Trainor, above n32, 106

Sir Gerard Brennan developed his own proposal:¹⁶⁸

Permit the exercise of prescribed powers (of appointment and dismissal of a Prime Minister and dissolution of the House) without or contrary to ministerial advice only when the President is of the opinion on reasonable grounds that it is absolutely necessary to exercise such a power in order to ensure compliance with the general law of the effective working of parliamentary democracy in accordance with the law and custom of the Constitution. Then establish a Constitutional Council to certify that reasonable grounds exist for the President's opinion.

But there are difficulties with such a formulation, not least that it is wordy and confusing. Moreover, this would leave too much power with a President to interpret, albeit on reasonable grounds, how best to preserve democracy. This cannot be a task to be shouldered by a single person but should rather be the responsibility of all of the constitutional actors.¹⁶⁹ The political process and Parliament itself, rather than a President, should be the protectors of parliamentary democracy.

2 *Articulate the convention that the President acts on Ministerial advice*

A more subtle, and perhaps less effective, way of controlling the exercise of a President's powers would be to amend the constitutional instruments so that the concept of responsible government is explicitly expressed. In Canada, the British North America Act stated that government was to be in accordance with the principles of the government of the United Kingdom. This was determined to include the principle of responsible government. Such a derivative formulation referencing the governing arrangements of another country would be unacceptable in a republican constitution. But there are other ways to encapsulate the convention that the President exercises his or her power on Ministerial advice.

¹⁶⁸ Brennan, above n164, 54

¹⁶⁹ See also R Quentin-Baxter, above n134

Australia's 1998 Constitutional Convention suggested as the executive powers provision of a republican constitution:¹⁷⁰

The head of state shall exercise his or her powers and functions in accordance with the advice tendered to him or her by the Federal Executive Council, the Prime Minister or other such Ministers of State as are authorised to do so by the Prime Minister.

While this would make explicit that the President is to act on Ministerial advice, it does not provide guidance as to the exercise of the reserve powers. Indeed the 1998 Constitutional Convention's 'direct election' model proposed that such a statement of the exercise of the executive powers should also be accompanied by partial codification of the conventions relating to the reserve powers. The amendment of the constitutional instruments to incorporate the idea of responsible government would be helpful, but insufficient on its own to control the exercise by the President of the reserve powers.

3 *Fully codify the constitutional conventions*

One way of clarifying the content of the reserve powers would be to codify the conventions surrounding their exercise, as has been done in the constitutions of Papua New Guinea, Malaysia and Jamaica. However, attempting to codify fully the constitutional conventions as they exist in Australia and New Zealand might well deprive the constitutions of the flexibility to respond to future political crises.¹⁷¹ Sir Robert Garran in 1897 in Australia expressed concerns that are still held about attempting to codify the conventions governing the exercise of the reserve powers:¹⁷²

To try to crystallise this fluid system into a hard and fast code of written law would spoil its chief merit; we must be careful to lay down only the essential principles of popular government, leaving the details of form as elastic as possible.

¹⁷⁰ George Williams "The 1998 Constitutional Convention – First Impressions" Current Issues Brief 11, 23 March 1998, www.aph.gov.au/library/pubs/cib/1997-98/98cib11.htm (last viewed 12 May 2005)

¹⁷¹ M Coper & G Williams (eds) *Hail to the Chief - Leadership and the Head of State* (Sydney, 1997) 37

¹⁷² Advisory Committee to the Constitutional Commission, above n69, 14

Codifying the conventions in the Australian and New Zealand constitutional instruments then, raises several difficulties. Firstly, constitutional experts have not been able to agree on how to reduce the constitutional conventions to words that would adequately and fully describe their content. As Professor Quentin-Baxter has so eloquently described, attempting to do so could result in the conventions suffering deformity in the course of transcription or losing their ambience when judicially interpreted.¹⁷³ Moreover, it is the interpretation of the political situation, rather than the actual content of the convention that is usually critical and, ultimately, controversial. As Alison Quentin-Baxter has argued, “no written provision conferring discretionary powers requiring the exercise of a political determination can provide for every imaginable contingency”.¹⁷⁴

Secondly, obtaining agreement as to how best to codify the conventions could well prove impossible. In 1981, Senator Gareth Evans introduced a Constitution Alteration (Fixed Term Parliaments) Bill that did even receive the required support in Parliament. Although fixed terms might have reduced the circumstances in which a President would be called upon to dissolve the Parliament, the idea was rejected as making the parliamentary system too rigid and unresponsive to the people. As a corollary, if the codified conventions were to appear in the Australian constitution, they might be frozen in time, given the difficulty and general unwillingness of the people to amend the constitution.

In addition to these difficulties, codifying the conventions would, according to Barwick, make them justiciable. Barwick, like Brennan, argues that judges are ill-equipped to decide political questions¹⁷⁵ – a rather hollow claim in Barwick’s case, given he advised Kerr in a ‘personal capacity’ that the circumstances were appropriate for him to exercise a reserve power. Winterton argues that as the reserve powers are implied from the constitution they are already justiciable. In a republican constitution therefore, the question of

¹⁷³ RQ Quentin-Baxter, above n134, 305; See also Brennan, above n164, 52

¹⁷⁴ Alison Quentin-Baxter, above n101, 250; Stockley “Becoming a Republic: Issues of Law” above n32, 96

¹⁷⁵ Barwick, above n113, 109

whether the President has exceeded the ambit of his or her reserve powers should also be justiciable. However, Winterton does concede that a Court would be more prepared to review the validity of an action by a President without Ministerial advice if that action were taken pursuant to an executive power that lacked any element of reserve power.¹⁷⁶ Although the courts in Australia have held they can review the exercise of Ministerial discretionary power,¹⁷⁷ it is less likely that they would feel entitled to review Presidential discretionary power.

Apart from codification in the constitutional instruments, another option might be to codify the conventions in legislation. The 1987 Australian constitutional reform advisory committee recommended the conventions be codified either by amendment to the constitution or in a law approved by parliament or as a statement of general guiding principles.¹⁷⁸ However, while this might achieve the desired aim of clarifying the conventions, it would not succeed in constraining their use by a President. Codifying the conventions in legislation would be a less than transparent way of trying to circumscribe the constitution and, in any event, such a project would be beset by the same difficulties as faced by the codification in the constitutional instruments. Placing the conventions in some form of presidential guidelines, even with an express constitutional provision to exclude judicial review¹⁷⁹ would also be insufficient to limit the exercise of the reserve powers by an elected President.

Alternatively, the circumstances in which a reserve power is to be exercised could be set out in a Parliamentary resolution. Following Whitlam's dismissal, the South Australian Parliament resolved that the Governor "should act on the advice of his Ministers and should not dismiss a Ministry" except if the Ministry was acting in breach of law or the Ministry lost the confidence of the lower house.¹⁸⁰ Such a formulation could place a President in the invidious position of considering the illegality of actions, a matter better left to the courts. In 1980, Professor Quentin-Baxter proposed that the New Zealand House of

¹⁷⁶ Winterton, above n3, 127

¹⁷⁷ *Sankey v Whitlam* (1978) 142 CLR 1, See also Zines' commentary in Evatt, above n21, C29

¹⁷⁸ Advisory Committee to the Constitutional Commission, above n69, 15

¹⁷⁹ Coper & Williams, above n171, 37

¹⁸⁰ Winterton, above n3, 214 at N158

Representatives pass a Resolution containing an exposition of the constitutional conventions, as a guide for the Governor-General.¹⁸¹ While such a resolution might guide a President, it would not be a legal restraint on the President exercising the powers according to his or her own discretion.

4 *Partially codify the constitutional conventions*

The exercise of a President's reserve powers might best be controlled by partial codification, which could avoid being too restrictive or rigid. Partial codification might be in the form of a single provision. Winterton proposed that the President be granted only such powers as are "absolutely necessary to preserve the rule of law and protect the operation of responsible government from abuse by the executive".¹⁸² For more effective control, such a provision should be accompanied by the codification of some specific conventions.

The 'direct election' model of a republic designed by the 1998 Australian Constitutional Convention¹⁸³ proposed a partial codification that goes a long way towards addressing concerns that a President handed the current reserve powers would have too great an unrestrained discretion. The proposed codifications related to each of the reserve powers. The President would appoint as Prime Minister the person who commanded the support of the House through a resolution of the House and, in the absence of a resolution, the person who in his or her judgment would most likely command support. Such a formulation would still on the face of it allow substantial room for the exercise of presidential judgment. The power would be more properly constrained by adopting Hardie Boys' view that the formation of the government was solely a political matter,¹⁸⁴ and so the clause phrase referring to the President's judgment should be excluded. The length of time following an election within which the House must be summoned could be shortened to ensure the House may sit and pass a resolution as to confidence closer to the date of the return of the writs. Provision

¹⁸¹ RQ Quentin-Baxter, above n134

¹⁸² George Winterton "Reserve Powers in an Australian Republic" (1993) 12 *University of Tasmania Law Review* 249, 256

¹⁸³ George Williams "The 1998 Constitutional Convention" above n170

¹⁸⁴ Hardie Boys "Role of the Governor-General Under MMP" above n116

could also be made for the President to appoint as Prime Minister the next most senior Minister in Cabinet rank, should the Prime Minister resign or die in office.

With respect to dismissal of a Prime Minister, the Constitutional Convention proposed that the President could dismiss a Prime Minister if he or she lost a motion of no-confidence and did not resign. Where the President perceived a constitutional contravention, the President could request a Prime Minister to demonstrate that no contravention was occurring, and if it was still occurring, the President could apply to the High Court for relief and dissolve the House of Representatives. While the first of these is a clear enunciation of a circumstance accepted in New Zealand as well as Australia¹⁸⁵ as one in which dismissal would be appropriate, the second leaves too much discretionary power in the hands of an elected President. It is hard to envisage a situation where there might be constitutional contravention that would require the intervention of the superior court. The only historical example in Australia and New Zealand of 'constitutional contravention' might be Lang's action in directing public servants not to abide by federal instructions. If such a matter were to re-occur, it should be a matter for other constitutional actors, or if the behaviour were criminal, law enforcement officers, to seek relief from the courts. An elected President should not retain such a sweeping personal discretion to subvert the democratic process by referring only to his judgment.

As a corollary to the appointment power, the Constitutional Convention further proposed that the President not dissolve the House, if the House expressed confidence in another Member. This is a reasonably uncontentious articulation of the current constitutional convention.

Partial codification of the sort outlined here would be valuable in shaping the President's powers. But the proposals recommend by the Constitutional Convention still leave power in the hands of the President in the event of a 'constitutional crisis' the like of which has admittedly not occurred in either Australia or New Zealand. The partially codified conventions should be further

¹⁸⁵ RQ Quentin-Baxter, above n134, 296; Joseph, above n26, 674

constrained to reflect the actual position as stated by Hardie Boys, that the primary responsibility for upholding the continuity of government rests with the political actors, not the head of state,¹⁸⁶ be it Governor-General or President.

5 *Establish a requirement to consult*

Professor Sawyer has suggested that experience in law or politics would qualify people for the constitutional duties of office.¹⁸⁷ Indeed, he “fervently hoped”¹⁸⁸ that future Governors-General would always have experience of the working of government. But a precondition that an elected President have such powers would make the office less than representative, and severely limit the legitimacy of the President’s symbolic and ceremonial roles. In order to make the office more accessible, it would be appropriate to ensure a reservoir of constitutional knowledge to be drawn on by the President, which could also act as a check on the exercise of a personal discretion.

In New Zealand, the Governor-General may refer to the Solicitor-General for advice, but Boston and others have suggested that even so, there would be value in formalising the process by which a President could source expert advice about his or her role.¹⁸⁹ No such facility is available in Australia, where it is not clear to whom the Governor-General could turn for advice as to the exercise of his or her constitutional role. A President should be provided with some resources to enable him or her to exercise his or her powers constitutionally. For example, the superior court in each country could be given the jurisdiction to prepare advisory opinions as to whether the constitutional stipulations for exercising the reserve powers, for example the power to dissolve Parliament, have been satisfied.¹⁹⁰ In New Zealand, if the current practice of appointing the Chief Justice as Administrator were maintained in a republican constitution, the Chief Justice would obviously have to recuse him or herself from considering

¹⁸⁶ Hardie Boys “Role of the Governor-General under MMP” above n116

¹⁸⁷ Sawyer, above n16, 46

¹⁸⁸ Geoffrey Sawyer *A Paper on Conventions governing the appointment and dismissal of Ministers of the Crown in the Constitutional System of the Commonwealth of Australia* (Government Printer, Melbourne) 22

¹⁸⁹ Boston, above n46, 183

¹⁹⁰ Advisory Committee to the Constitutional Commission, above n69, 44

any action undertaken while he or she was acting as Administrator in the President's absence.

Alternatively, an amendment to the constitution could establish a Constitutional Council to be consulted by the President prior to the exercise of the reserve powers. Father Frank Brennan proposed a 'Council of Elders', because he saw it as unthinkable for a President to enjoy "undefined reserve powers without recourse to a formally approved set of advisers".¹⁹¹ Possible members of such a council could be members of the bench of the highest courts (Supreme Court in New Zealand and High Court in Australia), State Governors in Australia and the immediate past Governor-General.¹⁹² Such a body would be a valuable addition to the constitutional framework.

6 *Sanction the President*

An extreme sanction that would be that the President would forfeit his or her position and not be allowed again to occupy the office if he or she exercised a reserve power according to personal discretion rather than on the advice of Ministers. As Winterton noted "[t]his would certainly be one way to reduce any perceived danger of presidential exuberance in the exercise of reserve powers".¹⁹³ This sanction has the advantage of being an effective restraint on the use of the reserve powers, but the disadvantage that an elected President would be very unlikely ever to forfeit his or her position, even if the executive was acting dictatorially and against the wishes of the people and the Parliament. For example, one rare circumstance where it would be appropriate for the President to exercise a personal discretion to dismiss the Prime Minister, would be if the Prime Minister refused to resign after a no-confidence vote and purported still to hold the Treasury benches. A President might be reluctant to exercise a personal discretion in such a case, if he or she were to lose his or her own job by doing so. But this disadvantage is minor. As Professor Quentin-Baxter showed in his analysis of the reserve powers in New Zealand, the annals of the old

¹⁹¹ in Coper & Williams, above n171, 39

¹⁹² Winterton "A Directly Elected President" above n4, 43

¹⁹³ George Winterton "The President: Adapting to Popular Election in M Coper & G Williams (eds) *Power, Parliament and the People* (Sydney, 1997) 1, 40

Commonwealth do not disclose any cases in which government set out to subvert the constitution and had to be stopped. They disclose a few cases in which a power of dismissal was exercised in less than extreme situations because of mistrust and miscalculation, compounded by a gap in the relevant rules.¹⁹⁴

Another sanction would be to create an impeachment mechanism, under which the President could be 'tried' by the Houses of Parliament. A President might be impeached for stated misbehaviour or criminal conduct.¹⁹⁵ The disadvantages are that determining what constitutes stated misbehaviour would be subjective and indeed any exercise of a personal discretion that went against a particular political party might be deemed to satisfy this standard. While it seems unlikely, given the more reserved political culture in Australia and New Zealand, there is no guarantee that such a process would not be highly politicised and reach the levels of hysteria as in the attempted impeachment of President Clinton in the United States. In addition, the process would be cumbersome and time consuming. The fact that the attempt to impeach President Clinton failed also suggests that such a process would provide insufficient restraint on a President's behaviour. If a President were deemed guilty of criminal activity, he or she should be subject to criminal jurisdiction of the courts rather than an impeachment process.

7 *Relocate the current reserve powers to the House of Representatives*

It is productive to consider whether other constitutional bodies might better perform some powers currently held by the head of state. The partial codification of powers begins this process by making it clear that the support of the House is critical in appointing a Prime Minister. Boston and others suggested that the Speaker could be allowed to appoint a Prime Minister,¹⁹⁶ although it seems illogical to assume the election of a Speaker prior to the expression of the confidence of the House in a member as Prime Minister. The Irish model provides an interesting precedent. The Irish president appoints a Prime Minister

¹⁹⁴ RQ Quentin-Baxter, above n134, 313

¹⁹⁵ See for example Sharman "The Pink Slip – Removing the President" above n163, 89

¹⁹⁶ Boston, above n46, 183

on the nomination of the Dail (Parliament). As Hardie Boys notes, the President is thus distanced from political negotiation and receives public and unequivocal advice on its conclusion. The advice on whom to appoint is channelled through the Parliament.¹⁹⁷ At present there is in Australia or New Zealand no requirement for Parliament's explicit endorsement of an incumbent government after an election. A government might continue until it loses a vote of no confidence. It would be possible to impose a requirement for a positive confidence motion by the House.

Stockley has suggested wording for New Zealand very similar to the wording proposed by the Australian Constitutional Convention's 'direct election' model of partial codification of the convention for appointing a Prime Minister:¹⁹⁸

... wherever it is necessary for the Head of State to appoint a Prime Minister, the Head of State shall appoint that person who commands the support of the House of Representatives expressed through a resolution of the House.

There would need to be some tinkering with other constitutional requirements, including the summoning of the House sooner after the return of the Writs, and greater clarification in the Cabinet Manual of the caretaker procedures to avoid an interregnum.

The power to dismiss a Prime Minister might also be relocated to the House, by requiring that no-confidence motions be limited to constructive motions. That is, that a motion of no-confidence would be accompanied by a resolution to dissolve the House, with that dissolution to become automatic.¹⁹⁹ The disadvantages are that such a requirement might be a recipe for political gridlock,²⁰⁰ and might require more numerous elections since the proposal removes the potential for a new government to be formed from the same House.

¹⁹⁷ Hardie Boys "Continuity and Change" above n122, 6

¹⁹⁸ Stockley "Becoming a Republic: Issues of Law" in Trainor, above n32, 107

¹⁹⁹ Stockley "Becoming a Republic: Issues of Law" in Trainor, above n32, 108

²⁰⁰ Joseph, above n26, 700

If Australia and New Zealand decide to retain a constitutional role for their republican Presidents, then the President's role must be carefully defined and the President's powers must be limited, in order to ensure the office does not become either an undemocratic check on the elected Parliament or a competing power base that threatens Parliament's role. This part of the paper has outlined how the statutory powers of the Australian and New Zealand Governor-General might be transformed into statutory powers of the President through clarification of the role of the Prime Minister and of the constitutional convention that a President is to act on Ministerial advice.

The possible exceptions to a stated requirement to act on Ministerial advice might occur in relation to the exercise of the reserve powers to appoint a Prime Minister, dismiss a Prime Minister and dissolve the House. The better approach would be to accept Hardie Boys' conclusion that these aspects of government are political matters for politicians to resolve. However, the fact of Whitlam's dismissal suggests that firmer controls on the President's power would be expected and therefore required to remove doubt about the extent of a President's powers.

It would be appropriate to circumscribe the exercise of the discretionary reserve powers by firstly, clarifying the circumstances in which they might be exercised and secondly, curtailing the likelihood of the President reaching for the reserve powers instead of acting on Ministerial advice. The constitutional conventions surrounding the exercise of the reserve powers should be partially codified, for example to acknowledge constitutionally that the leader who can command the confidence of the House must be appointed Prime Minister. There is even a persuasive argument that the responsibility of determining who should be Prime Minister lies with the House, who in turn should so advise the President. The partial codification of the constitutional conventions should be accompanied by the provision of constitutional advice to the President by way of a Constitutional Council, and perhaps also by the sanction of the President in the form of the office of President being vacated in the event of the use of the reserve powers. Only if the circumstances in which the reserve powers might be used

are clearly delimited and the exercise of the reserve powers constitutionally discouraged, should a republican President retain a constitutional role.

V CONCLUSION

Australia and New Zealand have become modern constitutional monarchies through a process of legislation, declaration and political decision-making. The final momentous step for each to become a republic and attain final symbolic as well as political independence from the United Kingdom, will be the replacement of the sovereign as head of state. This paper has shown how the similarities of Australian and New Zealand constitutional arrangements, together with our similar expectations of democratic governance by Parliament, mean that the options for a republican head of state proposed in one country are worth considering in the other.

Firstly, it examined the shared evolution of our constitutional arrangements and the gradual and, in large part parallel, acquisition of constitutional independence. Secondly, it recognised that each country retains distinctive constitutional characteristics, which will affect the possibility and ease with which each might become a republic. Thirdly, it analysed the symbolic, ceremonial and constitutional roles of our current Governors-General, an analysis which served to highlight their similarity. Fourthly, it responded to the challenge of considering ways of limiting the powers, with particular focus on the reserve powers, of a directly elected President in order to preserve the constitutional balance. After assessing the options, Part IV concluded that the current role of the Governor-General could best be preserved for a republican President through the partial codification of the constitutional conventions surrounding the exercise of the reserve powers and by the formation of an independent Constitutional Council to advise the President.

In each country, the republican debate will need to be dramatically reinvigorated before there is any likelihood of a referendum being put to the people and then gaining the required support. Proponents of a republic should take advantage of the hiatus in republican momentum to hone and polish a constitutional model that would also protect our modern democracies by constraining the powers of a President and so retaining the constitutional balance that has served our countries well.

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