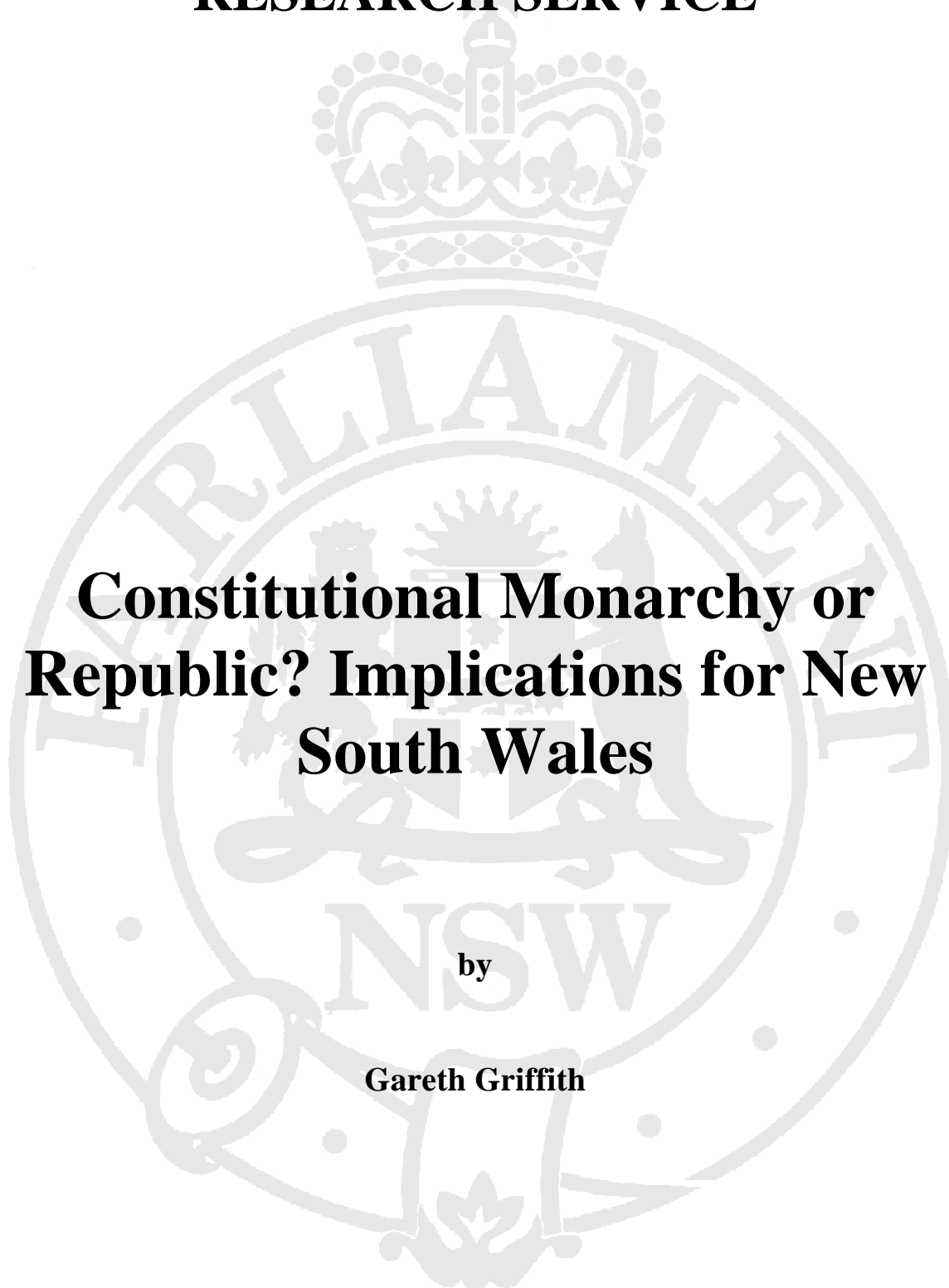


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**Constitutional Monarchy or
Republic? Implications for New
South Wales**

by

Gareth Griffith

Briefing Paper No 3/98

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February 1998

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EXECUTIVE SUMMARY

This paper canvasses the main legal and constitutional implications for NSW should Australia adopt a form of republican government. It does not address the general arguments for and against an Australian republic, such as those relating to identity and nationhood. Instead, it is more concerned to ask *what if?* than *why?* The immediate background to the paper is the forthcoming Constitutional Convention which is to be held in February 1998.

Constitutional monarchy in NSW: The paper presents an overview of the operation of constitutional monarchy in NSW. It is noted in this context that a threefold distinction can be drawn in which 'the Crown' can be associated, first, with the *Monarch*, secondly, with the *Government* and, thirdly, with the *State*. The paper then asks: *what is meant by "the Crown in the right of NSW"?*; and *what effect did the Australia Act 1986 have on constitutional monarchy in NSW?* (pp.10-17).

A republican NSW: A distinction can be made between: those questions and issues relating to transitional matters, dealing with the machinery of change; and those concerning the details of any republican system in the States. The second group of constitutional issues would arise irrespective of how the republican system of government was achieved. These include:

- *what would a republican system substitute for the Crown?* (pp.17-19).
- *would NSW need its own head of state under a republican form of government?* (pp.19-23).
- *how would the NSW republican head of state be chosen?* (pp.23-25).
- *how would a republican head of state be removed?* (pp.25-26).
- *how should the tenure of a republican Governor be defined?* (p.26).
- *and should a republican Governor's reserve powers be codified?* (pp.26-29).

Transition to a republic: As far as the transition to a republic is concerned, the key questions arise under: (a) the Commonwealth Constitution; (b) the Constitution Act of NSW; and (c) the Australia Act. In relation to the first, a key issue is: *can a republican form of government be imposed on the States through the referendum procedure in section 128 of the Commonwealth Constitution?* In relation to the second, a key issue is: *is the monarchy entrenched under the NSW Constitution Act, thereby requiring a State referendum?* In relation to the third, a key issue is: *does section 7 of the Australia Act entrench the monarchy in the States, thereby requiring amendment or repeal of that section?* Note that the significance of these issues, all of which relate to the method by which the republican system of government is to be introduced, varies considerably depending on which strategy is adopted for achieving that goal at State and/or Federal level. For example, the question as to whether constitutional monarchy is entrenched under the *NSW Constitution Act 1902*, thus requiring a State referendum if it is to be removed, would not arise if the decision was taken to establish a republic at all levels of Australian government by means of a national referendum under section 128 of the Commonwealth Constitution. One point to make, therefore, is that legal and strategic issues often intersect in the context of the republican debate. Another is that there will be occasions when considerations of legal validity must give way to practical political concerns (pp.29-41).

1. INTRODUCTION

The purpose of this paper is to canvass the main legal and constitutional implications for NSW should Australia adopt a form of republican government. In the past it has been said that the potential impact that republicanism may have on the constitutions of the States has been a neglected theme in the debate. For example, Gerard Carney, Associate Professor of Law at Bond University, stated in 1994:

The Report of the Commonwealth's Republic Advisory Committee only briefly considered the States under paragraph six of its terms of reference: 'The implications for the States'. The Committee's main focus was on the option for a republic at the Commonwealth level.¹

If that was indeed the case a few years ago, it is fair to say that there is now a considerable and growing body of analysis on the implications of an Australian republic for the States. In January 1995, for instance, the Report of the Western Australian Constitutional Committee dealt with the matter in some detail, as did the Tasmanian Advisory Committee on Commonwealth/State Relations in its June 1995 report, *A Republican Australia? - Issues for Tasmanians*. More detailed still is the 1996 First Report of the South Australian Constitutional Advisory Council. Several academic commentators have also discussed the subject in recent years, notably George Winterton, George Williams, Anne Twomey and John Waugh, as has the former Governor of Victoria, the Hon Richard E McGarvie. All the same, writing in 1996 John Waugh, Lecturer in Law at the University of Melbourne, still commented:

The level of anticipation of republican changes in the States is still very low. Most argument about the republic has understandably concentrated on the Commonwealth. The main questions involving the States has so far been whether they could keep their links with the monarchy under a republican Commonwealth Constitution, and whether their governments and parliaments would have to give their consent to a Commonwealth republican scheme. The form the State constitutions would take after such a change has had much less attention, although in its own way it is an issue raising nearly as many questions as the changes that might be made in the Commonwealth Constitution.²

This paper, which takes the Constitution of NSW as its focus, builds on the work which has been undertaken in recent years, with the aim of presenting an overview of the relevant legal and constitutional issues. To some extent it updates the Parliamentary Library's

¹ G Carney, 'Republicanism and State Constitutions' from *Australia: Republic or Monarchy? Legal and Constitutional Issues* edited by MA Stephenson and C Turner, University of Queensland Press 1994, p 183.

² J Waugh, 'Australia's State Constitutions, Reform and the Republic' (1996) 3 *Agenda* 59 at 68.

Briefing Paper No 5/1993, *Republicanism: Review of Issues and Summary of the Republic Advisory Committee Report*. Unlike that paper, however, it does not canvass the general arguments for and against an Australian republic, such as those relating to identity and nationhood. This paper is more concerned to ask *what if?* than *why?*

With this in mind, this paper poses a series of questions designed to explore the implications of the republican debate for the States, with particular reference to NSW. In some respects, especially where the powers of a republican Governor and the method of his or her appointment are concerned, these questions correspond to those which are posed at a Federal level. In other respects, the issues are unique to the States, and sometimes to NSW. The paper begins, however, with a brief note on the upcoming Constitutional Convention and the debate attending it, followed by a definition of key terms and a brief overview of the current operation of constitutional monarchy in NSW.

2. THE CONSTITUTIONAL CONVENTION AND THE REPUBLICAN DEBATE

The Constitutional Convention: The immediate background to this paper is the forthcoming Constitutional Convention in February 1998, for which there are to be 76 appointed and 76 elected delegates. The appointed delegates will include 40 members of parliament (three each from the States, one from each Territory, and 20 from the Federal Parliament). Of the elected delegates, 20 will come from NSW, 16 from Victoria, 13 from Queensland, 9 from Western Australia, 8 from South Australia, 6 from Tasmania and 2 each from the Territories. In the Second Reading Speech for the Constitution Convention (Election) Bill 1997, the Prime Minister said:

The convention will provide a forum for discussion about whether or not our present constitution should be changed to a republican one. In particular:

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

In establishing the convention, I am conscious of the view among many Australians in favour of change to a republican form of government. Equally, I am conscious that the existing constitution has served Australia well, providing stable and effective democratic government. These are sincerely held views on both sides which deserve full debate in public view...The government's aim is to ensure that, if there is to be any change to our system of government, that change is achieved through a process that unites rather than divides the Australian community. The constitutional convention will serve as a forum for mature discussion on the range of issues surrounding our system of government and proposals for an Australian republic. It will provide a process by which the wider community can become engaged in the

debate.³

Speaking on the Nine Network's *Sunday* program on 9 November 1997, the Prime Minister called on those attending the Constitutional Convention to engage in constructive dialogue, stating:

I think the convention should spend its time, both republicans and non-republicans alike, trying to reach agreement on the alternative to the present system...I want it to be constructive because, at the end of the day, what is more important than whether we have a republic or a constitutional monarchy is a united workable system of government.⁴

The Federal Government has said that if the convention produces a consensus in favour of a republic, the question will be put to the Australian people voting in a referendum under section 128 of the Commonwealth Constitution.⁵

Voting for the elected positions was by means of a voluntary postal ballot which was completed by 9 December 1997. In NSW there were a total of 174 candidates (122 male and 52 female) for the 20 delegated places, with 20 groups contesting the election and 57 ungrouped candidates. The order in which the names of the candidates appear on the ballot paper was determined by a random draw, with separate draws being held for the grouped and ungrouped candidates. Each candidate was required to pay a non-refundable fee of \$500.⁶ In *The Australian* on 24 December 1997 it was reported that republican candidates won 56.4 per cent of the national vote, plus a majority in four of the six States. This included NSW where republican candidates are reported to have gained 60.4 per cent of the first preference vote.⁷

The cost of the Constitutional Convention has been estimated at \$35 million.⁸

³ CPD (HR), 26 March 1997, p 3061.

⁴ 'MPS must elect any president, says PM', *The Sydney Morning Herald*, 10 November 1997.

⁵ M Steketee, 'Decision we have to have', *The Weekend Australian*, 8-9 November 1997; C Saunders, 'Why a convention' (1997) 8 *Public Law Review* 213. Professor Saunders queries what is meant by the word 'consensus' in this context. She also asks whether the terms of reference of the Convention should have been confined to the republican issue and asks 'whether the agenda of a Convention can effectively be confined, once it is called together' (at 215).

⁶ *Electoral Newsfile*, No 67, October 1997

⁷ 'Republic surge: it's all over bar the voting', *The Australian*, 24 December 1997. It seems the official figures from the Australian Electoral Commission will be available in March.

⁸ 'The two Senators who settled for half a loaf', *The Australian*, 29 August 1997.

The current republican debate: Foreshadowing the current debate, back in 1974 the noted Canadian commentator on constitutional law, Dr Eugene Forsey, said that the abolition of constitutional monarchy would entail one of two things: either the whole system of government would have to be replaced by some form of Presidential system, based perhaps on the American or French models; or else a more modest attempt would have to be made to replace the Crown by presidents, otherwise leaving (hopefully) the structure of parliamentary responsible government intact. Dr Forsey, admittedly from the standpoint of a constitutional monarchist, then outlined the issues to be confronted if the second, more modest approach were adopted. He wrote, in terms which basically sum up the more technical (*what if?*) side of the current republican debate in Australia:

Unless we give the presidents the reserve powers, we shall run the risk of Prime Ministerial dictatorships. But the reserve powers are not easy to define in precise terms, and the constitutional draftsmen might end up by giving the head of state, and his [in Canada] provincial counterparts, either too much power or too little. Even if he were successful, his troubles (and ours) would not be over; for he would have to devise a method of election which would provide some hope that the presidents would be reasonably impartial politically; no small task.⁹

Further to this, the most significant issue to emerge in the current debate, both within republican circles as well as between republicans and constitutional monarchists, is whether any proposed republican Head of State should be popularly elected.¹⁰ This is in contrast to the 'minimalist model' associated with former Prime Minister, Paul Keating, which proposed that the republican Head of State should be appointed by a two-thirds majority of the Federal Parliament.¹¹ That minimalist model is also the preferred position of the Australian Republican Movement (ARM), although in response to what is seen to be 'overwhelming public support for popular election', it seems the ARM is now prepared to consider the alternative option of popular election.¹² A compromise proposal suggested by one pro-republican Coalition member of the Federal Parliament, Susan Jeanes, is that the Parliament should select a short list of candidates, with a subsequent popular vote deciding the head of state.¹³

⁹ E Forsey, *Freedom and Order*, McClelland and Stewart Ltd 1974, p 31.

¹⁰ For recent comments on this issue see - G Winterton, 'A popular republic that works', *The Australian*, 29 December 1997; T Blackshield, 'A popular president must have a clear mandate', *The Australian*, 5 January 1998.

¹¹ 'Labor's republic in danger, Ray warns', *The Australian*, 9 October 1997.

¹² M Steketee, 'Decision we have to have', *The Weekend Australian*, 8-9 November 1997. The November 1997 Newspoll survey suggested that 78 per cent supported election by popular vote should Australia become a republic - *The Australian*, 13 November 1997.

¹³ 'Republic chiefs bow to people power', *The Australian*, 13 November 1997.

On this issue, the Prime Minister, while remaining an advocate of the existing system, has said that if the Australian people favour change, then he would support a president elected by parliament rather than by popular vote. Again, on the Nine Network's *Sunday* program, Mr Howard said he was 'violently and passionately' opposed to a popularly elected president, which would be a recipe for undermining the stability of the present system'.¹⁴ A few days later, when delivering the annual Sir Edward 'Weary' Dunlop AsiaLink lecture in Melbourne, Mr Howard described the existing constitutional system as a 'crowned republic'. He admitted there is a 'theoretical conflict' between the position of Elizabeth II as the Queen of Australia and the role of the Governor-General as Australia's effective head of state, but he added, 'It will be up to the Australian people to resolve whether this theoretical conflict between our history and the day-to-day constitutional reality matters sufficiently to justify changing our Constitution'.¹⁵

An issue to emerge on the constitutional monarchy side of the debate is the proposal put forward by Tony Abbott, Federal Member for Warringah, in his book *How To Win The Constitutional War*, to legislate or change the Commonwealth Constitution to make the Governor-General Australia's Head of State, instead of the Queen. Responding to this, the group, Australians for Constitutional Monarchy, is reported to have said that, while it may be worth 'considering a law which clarified that the Governor-General acted as head of state, there should be no constitutional alteration'.¹⁶ From the republican standpoint, Malcolm Turnbull is reported to have said that the proposal to have the Governor-General called the head of state, but still reporting to the Queen and still appointed by the Queen, was 'probably the silliest contribution to the debate yet'.¹⁷

Another key issue raised by constitutional monarchists is the flag. Notably, former Governor-General, Bill Hayden, has argued that, 'Should a referendum for a republic be successful, pretty much the same gang of activists will then be on the campaign trail to change our flag'.¹⁸

In relation to the wider issues, it is the case that some of those advocating republicanism would not limit the debate to the subject of an Australian head of state. For example, responding perhaps to the richer conception of the republican ideal found in contemporary political philosophy,¹⁹ the group, A Just Republic, has stated that 'The Republic debate

¹⁴ 'PM pledge gives boost to republic', *The Australian*, 10 November 1997.

¹⁵ 'Stick with "crowned republic": Howard', *The Sydney Morning Herald*, 12 November 1997.

¹⁶ 'Agree on republic options, urges PM', *The Australian Financial Review*, 10 November 1997.

¹⁷ 'O'Shane accuses Turnbull of setting his sights too low', *The Sydney Morning Herald*, 11 November 1997.

¹⁸ *Ibid.*

¹⁹ See, for example, P Pettit, *Republicanism: A Theory of Freedom and Government*, Clarendon Press 1997. It should be noted, however, that Pettit's sophisticated theory of republicanism is hard to summarise and that it resists easy identification with any political

presents a significant opportunity for Australians to take control of our collective life, by entrenching principles of equality, fairness and ecological sustainability in our new Constitution'. More narrowly focused, but still outside the minimalist framework favoured by ARM, is the group, Australian Reconciliation, which says it supports a republic in which the Constitution acknowledges 'recognition and respect for Aborigines and Torres Strait Islanders'.²⁰

In any event, as the Prime Minister has said, the important task facing the Constitutional Convention will be to arrive at some consensus view as to the best and most viable alternative to the present system. The first opinion poll conducted after the Convention was approved by Federal Parliament suggested that support for a republic stands at around 54 per cent.²¹ The question is whether that apparent level of support, with the representation it will find at the Constitutional Convention, can be translated into a stable working model of republican government which the Convention itself can agree to submit to the Australian people. Again, delivering the annual Sir Edward 'Weary' Dunlop AsiaLink lecture in Melbourne, Mr Howard explained the situation in these terms:

The onus will...lie upon the advocates for change to achieve a degree of unity and compromise on the favoured model. For their part, anti-republicans will be asked to listen to cogent argument and play a constructive role in the debate.²²

3. DEFINING TERMS

Constitutional monarchy: Vernon Bogdanor, Reader in Government at the University of Oxford, a noted commentator on constitutional matters, has said that:

In a modern constitutional monarchy, the constitution, whether codified or not, permits the sovereign to perform only a small number of public acts without the sanction of his or her ministers. Thus today a constitutional monarchy is also a *limited* monarchy: the constitution does not allow the sovereign actually to govern...A constitutional monarchy, then, can be defined as a state which is headed by a sovereign who reigns but does not rule.²³

platform.

²⁰ Candidate statement on behalf of the group, A Just Republic, and contained in the booklet *Your Guide to the Constitutional Convention Election*.

²¹ 'New converts lift republic to historic lead', *The Australian*, 10 September 1997; the November 1997 Newspoll survey suggested that support for a republic was at 52 per cent - *The Australian*, 13 November 1997.

²² 'Stick with "crowned republic": Howard', *The Sydney Morning Herald*, 12 November 1997.

²³ V Bogdanor, *The Monarchy and the Constitution*, Clarendon Press 1995, p 1.

This corresponds with the Bagehot's famous distinction between the *dignified* and the *efficient* parts of the constitution.²⁴ These are, indeed, perhaps the most famous reflections on the monarchical system of government. Writing in 1865 in his work on *The English Constitution*, Bagehot remarked, 'The best reason why monarchy is a strong government is, that it is an intelligible government. The mass of mankind understand it, and they hardly anywhere in the world understand any other'. This, according to Bagehot, was due to 'the weakness of their imaginations'.²⁵ He continued:

royalty is a government in which the attention of the nation is concentrated on one person doing interesting actions. A republic is a government in which attention is divided between many, who are all doing uninteresting actions. Accordingly, so long as the human heart is strong and human reason weak, royalty will be strong because it appeals to diffused feeling, and republics weak because they appeal to the understanding.²⁶

It may be that the relevance of these reflections for present day Australia should not be overstated. Bagehot was, after all, writing in the context of what he described as a 'very small and very crowded' country in which the population was 'uneducated' and mostly 'poor'. It was in these circumstances that the legal figments connected with constitutional monarchy were a 'useful fiction'.²⁷ In any event, it may be that the usefulness of that fiction to both colonial and post-federation Australia would need to be formulated in different terms.²⁸

What is unusual (though not unique) about constitutional monarchy in Australia is that, while there is a Queen of Australia, the sovereign resides in another country of which she is also the head of state. In Australia the head of state is *represented* by the Governor-General, at the federal level, and by a Governor in each of the States. For all practical purposes, in the Australia system of constitutional monarchy it is these representatives of the head of state who perform those ceremonial and other functions associated with the dignified part of the constitution.

²⁴ N St John-Stevás, *The Collected Works of Walter Bagehot*, Volume 5, The Economist 1974, p 206.

²⁵ *Ibid*, p 226.

²⁶ *Ibid*, p 229-230.

²⁷ *Ibid*, pp 424-426 and p 428.

²⁸ B Galligan, *A Federal Republic*, Cambridge University Press 1995, p 21. Galligan notes: 'The political significance of monarchy for legitimising the disguised republic and satisfying the simple emotions of ignorant people was always considerably less in Australia, especially in the twentieth century. In a very real sense the British monarchy was far away so that Australians always looked to their own governments'.

Republicanism: The term ‘republic’ is ancient in origin and has a diverse range of usages.²⁹ However, as Brian Galligan has argued, its core modern meaning ‘is rule not by a monarch in his or her own right but by the people through a constitution that controls all the parts of government’.³⁰ To this he adds, ‘Republicanism means that the people have supreme constitutional power’.³¹ In a similar vein, based on the Report of the Republic Advisory Committee a ‘republic’ can be defined as a ‘state in which sovereignty is derived from the people, and in which all public offices are filled by persons ultimately deriving their authority from the people’. The following definitions of the term from the Macquarie Dictionary were cited in the Report:

1. a state in which the supreme power rests in the body of citizens entitled to vote and is exercised by representatives chosen directly or indirectly by them...3. a state, especially a democratic state, in which the head of government is an elected or nominated president, not an hereditary monarch.

The Republic Advisory Committee then went on to say:

Since the Commonwealth Constitution can be amended only by the people pursuant to a referendum under section 128 of the Constitution, ultimate sovereignty in Australia vests in the Australian people, even though the Commonwealth Constitution at least initially derived its legal authority from an Act of the United Kingdom Parliament. As Chief Justice Mason recently remarked: ‘The Australia Act 1986 (UK) marked the end of the legal sovereignty of the imperial Parliament and recognised that *ultimate sovereignty resided in the Australian people*’.

Australia is, therefore, a state in which sovereignty resides in its people, and in which all the public offices, except that at the very apex of the system, are filled by persons deriving authority directly or indirectly from the people.³²

From a republican standpoint, the crux of this argument is that the institution of monarchy is an anomaly in an Australian context and that, viewed from a minimalist republican position, the head of state is the only Australian office which is incompatible with a republic.

²⁹ For a brief overview see - H Evans, ‘Essays on republicanism: small r republicanism’, *Papers on Parliament No 24*, Department of the Senate September 1994, pp 1-6.

³⁰ B Galligan, *A Federal Republic*, Cambridge University Press 1995, p 10.

³¹ Ibid, p 15. Galligan’s argument is that Australia is already a federal republic, ‘albeit one that is thinly disguised by monarchical symbols and formulations of the executive office’ (at p 16). However, Galligan would still support the removal of those monarchical symbols from Australia’s constitutional system (at p xi).

³² Republic Advisory Committee, *An Australian Republic: The Options - The Report*, Volume One, AGPS 1993, p 39. (Henceforth, Republic Advisory Committee Report).

However, it is worth noting at this stage that, just as Bagehot referred to the ‘legal figments’ and ‘useful fictions’ underlying constitutional monarchy, so Professor Leslie Zines has written in similar terms about the notion of the sovereignty of the people in an Australian context, stating that it is difficult in ‘clear legal terms’ to be certain what it means. He explains that the legal power of this ‘sovereign’ is limited, notably to choosing its parliamentary representatives and to approve or disapprove proposed alterations to the Constitution put to it by those representatives. However, as a result of the federal considerations found in section 128 of the Commonwealth Constitution, the term ‘the “people”’ has a different meaning or composition for each of these two purposes’.³³ Professor Zines continues:

It is clear, therefore, that there is a considerable fictional element in the concept of both ‘sovereign’ and ‘people’ for this purpose...The concept of sovereignty of the people, therefore, must be regarded as either purely symbolic or theoretical. Seen as symbolic it might be regraded as similar to the symbol of the Crown, uniting the various organs and elements of organisation of government under one concept, and, in particular, symbolising the system of representative government that has been discovered in the Constitution.³⁴

³³ See also the comments of Gummow J in *McGinty v WA* (1996) 134 ALR 289 at 378-379. Gummow J noted: ‘Broad statements as to the reposition of “sovereignty” in “the people” of Australia, if they are to be given legal rather than popular or political meaning, must be understood in the light of the federal considerations contained in s. 128. Those statements must also allow for the fact that none of the Australia Acts...followed approval at a referendum, in particular, any submission to the electors pursuant to s. 128 of the Constitution. Moreover, in s. 15 thereof, the Australia Acts provide their own mechanism for amendment or repeal by statute and without submission to the electors at State or Commonwealth level’. The ‘federal considerations contained in s. 128’, noted above, were also discussed by McHugh J at 349.

³⁴ L Zines, *The High Court and the Constitution*, Fourth Edition, Butterworths 1997, pp 395-396. It is explained by Zines that the notion of the ‘sovereignty’ itself does not seem necessary to the presence of the concept of representative government in the Constitution. See also - L Zines, ‘The sovereignty of the people’ from *Power, Parliament and the People* edited by Michael Coper and George Williams, The Federation Press 1997, pp 91-107. The latter was cited by McHugh J in *McGinty v WA* (1996) 134 ALR 289 at 343 where it is said ‘Since the passing of the Australia Act (UK) in 1986, notwithstanding some considerable theoretical difficulties, the political and legal sovereignty of Australia now resides in the people of Australia’.

4. CONSTITUTIONAL MONARCHY IN NSW

What is meant by 'the Crown'? The comment is made that 'The Crown is a convenient term, but one which is often used to save the asking of difficult questions'.³⁵ Indeed, on close inspection it is found that the term 'the Crown' is used in different ways in different contexts. It can have a personal connotation, in that it refers to the Monarch or Sovereign of the day. However, with the decline in the personal power of the Monarch since the seventeenth century, the Crown has also acquired a broader meaning so that, following Professor Zines, the symbol of 'the Crown' can be viewed as a useful shorthand, uniting as it does the various organs and elements of the organisation of government under one concept. In this more abstract, legal or political sense 'the Crown' can be associated with the executive government, a notion which encompasses the idea of the Monarch acting, not personally, but as head of state on the advice of his or her Ministers who, in their turn, operate under the doctrine of ministerial responsibility.³⁶ The system of government which operates throughout Australia can be described as a form of responsible government, elected by representative democracy, under the Crown. Used in this way, the Crown is the embodiment of the executive power of the Commonwealth and the States, symbolising their executive governments.

More abstract still is the use, especially in the United Kingdom, of the term 'the Crown' as synonymous with what in many countries is called 'the state', in the sense that that term extends beyond the government of the day to refer to the source and embodiment of legitimate authority in an organised community or polity. Used in this way the term encompasses the totality of institutions (legislative, judicial and executive) which constitute the polity. It is fair to say that this association of 'the Crown' with 'the state' is less intense in a jurisdiction like NSW than it is in the United Kingdom, for the obvious reason that here, where the polity at large is invoked, reference can readily be made to 'the State of NSW'. All the same, echoes and vestiges of the more abstract usage are found where, for example, the Crown exercises its reserve powers, in those rare circumstances where the Governor is called upon to act as the guardian of the State constitution. It has been said, in this regard, that the Governor is undoubtedly 'the ultimate constitutional watchdog for protecting parliamentary democracy and the constitution'.³⁷ A different sort of illustration may be found in the prosecution of the criminal law in the Crown's name, or in the use of the term Crown Land to denote, broadly, land that is the property of the State .

Roughly, then, a threefold distinction can be drawn in which 'the Crown' can be associated,

³⁵ *Bank Voor Handel En Scheepvaart v Slatford* [1952] 1 All ER 314 (per Devlin J at 319).

³⁶ In brief, the doctrine of ministerial responsibility means that Ministers are responsible for the general conduct of government, including the exercise of many powers legally vested in the Monarch, and that they are responsible to Parliament and, ultimately, to the electorate - G Marshall and GC Moodie, *Some Problems of the Constitution*, Hutchinson and Co 1961, p 47.

³⁷ G Winterton, 'The Constitutional Position of Australian State Governors' from *Australian Constitutional Perspectives* edited by HP Lee and G Winterton, The Law Book Company 1992 p 295.

first, with the *Monarch*, secondly, with the *Government* and, thirdly, with the *State*. Rough though it is, this distinction serves the purpose here of suggesting the different ways in which the fact of constitutional monarchy may find expression in the legal and constitutional structure of NSW. With that, it also suggests the range of legal amendments that may be required should NSW adopt a republican system.

What is meant by ‘the Crown in the right of NSW’? Section 13 of the NSW *Interpretation Act 1987* provides that ‘a reference to the Crown is a reference to the Crown in right of New South Wales’. What does this mean? Under the *Royal Style and Titles Act 1973* (Cth), there is a Queen of Australia, but ordinarily at least reference is not made to the Queen of NSW.³⁸ How then can there be a Crown in right of NSW?

Professor George Winterton has explained this conundrum by noting that ‘as is often the case in matters monarchical the legal position does not entirely reflect reality’. The reality, he explains, is that the Crown in right of the Commonwealth and the Crown in right of each State ‘are recognised as separate juristic entities which contract with one another, sue one another, and are prime facie not bound by the legislation of the other. Moreover, when acting in respect of the relevant polity, the Queen acts on the advice of the Chief Minister of that polity’.³⁹

Does this mean, then, that Australia is a ‘heptarchy’, in which there is a separate Crown in right of each of the States and the Commonwealth, since in respect of matters concerning each Australian jurisdiction the Queen acts only on the advice of ministers in that jurisdiction. Winterton does not think so.⁴⁰ However, that was the conclusion reached by the Republic Advisory Committee in 1993.⁴¹

Another view is that the Australian States are not themselves ‘monarchies’; they are parts of a constitutional monarchy, Australia. Therefore, while the Crown acts in different capacities and on different advice in different jurisdictions, there is, on this understanding, only one Crown of Australia. Bradley Selway QC, Solicitor General of South Australia adds

³⁸ In *Commonwealth v Queensland* (1975) 134 CLR 298 Queensland was prevented (on the basis of inconsistency with Chapter III of the Commonwealth Constitution) from referring to the Privy Council an Act purporting to establish a Royal Style and Titles which included a reference to the Queen as Queen of the UK and of Queensland. But note the reference to the Queen as ‘lawful sovereign of the United Kingdom *and of this State of Victoria*’ in the Second Schedule to the *Constitution Act 1975* (Vic). This was amended in 1994, so that now the Second Schedule refers only to ‘Her Majesty’. According to the Second Reading Speech, this was to make the Victorian Constitution ‘consistent’ with the Commonwealth *Royal Style and Titles Act 1973* (VPD, Legislative Assembly, 10 November 1994, pp 1676-1678).

³⁹ G Winterton, ‘The Constitutional Position of Australian State Governors’ from *Australian Constitutional Perspectives* edited by HP Lee and G Winterton, The Law Book Company 1992, p 274.

⁴⁰ G Winterton, ‘The States and the republic: a constitutional accord?’ (1995) 6 *Public Law Review* 107 at 113.

⁴¹ Republic Advisory Committee Report, Volume One, pp 124-125.

to this, ‘The relationship between these various emanations of the Australian Crown is governed by and derived from the [Commonwealth] Constitution, and the theory of agency’. Under that theory, which holds that the Crown’s ‘legislative, executive and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality’,⁴² the Crown in right of the Commonwealth and the Crown in right of each of the various States are ‘treated as separate agents of the one and indivisible Crown, the Queen of Australia’.⁴³

As Professor Zines explains, in opposition to the heptarchy theory, it needs to be recognised that the word ‘Crown’ is used in different ways in this context. Thus, where the divisibility of the Crown is emphasised in relation to Australia’s federation, ‘it is because the concept of “Crown” has come to mean the entire executive organisation of the Commonwealth and the States respectively’. It is in this respect that they are treated by the Commonwealth Constitution as independent juristic persons. To which Zines adds, ‘But in so far as the Queen is sovereign of the nation, she is clearly one and indivisible. Australia is one monarchy, not seven separate monarchies. This view is supported by the preamble to, and s 2 of, the Constitution Act’.⁴⁴

What effect did the Australia Act 1986 have on constitutional monarchy in NSW? The *Australia Act 1986* (Cth), the same version of which was passed by both the Commonwealth and United Kingdom Parliaments, is binding on NSW. The Act does not deal expressly with the relationship between the Crown in right of the Commonwealth and the Crown in right of each of the various States. What it does, however, is to clarify the relationship between the Queen and the governments of the States, breaking any residual ties there may have been between the States and the Crown in right of the United Kingdom.⁴⁵ Under the *Australia Act 1986*:

⁴² *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case)*(1920) 28 CLR 129 at 152. Note that the nineteenth century theory of the indivisibility of the Crown in right of the United Kingdom had to be modified with the federation of the Australian colonies which established, under section 75 of the Constitution, the States as separate juristic entities. However, it was only later still that the Crown in the right of the Commonwealth of Australia became separate and independent from the Crown in the right of the United Kingdom, perhaps with the adoption in 1942 by the Commonwealth of the *Statute of Westminster 1931*. Note, too, that in the *Engineers* case of 1920 the High Court continued to view the Crown as ‘one and indivisible throughout the Empire’. For a detailed commentary see - G Winterton, ‘The evolution of a separate Australian Crown’ (1993) 19 *Monash Law Review* 1. He notes (at p 4) that ‘The Queen’s present Australian Royal Style and Title dates from 1973 when the *Royal Style and Titles Act* of that year dropped all reference to the United Kingdom, mentioning specifically only Australia’.

⁴³ *The Laws of Australia*, The Law Book Co Ltd, [19.3].

⁴⁴ L Zines, *The High Court and the Constitution*, Fourth Edition, Butterworths 1997, p 314.

⁴⁵ Bradley Selway QC explains that ‘Until 1986, it was unclear whether Her Majesty when acting in respect of the States was acting in a different capacity from the British Crown. In practice, all communication between the States and Her Majesty was transmitted through the Foreign and Commonwealth Office of the United Kingdom government’ - *The Laws of Australia* [19.3]

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- it is declared that in each of the States the Crown is represented by the Governor of the State.⁴⁶
 - subject to two exceptions, all the powers and functions of the Queen in respect of a State, including presumably the powers conferred both by statute and the prerogative,⁴⁷ are exercisable only by the Governor of the State:⁴⁸ one exception is in respect of the appointment and termination of the Governor;⁴⁹ the other is when the Queen is present in the State.⁵⁰ Subject to those exceptions, a State Governor is, in effect, a viceroy, in that he or she can exercise all of the Queen's prerogatives and powers in respect of the State without further approval or instruction from her Majesty.
 - when the Queen does exercise her powers personally, she is to be advised by the Premier of the State.⁵¹ Indeed, it has been said that 'In practice, Her Majesty's authority in Australia now extends only to appointing or removing the Governor-General and the State Governors, and in exercising that authority she must act only on the advice of the relevant Prime Minister or Premier'.⁵²
 - Her Majesty's Government in the United Kingdom has no responsibility for the government of any State.⁵³
 - the former requirement that certain State legislation be reserved for the Queen's assent⁵⁴ and the former power of the Queen to disallow legislation enacted by a State Parliament is terminated.⁵⁵

⁴⁶ Section 7(1), *Australia Act 1986*.

⁴⁷ G Winterton, 'The Constitutional Position of Australian State Governors' from *Australian Constitutional Perspectives* edited by HP Lee and G Winterton, The Law Book Company 1992, p 281.

⁴⁸ Section 7(2), *Australia Act 1986*.

⁴⁹ Section 7(3), *Australia Act 1986*.

⁵⁰ Section 7(4), *Australia Act 1986*.

⁵¹ Section 7(5), *Australia Act 1986*.

⁵² The South Australian Constitutional Advisory Council, *South Australia and Proposals For An Australian Republic*, First Report, September 1996, p 255. (Henceforth, South Australian Constitutional Advisory Council Report).

⁵³ Section 10, *Australia Act 1986*.

⁵⁴ Section 1(1), *Australian States Constitution Act 1907* (Imperial).

⁵⁵ Sections 8 and 9, *Australia Act 1986*.

In keeping with the purpose of the Australia Act, which was defined in terms of bringing Australian constitutional arrangements into conformity with its status as a 'sovereign, independent and federal nation', changes were made to the NSW Constitution Act which were designed to better reflect that status. For example, since 1987 the office of State Governor in NSW, which was constituted originally by Letters Patent dated 29 October 1900,⁵⁶ is continued under section 9A of the *Constitution Act 1902*.⁵⁷

How does the monarchical system operate in NSW?⁵⁸ The point is often made that the notion of the Crown pervades Australia's constitutional structures.⁵⁹ Confounding the notion of the separation of powers, the Monarch is both the head of the executive as well as integral part of the legislatures of all the Australian Parliaments. The preamble to the Commonwealth Constitution recites that the people of five of the Australian colonies 'have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom'. Under section 1 of the Constitution itself the Queen is declared to be a constituent part of the Federal Parliament. Section 61 of the Commonwealth Constitution vests the executive power of the Commonwealth in the Queen, to be exercised by the Governor-General as her representative.

Similar arrangements operate in NSW where the activities of the Government are conducted formally on behalf of the Crown through the Governor acting on the advice of the Executive Council. The powers of the Governor in Council, as the formal head of the executive government, are set out in the NSW *Constitution Act 1902*, with section 35B ensuring the continuance of the Executive Council 'to advise the Governor in the government of the State' and with section 35E providing:

- (1) The Premier and other Ministers of the Crown for the State shall be appointed by the Governor from among the members of the Executive Council.
- (2) The Premier and other Ministers of the Crown shall hold office during the Governor's pleasure.⁶⁰

Thus, unlike the Commonwealth Constitution, which makes no mention of the office of Prime Minister, since 1987 at least the NSW Constitution Act has acknowledged the existence of the office of Premier, for all practical purposes the effective head of the

⁵⁶ While the office of Governor was constituted under the Letters Patent, its powers were further defined under the Instructions to the Governor of NSW dated 29 October 1900, as well as under the Additional Instructions dated 1 December 1909 and 26 February 1935. For this reason section 9F of the *Constitution Act 1902* (NSW) provides that both the Letters Patent and the Instructions cease to have effect on the commencement of the *Constitution (Amendment) Act 1987* (NSW).

⁵⁷ Section 9B of the *Constitution Act 1902* (NSW) also makes arrangements for the appointment of a Lieutenant-Governor and an Administrator of the State.

⁵⁸ See generally *Halsbury's Laws of Australia*, Volume 5, Butterworths 1993.

⁵⁹ L Zines, *The High Court and the Constitution*, Fourth Edition, Butterworths 1997, p 249.

⁶⁰ Again, a wide discretion is suggested here.

government. However, it remains the case that, in formal terms, it is the Governor who has the power to appoint Ministers and Members of the Executive Council. The Executive Council is itself a formal institution which transforms government decisions into legally effective decisions.⁶¹ In reality, of course, the Crown in right of NSW acts in its day to day activities through the agency of its public service and through other institutions and instrumentalities created for that purpose.

As the embodiment of executive power in NSW, it can be said that the Executive Crown and its servants enjoy two types of powers: prerogative powers and statutory powers. In other words, the activities of the Government and its public servants, under the authority of the Crown, are either authorised by legislation or by some other inherent, common law power or prerogative. These prerogatives of the Crown include: the power to grant pardons; Crown copyright; priority in the payment of debts; the right to treasure trove; and a presumptive immunity from legislation.⁶² The authority to establish a Royal Commission also lies in the prerogative, although the procedures and powers of the Royal Commission itself will be governed by the *Royal Commissions Act 1923* (NSW).

As at the Commonwealth level, in NSW the Crown is declared to be a constituent part of the State Legislature, with section 3 of the *Constitution Act 1902* (NSW) defining 'The Legislature' to mean 'His Majesty the King with the advice and consent of the Legislative Council and Legislative Assembly'. Legislation is enacted, therefore, by the Queen-in-Parliament. This power of Royal Assent was traditionally a common law, prerogative power of the Crown. However, in recent years many of these prerogative powers, especially those affecting the Crown's relationship with Parliament, have been established under statute. Since 1987 this is the case with respect to the power of Royal Assent to Bills.⁶³ Also, under the NSW Constitution Act the Governor may summon Parliament,⁶⁴ as well as fix the time and place for holding sessions of Parliament.⁶⁵ The Governor also has the power to convene a joint sitting of the two Houses of Parliament as part of the process for resolving deadlocks between the two Houses.⁶⁶ Note, however, that with the introduction of fixed term Parliaments in NSW,⁶⁷ the Governor's power to dissolve the Legislative Assembly is heavily circumscribed.

Under the *Interpretation Act 1987* it is made clear that, when exercising a statutory power,

⁶¹ *Halsbury's Laws of Australia*, Volume 5, [90-2480].

⁶² *Halsbury's Laws of Australia*, Butterworths 1993, Volume 5 [90-2465].

⁶³ Section 8A, , *Constitution Act 1902* (NSW).

⁶⁴ Section 23, *Constitution Act 1902* (NSW).

⁶⁵ Section 10, *Constitution Act 1902* (NSW).

⁶⁶ Section 5B (1), *Constitution Act 1902* (NSW).

⁶⁷ *Constitution (Fixed Term Parliaments) Amendment Act 1993* (NSW).

the Governor is required to act 'with the advice of the Executive Council'.⁶⁸ On the other hand, complicating matters somewhat, it seems that that rule of interpretation would not apply where the 'specific legislation expressly or impliedly evinces a contrary intention'.⁶⁹ It should be noted in this regard that a number of provisions in the NSW Constitution Act suggest that the Governor retains a wide discretion to act independently of advice,⁷⁰ particularly where the Act touches on the reserve powers of the Crown.⁷¹

In addition to the powers expressly conferred on the State Governor by legislation some powers are also enjoyed by the Governor in person as a matter of prerogative. Most important in this respect is the controversial reserve power to dismiss a Premier in certain extreme circumstances, notably (and perhaps only) where a 'significant illegality' has been committed. In relation to the dissolution of the Legislative Assembly, section 24B (5) preserves the Governor's right to dissolve the Assembly on extraordinary occasions, against the advice of the Premier or the Executive Council, but only 'if the Governor could do so in accordance with established constitutional conventions'.⁷² There is, therefore, a partial codification of this reserve power in NSW. It has been said that the reserve powers can be exercised 'only on extraordinary occasions to prevent a flagrant breach of constitutional right...it is only on the occasions, fortunately rare, when Cabinets forget themselves, that the reserve powers come into play'.⁷³ This is one context in which the Governor, as the Queen's representative, can be seen as 'the ultimate constitutional watchdog for protecting parliamentary democracy and the constitution'.

From this sketch, therefore, a picture emerges of the multi-faceted operation of the notion

⁶⁸ Section 14, *Interpretation Act 1987* (NSW). In fact, the same rule of interpretation applied under section 15(II) of the *Interpretation Act 1897* (NSW). Note that where the Governor is exercising a non-statutory power, other than a reserve power, constitutional convention requires that ministerial advice be followed.

⁶⁹ G Winterton, 'The Constitutional Position of Australian State Governors' from *Australian Constitutional Perspectives* edited by HP Lee and G Winterton, The Law Book Company 1992, p 291.

⁷⁰ Section 10 of the *NSW Constitution Act 1902* may be one example: the Governor has the power to prorogue Parliament 'by proclamation or otherwise whenever he deems it expedient', thus suggesting a wide discretion.

⁷¹ Following Winterton, it can be said that there are four reserve powers which can be exercised contrary to ministerial advice: the power to appoint the Premier, to dismiss the Premier in certain limited circumstances (section 35(2)), to refuse a dissolution of Parliament, and to force a dissolution of Parliament (which is a corollary of the power to dismiss the Premier). As noted, the latter has been circumscribed in NSW by the introduction of four year fixed term parliaments - G Winterton, 'The Constitutional Position of Australian State Governors' from *Australian Constitutional Perspectives* edited by HP Lee and G Winterton, The Law Book Company 1992, p 293.

⁷² The Governor is required to 'consider whether a viable alternative Government can be formed without a dissolution...' - section 24B(6), *Constitution Act 1902* (NSW)

⁷³ E Forsey, *Freedom and Order*, McClelland and Stewart Ltd 1974, p 60.

of the Crown in NSW, one which serves as a basis for the range of complex constitutional questions raised by the republican debate.

5. A REPUBLICAN NEW SOUTH WALES - KEY ISSUES AND QUESTIONS

At the outset a distinction can be made between: those questions and issues relating to transitional matters, dealing with the machinery of change; and those concerning the details of any republican system in the States. The second group of constitutional issues would arise irrespective of how the republican system of government was achieved. These include: would NSW need its own head of State? if so, how would he/she be elected or appointed and for how long? would that head of State still be called 'Governor'? what would replace the notion of the Crown in NSW legislation? Such issues are canvassed first, before the various questions relating to the machinery of change are discussed.

What would a republican NSW substitute for the Crown? To a large extent this question was answered by the Oaths and Crown References Bill 1995 which, according to the Second Reading Speech, was designed to 'make a number of symbolic changes to remove some of the obvious and significant references to the Crown in State legislation and administration'.⁷⁴ For instance, the Bill would have: replaced the oath of allegiance with a pledge of loyalty to Australia; enabled criminal proceedings to be brought in the name of the State of NSW; changed the title of the offices of Crown Advocate, Crown Prosecutor and Crown Solicitor by substituting 'State' for 'Crown'; enabled laws to be expressed as binding on the State rather than the Crown; and it would also have dispensed with the words 'God Save the Queen' in proclamations and other documents.

At the same time, the Bill did not attempt an exhaustive amendment of all references to the Crown in State legislation, restricting its scope to those areas where 'State' could be substituted for 'Crown'. This may or may not apply where the 'Crown' is used in the legislation more as a synonym for 'the executive government'. One example is the term 'office of profit under the Crown', as this is used in sections 13 and 13B of the *Constitution Act 1902*. Would the term 'office of profit under the executive government of the State' be used in this context?⁷⁵

Then again, what of the definition of the Crown as a constituent part of the NSW Legislature under section 3 of the *Constitution Act*? At present, the reference is to 'His Majesty the King with the advice and consent of the Legislative Council and Legislative Assembly'. Following the suggestions made for a republican constitution at the Commonwealth level, the substitution of 'Governor' (or 'President' or whatever term is chosen) for the Crown in the definition of the NSW Legislature would seem to be the most likely option, with perhaps the added provision that the Governor (or its equivalent) 'shall

⁷⁴ NSWPD, 23 May 1995, p 50.

⁷⁵ That is the solution suggested in a federal context under the Constitution Alteration (President of the Commonwealth of Australia) Bill 1996 (section 44 of the Commonwealth Constitution as altered for a republican Australia). This Private Senator's Bill has not advanced beyond its Second Reading Stage.

exercise his or her powers in accordance with this Constitution'.⁷⁶ This would be consistent with the present arrangements where it is the Governor, as the Queen's representative, who performs the functions associated with the Crown's role as a constituent part of the Legislature, notably assenting to legislation.

The above comments suggest again the multi-faceted symbolic functions performed by the office of the Governor in the name of the Crown under the system of constitutional monarchy. For example, in relation to the Legislature some of the Governor's functions may be considered in the context of his or her role as the head of the executive, such as fixing the time and place for the holding of sessions of the Legislative Council and the Legislative Assembly. On the other hand, assenting to Bills can be seen as belonging to the Governor's functions in representing the Queen as part of the Legislature - as the 'Sovereign in Parliament'.⁷⁷ There is a vestige here of a more personal reference to the Crown, taking into account the Monarch's discretion, historically, to refuse Royal Assent to legislation. In a modern context, however, this aspect of the Sovereign in Parliament is, in effect, the Sovereign as the symbolic head of the executive government acting on the advice and with the consent of the Houses of Parliament. This, in turn, suggests the peculiarities of the Westminster system, especially when viewed from the standpoint of the separation of powers.

With these peculiarities in mind, the question is whether a republican Governor could exercise these various functions, without making the new system seem either absurd or artificial. This is a question which goes first to perception, but it may also have practical implications. Presumably, the republican Governor would represent the sovereignty of the people of NSW. But what, in these circumstances, does it mean to speak of the 'the sovereignty of the people in Parliament', or indeed of the 'people' as a constituent part of the Legislature? It may be that the two Houses of Parliament and the republican Governor would represent different aspects of the sovereignty of the people, thereby cementing the ties between the Legislature and representative democracy. But what if the republican Governor was appointed by the Premier, thereby affirming the symbolic and practical ties with the executive government? In what sense could a republican Governor be said to be a representative of popular sovereignty in these circumstances? Alternatively, if the Governor was in some way the direct representative of the people, holding office by popular election, then this may lend weight to the call for greater participation in the Legislature, notably through the introduction of a citizens' initiated referendum. Then, again, it may be that even election by a special majority of the Houses of Parliament would work a subtle change into the peculiar doctrine of the separation of powers operating under the Westminster model of government, bearing in mind that one constituent part of the Legislature would be in

⁷⁶ Constitution Alteration (President of the Commonwealth of Australia) Bill 1996 (sections 1 and 2 of the Commonwealth Constitution as altered for a republican Australia).

⁷⁷ WL Morison, *The System of Law and Courts Governing New South Wales*, Butterworths 1979, p 74.

some sense dependent on the other two.⁷⁸ The general point to make is that the Crown, which is integral to the present system, is a thing of many parts and that the coherence of its ceremonial and constitutional functions is largely the product of historical usage; in the minimalist model, a republican Governor would be required to play most of those parts while retaining a sense of the coherence of the system as a whole.

None of this is to suggest that the theoretical or practical difficulties involved in moving to a republican system are insurmountable, only that these need to be considered in all their complexity, remembering that republicanism involves grafting a new theory of sovereignty onto the Westminster model. A simple option would be to dispense with the Governor's function of assenting to legislation, thereby omitting any reference to the republican Governor, or any equivalent, from the definition of the 'Legislature'.⁷⁹

Would NSW need its own head of state under a republican form of government? Various options were set out for discussion in the report of the Tasmanian Advisory Committee on Commonwealth/State Relations as follows:

- *retain the Governors as they stand:* the difference would be that the republican Governor would not be the representative of the Queen. This option was supported by Associate Professor Gerard Carney who, after a review of the ceremonial and other functions performed by State Governors at present, concluded that 'The arguments in favour of maintaining a Head of State at the State level to perform a constitutional and ceremonial role seem overwhelming'.⁸⁰
- *maintain Governor, but more circumspectly:* certain arrangements intended to

⁷⁸ As long as both Houses of Parliament were themselves elected by direct popular vote then it could still be said that the people of the State would remain the ultimate source of authority for the stream of executive power in NSW. But what if, for the sake of argument, the Legislative Council reverted to the method of election that was in place up until 1978? Between 1933 and 1978 members of the Legislative Council were elected, on a part-time basis, by members of the two Houses. With the reference to the jurisprudence arising under section 24 of the Commonwealth Constitution, the NSW Constitution Act does not require that either or both Houses of Parliament be 'directly chosen by the people'. On the other hand, the Sixth and Seventh Schedules to the NSW Constitution Act do set out the method of election for the two Houses in detail. Both Schedules are entrenched under sections 7A and 7B respectively.

⁷⁹ The Standing Orders of the two Houses of Parliament would also have to be looked at in this regard, to ensure compatibility with whatever form of republican government that was adopted. For example, surviving from colonial times is Standing Order 212 of the Legislative Council which permits a Member to enter a protest against a Bill to the Governor even after that Bill has been finally passed by both Houses. It is hard to see what practical effect this could have under the present system, although it was invoked in relation to the Judicial Officers Bill 1986. The question would be whether it should continue under a republican system and, if so, to what purpose. A second example is Standing Order 281 of the Legislative Assembly which requires that a Bill appropriating revenue (other than a Bill introduced by a Minister) must be initiated by a message from the Governor.

⁸⁰ G Carney, 'Republicanism and State Constitutions' from *Australia: Republic or Monarchy? Legal and Constitutional Issues* edited by MA Stephenson and C Turner, University of Queensland Press 1994, p 190.

reduce the costs associated with the Governor have already been made in NSW. The idea of a part-time Governor has also been discussed.

- *combine the office of Governor with the office of Chief Justice:* this option raises difficulties associated with the doctrine of the separation of powers, as well as the practical consideration that the Chief Justice would not have the time to perform all the Governor's constitutional duties properly on any regular basis.
- *the President of the Commonwealth could act as the head of state of each of the States:* under this option, in acting as the Governor of NSW, for example, the President would rely on the advice of the Premier of this State. For most practical purposes this would be equivalent to having no Governor at all, as the President would be too busy to perform the duties performed previously by State Governors. On the other hand, the President could exercise the reserve powers of the head of state in appropriate circumstances, thereby ensuring that these constitutional functions could be fulfilled.
- *abolish the office of Governor entirely:* both Austria and Germany have a non-executive President at the national level without an equivalent at the State level. Also, the ACT operates its Parliament without a local head of state, but this is because the Governor-General also acts as the ACT head of state in terms of dissolving the Legislative Assembly.⁸¹ The option of dispensing with heads of state at the State level was supported by Professor Winterton, using the German model as an illustration of how the constitutional role of the head of state could be replaced by detailed rules, justiciable before the courts, to resolve all future constitutional problems.⁸²
- *several States could share the same Governor:* this was suggested by Professor Winterton, mainly as an alternative to dispensing with State heads of state altogether.⁸³ It does not appear to have been taken up in the debate to date.

Both the Western Australian Constitutional Committee⁸⁴ and the South Australian Constitutional Advisory Council received submissions proposing that the post of State Governor be abolished.⁸⁵ Both rejected the proposal, along with the idea that the President of the Commonwealth could act as the head of state of each of the States.

⁸¹ Tasmanian Advisory Committee on Commonwealth/State Relations, *A Republican Australia? - Issues for Tasmanians*, June 1995, p 16.

⁸² G Winterton, *Monarchy to Republic*, Oxford University Press 1994, pp 106-107.

⁸³ *Ibid*, p 107.

⁸⁴ The Report of the Western Australian Constitutional Committee, January 1995, pp 86-89.

⁸⁵ South Australian Constitutional Advisory Council Report, pp 104-105 and Recommendation 20 at page 11.

Basically, two arguments were advanced in these reports for retaining a head of state of the same standing as the Governor. One was practical in nature, based on the view that the present Governors of the States perform important functions in their capacity as non-partisan representatives of the each State, as well as in the exercise of the ordinary and reserve powers attached to the office. These functions, it was said, would be no less important if a republican system of government were adopted.⁸⁶ For its part, the South Australian Constitutional Advisory Council stressed that the Governor's post is a full-time job.⁸⁷

The second argument related more to the maintenance of the status of the States within the Australian federation. Looking back to the Convention Debates of the 1890s, the South Australian Constitutional Advisory Council noted that the Convention accepted Edmund Barton's argument that each State should have its own Governor, quite separate from the Governor-General, as a means of underlining the independence of the States from the proposed national government;⁸⁸ further, that each State should continue to communicate directly with the monarch was said to be central to the notion that 'as between the Commonwealth and the States the one should be sovereign in its sphere just as the others are sovereign in their sphere'.⁸⁹ In Adelaide in 1897 Sir Samuel Griffith was quoted by Barton as saying that 'Governor [and not Lieutenant-Governor as in the Canadian model of federation]⁹⁰...is the proper term to indicate that the States are sovereign'.⁹¹ The South Australian Constitutional Advisory Council went on to say, 'If federalism is to survive in Australia, abolition of the Australian Crown must not lead to State Governors being rendered subservient to anyone in Canberra'.⁹² With this in mind, the Council recommended that 'If South Australia, together with the Commonwealth, severs its links with the monarchy, the State should have its own head of state, who should be styled "the Governor

⁸⁶ The Report of the Western Australian Constitutional Committee, p 88-89.

⁸⁷ South Australian Constitutional Advisory Council Report, p 105.

⁸⁸ Ibid, p 52.

⁸⁹ *Official Record of the Debates of the Australasian Federal Convention*, Volume 2, Melbourne 1898, p 1706.

⁹⁰ The South Australian Constitutional Advisory Council noted that the Convention delegates studied the Canadian model, but rejected it, rather ironically as it turned out, 'because they considered that Canada was not really a federation as it had no effective division of power between central and regional governments, which was what Australia wanted'. Among other things, the Canadian central government appoints (and in several instances has dismissed) the head of each provincial executive, who is styled 'lieutenant -governor' rather than 'governor' - South Australian Constitutional Advisory Council Report, p 51.

⁹¹ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide 1897, p 994. Note, however, that at the 1891 Convention Sir Samuel Griffith had supported the notion that communications from the Governor of a State to the Monarch should be made through the Governor-General. This was to overcome the fact that Australia 'speaks with seven voices instead of with one voice' - *Official Record of the Debates of the Australasian Federal Convention*, Volume 1, Sydney 1891, p 850.

⁹² South Australian Constitutional Advisory Council Report, p 53.

of South Australia”⁹³.

Likewise, the Western Australian Constitutional Committee commented, ‘Without a separate head of state, the standing of Western Australia within the federation could be diminished. And unless the head of state in a republican Western Australia has the same status as the Governor has now in relation to the Governor-General, the fear put to the Committee by Professor Peter Boyce might be realised: “the emergence of a republican constitution will almost certainly see the Governor-General’s successor greatly overshadow the successors to State Governors”’.⁹⁴ The Committee recommended:

If the monarchy were removed from the State Constitution, Western Australia should retain a head of state of the same standing, and possibly with the same title, as the Governor.⁹⁵

It may be that the same conclusion will not be reached in every State. Part of the difficulty in that regard is that there are notable variations between the Constitutions of the different States and, as John Waugh has argued, NSW is in many ways the least typical of all. Waugh has said:

The New South Wales constitution, with fixed four-year terms for the Legislative Assembly, an upper house unable to block supply, and entrenchment of significant parts of the constitution with a referendum requirement, represents, as it were, the furthest point yet reached in the line of development from the original Constitution Acts. A position like that reached in New South Wales has other implications. Fixed terms and minimisation of the risk of a supply crisis reduce the discretion, and, to some extent, the significance, of the State Governor, making it easier for the New South Wales Premier to raise, as he reportedly has, the possibility of abolishing the office.⁹⁶

On the other side, the main issues discussed by both the South Australian Constitutional Advisory Council and the Western Australian Constitutional Committee, especially those relating to the standing of the States within the Australian federation, apply with equal force to NSW.

How would the NSW republican head of state be chosen? Much depends on this. As at the federal level, it may prove to be the most contentious issue in the republican debate for the States. The assumption behind the debate may also be the same, namely, that a republican head of state would be non-executive in nature. Unlike the US Presidency,

⁹³ Ibid, p 11.

⁹⁴ The Report of the Western Australian Constitutional Committee, p 89.

⁹⁵ Ibid.

⁹⁶ J Waugh, ‘Australia’s State Constitutions, Reform and the Republic’ (1996) 3 *Agenda* 59 at 63.

therefore, the functions of the office would be primarily symbolic and ceremonial in nature. Briefly, the main options for the election/appointment of such a non-executive head of state are as follows:

- *appointment by Premier*: the former Governor of Victoria, Richard McGarvie, has suggested the Governor could be appointed by a Constitutional Council on the Premier's advice. His suggestion was that the Council, which would consist of a former Governor, a former Governor-General and a former Chief Justice, 'could place before the Premier the names of several suitable persons and then appoint the one chosen by the Premier'.⁹⁷ As discussed in more detail below, the South Australian Constitutional Advisory Council also favoured appointment of a republican State Governor by the Premier.
- *appointment by Parliament*: at the federal level the Republic Advisory Committee said this could be achieved by one of the following options: (a) approval by a majority of members in a joint sitting; (b) approval by a majority of members in each House; (c) approval by a two-thirds majority of members in a joint sitting; or (d) approval by a two-thirds majority of members in each House.⁹⁸ The same options could apply in NSW. This would then involve choosing a nomination process for parliamentary selection. For example, should every member of both Houses of the NSW Parliament be allowed to nominate his or her own candidate? Alternatively, single nomination by the Premier could be provided for, or nomination by an independent group (such as the Constitutional Council suggested by Richard McGarvie).
- *appointment by an electoral college*: the pros and cons of this arrangement at the federal level were discussed by the Republic Advisory Committee, only to be dismissed. It does not appear to have found favour at the State level to date.
- *appointment by popular election*: as noted, the advantages and disadvantages of popular election has excited more interest than any other in the republican debate. Whether the matter would be discussed with the same intensity at the State level remains to be seen, bearing in mind the costs that may be involved. However, the Western Australian Constitutional Committee reported that this was the method of appointment most favoured in the submissions it received. Responding to this, the Committee stated: 'Popular election would create an office with an independent political power base which, depending on the powers exercised by the head of state, would have the potential, as in the Commonwealth sphere, to modify the operation of parliamentary democracy in the State'.⁹⁹ The concern is that, in these circumstances, where the Governor might be said to have an independent source of

⁹⁷ R McGarvie, 'The work and selection of a Governor: by election, Parliament or Premier' (1997) 20 *University of NSW Law Journal* 130 at 142.

⁹⁸ Republic Advisory Committee Report, Volume One, p 67. The Committee favoured appointment by a special majority at a joint sitting of the Houses.

⁹⁹ The Report of the Western Australian Constitutional Committee, p 91.

legitimacy, certain tensions and even rivalries could develop in the relationship between the Premier, as the effective head of the government, and the Governor, in the dual role of formal head of the executive government and as head of State.

For its part, a majority of the Western Australian Constitutional Committee favoured 'appointment of the head of state in a republican Western Australia by a two-thirds majority of a joint sitting of both Houses of State Parliament'. However, the Committee went on to add that 'the final decision on which method should be adopted at State level could be influenced by the procedure adopted at Commonwealth level'.¹⁰⁰

Associate Professor Gerard Carney would also favour appointment by a two-thirds majority of a joint sitting of both Houses of State Parliament, but with this election coming at the end of a process beginning with an invitation to the people of the State to nominate to the Cabinet Office suitable persons for appointment as head of state. In this model the Cabinet, after consultation with the Leader of the Opposition and leaders of other minor parties, would then nominate and select one person as the next Governor, and subsequently this would be ratified by a special parliamentary majority.¹⁰¹ Thus, the Houses of Parliament would, in effect, be asked to ratify the person selected by the Cabinet.

On the other hand, a majority of the South Australian Constitutional Advisory Council rejected the proposal that either a republican Governor (at the State level) or President (at the Commonwealth level) be appointed by a two-thirds majority of a joint sitting of both Houses of State or Federal Parliament respectively. The reasons advanced against the proposal were that:

- it would change the nature of the office of head of state by giving it much greater authority than it possesses now. Every Governor or President could claim to have a solid mandate from the Parliament as a whole, while many Premiers and Prime Ministers can only claim to have the backing of one House. This may make the head of state more interventionist than is appropriate in our system of responsible government.
- the fitness for office of each candidate for head of state would be publicly investigated and assessed, as is the case in the appointment of Supreme Court judges in the United States.
- removal of the head of state in appropriate circumstances would be very difficult.
- where a government did command the allegiance of two-thirds of the members of both Houses, 'the pressure to appoint a party hack would be irresistible'.

¹⁰⁰ Ibid.

¹⁰¹ G Carney, 'Republicanism and State Constitutions' from *Australia: Republic or Monarchy? Legal and Constitutional Issues* edited by MA Stephenson and C Turner, University of Queensland Press 1994, p 192.

Alternatively, where the government does not command such a high level of allegiance, the ‘necessity for horse-trading with the representatives of the minor parties could prove overwhelming, again with undesirable results’.¹⁰²

On behalf of appointment by the Premier, the Council stated: ‘In State matters as in federal, the attractions of minimal constitutional change are considerable. When we have a system of appointment which, at the State level, has worked well for several generations, there is no significant case for “reform”. Any change to a new system is a leap into the unknown, and the experience of other countries shows that it may well have unfortunate consequences which cannot at present be foreseen’.¹⁰³ Thus, the Council recommended that ‘the Governor should continue to be appointed and be dismissable on the advice of the Premier of the State’.¹⁰⁴

How would a republican NSW head of state be removed? As suggested in the above recommendation of the South Australian Constitutional Advisory Council, the answer to this question depends largely on the method used to appoint the Governor in the first place. This was recognised at the federal level by the Republic Advisory Committee which noted, ‘There is much to be said for adopting the same method of removal as appointment, unless there are good practical reasons for not doing so’.¹⁰⁵ Presumably, the same would apply at the State level. The South Australian Constitutional Advisory Council suggested that, as a means of restraining impulsive action on the part of a Premier wanting to get rid of a Governor, the State Constitution could be changed to provide ‘a time delay equivalent to the one which arises from the present necessity of making contact with and properly consulting the Queen’.¹⁰⁶ On the other hand, if a Constitutional Council was part of the process of appointment and removal then it could act as a break on an impetuous Premier.

Another relevant factor here is the question of how the tenure of the office of a republican head of state is to be defined. For example, very different considerations would be raised if, on one side, a Governor were to hold office at the Premier’s ‘pleasure’, or under a fixed term appointment, on the other.

How should the tenure of a republican Governor be defined? As ever, opinion differs on this question. Two recommendations can be noted. In 1995 the Western Australian

¹⁰² South Australian Constitutional Advisory Council Report, pp 4-5.

¹⁰³ Ibid, p 106.

¹⁰⁴ Ibid, p 107. The Council also recommended that ‘It ought to be accepted as one of the unwritten conventions of the [South Australia] Constitution that, prior to tendering advice for the appointment of a new Governor, the Premier should consult confidentially with the Leader of the Opposition’. Further, the Premier’s advice should be tendered to the retiring Governor who might warn against the appointment of a candidate ‘who could prove unacceptable to a significant proportion of the population’. However, ‘if the Premier persists with the same advice, it must be accepted’.

¹⁰⁵ Republic Advisory Committee Report, Volume One, p 75.

¹⁰⁶ South Australian Constitutional Advisory Council Report, p 12.

Constitutional Committee thought that terms of appointment should be fixed at five years, and should be non-renewable.¹⁰⁷ Whereas the South Australian Constitutional Advisory Council thought that, if the Governor was still to be appointed by the Premier, then appointment should be ‘at pleasure’.¹⁰⁸

Should a republican Governor’s reserve powers be codified? This is another contentious issue upon which informed opinion differs markedly.¹⁰⁹ Again, the debate has its equivalent at the Federal level. Also, it is recognised that the answer may vary depending on the method used to appoint a republican head of state. There is, in addition, the threshold question as to whether such a head of state, either at State or Federal level, is to have the same reserve powers as the present Governor-General and State Governors.

Opinion varies, too, as to the content and scope of the reserve powers. The South Australian Constitutional Advisory Council defined the principal reserve powers thus: (a) power to appoint the Premier; (b) power to dismiss the Premier and therefore the whole ministry; and (c) power to refuse a Premier’s request that the House of Assembly be dissolved.¹¹⁰ As noted, the scope of the latter power has been curtailed in NSW with the introduction of fixed four-year terms for the Legislative Assembly.

For its part, at the Federal level, the Republic Advisory Committee supported retention of the reserve powers in the office of the head of state, thus avoiding ‘substantial change to our way of government’. The following options were then considered, all of which might also be applied at the State level:

- *incorporating the conventions by reference*: leaving the powers in the same form as are presently set out in the [Commonwealth] Constitution, but stating in the Constitution that the existing constitutional conventions will continue to apply to the exercise of those powers.
- *formulation of written conventions*: leaving the powers in the same form, with the constitutional conventions formulated in an authoritative written form, but not as part of the Constitution.
- *Parliament to make laws concerning the conventions*: leaving the powers in the same form, but providing that Parliament can make laws (possibly by a two-thirds majority) to formulate the relevant constitutional conventions in a legislative form.

¹⁰⁷ The Report of the Western Australian Constitutional Committee, p 92.

¹⁰⁸ South Australian Constitutional Advisory Council, p 12.

¹⁰⁹ The Report of the Western Australian Constitutional Committee, p 90. The Committee noted that it was divided on whether the powers of the head of state ‘should be identified in broad terms in the State Constitution or preserved by including in the State Constitution a statement that they will continue’.

¹¹⁰ South Australian Constitutional Advisory Council Report, p 115.

- *codification*: ‘codifying’ the relevant constitutional conventions by setting out in the [Commonwealth] Constitution the circumstances in which the head of state can exercise the reserve powers. This could take the form of ‘partial’ or ‘full’ codification.¹¹¹

In the view of the Republic Advisory Committee things could not be left simply as they are, if only because the fears that a future President could exercise autocratic power under the Commonwealth Constitution have to be assuaged. Of the four alternative options outlined above, the Republic Advisory Committee favoured some form of codification. At the same time, however, the report noted the criticisms made of codification: (a) that it can produce rigidity; and (b) that it will be difficult to achieve a sufficient degree of consensus around a code for it to be successfully inserted in the Constitution.

With such difficulties in mind, the republican model outlined on 7 June 1995 by the former Prime Minister, Paul Keating, recommended against codification, stating:

after careful consideration, the Government has formed the view that it is probably impossible to write down or codify these powers in a way that would both fund general community acceptance and cover every possible contingency...Were we to try, by Constitutional amendment, to set down precisely how the reserve powers should be exercised by the Head of State, those amendments, even if intended to be otherwise, could well become justiciable...Hence, codification would be likely to result in fundamental change to our system of government and alter the status of the High Court in relation to the Executive and Parliament.¹¹²

The South Australian Constitutional Advisory Council agreed with this assessment and also recommended against codification. However, that recommendation was qualified in nature, with the majority of the Council stating that ‘the reserve powers may safely be left as they stand *only* if the head of state in an Australian republic continues to hold office at the Prime Minister’s pleasure, as the Governor-General does now’.¹¹³ For the Council the same applied at the State level where it was said that, in the event that the Governor is still to be appointed by the Premier, then the reserve powers should remain uncodified so that the Governor could act in a constitutional crisis ‘on behalf of the people to ensure that the government of the State is carried on in accordance with the law and custom of the Constitution’.¹¹⁴ In this way the reserve powers would also remain unjusticiable. On the other hand, should the republican head of state be elected, either by parliament or the people, at State or Federal level, then codification of some kind would be required on the reasoning that if the republican head of state ‘is liberated from the risk of summary dismissal,

¹¹¹ Republic Advisory Committee Report, Volume One, pp 94-116.

¹¹² CPD (House of Representatives), 7 June 1995, p 1438.

¹¹³ South Australian Constitutional Advisory Council Report, pp 79-87.

¹¹⁴ Ibid, p 116.

it will be essential to limit and define the circumstances in which the head of state could act without, or contrary to, the advice of ministers'.¹¹⁵ The Council's exact recommendation was that, if codification is essential, the rules should not be written into the Constitution, but should be established - and should only be alterable - by special legislation, requiring approval by a two-thirds majority in each House of Parliament, voting separately.¹¹⁶

It can be asked whether the situation in the States is quite comparable to that at the Federal level. On paper, at any rate, the Federal head of state commands Australia's naval and military forces and nowhere are these and other powers checked by any reference to the real sources of political power, namely, the office of Prime Minister and the cabinet. It is understandable, therefore, that the Republic Advisory Committee should seek to assuage fears that a future President could exercise autocratic power under the Commonwealth Constitution. Such fears may not apply with the same intensity in the States. Taking the NSW Constitution as an illustration, on one side the question of military power does not arise and, on the other, the office of the effective head of government, the Premier, is recognised under the Constitution Act. What remains, therefore, are concerns about emergency situations and the question whether the reserve powers model is a better safeguard to fixed rules enforced through court action.¹¹⁷ It may be that an option short of either full or partial codification would be sufficient in these circumstances.

Again, the situation is made complex by the variations between the State constitutions themselves, thereby making it hard to generalise as to any preferred course of action. It has been said already that NSW is untypical for a number of reasons. On one reading, it could be argued that the introduction of fixed four-year terms for the Legislative Assembly has narrowed the scope of the Governor's discretionary powers, as have the longstanding arrangements under section 5B of the Constitution Act 1902 dealing with disagreements between the two Houses of Parliament on the issue of supply. In effect, a referendum procedure is set in place under that provision, which means that in this State the Upper House is unable to block supply. Whether such factors prove to be significant in the debate concerning codification remains to be seen. Another reading may be that, in relation to the dissolution of the Legislative Assembly, section 24B (5) of the NSW Constitution Act preserves the Governor's right to dissolve the Assembly on extraordinary occasions, against the advice of the Premier or the Executive Council, but only 'if the Governor could do so in accordance with established constitutional conventions'.¹¹⁸ As suggested earlier in this paper, this may be seen as a partial codification of this reserve power in NSW. In turn, section 24B (5) may serve as a useful model for a republican constitution for, while it avoids an explicit approach to codification, it could at the same time offer a means of limiting the reserve powers of any future republican head of state to those enjoyed by the Governor

¹¹⁵ Ibid, p 9.

¹¹⁶ Ibid.

¹¹⁷ J Waugh, 'Australia's State Constitutions, Reform and the Republic' (1996) 3 *Agenda* 59 at 67.

¹¹⁸ As noted, the Governor is required to 'consider whether a viable alternative Government can be formed without a dissolution...' - section 24B(6), *Constitution Act 1902* (NSW)

under the present system.

An interesting, if unlikely, scenario is that the States may wish to be used as ‘social laboratories’ in this context, with the Commonwealth adopting the option of codification at a later time if it was deemed a success in the States, as suggested by Professor Winterton.¹¹⁹

6. TRANSITION TO A REPUBLIC - KEY ISSUES AND QUESTIONS FOR NEW SOUTH WALES

What are the key constitutional issues relating to the machinery of change? As far as the transition to a republic is concerned, the key questions arise under: (a) the Commonwealth Constitution; (b) the Constitution Act of NSW; and (c) the Australia Act. In relation to the Commonwealth Constitution, the main issue is: can the Commonwealth amend the State Constitutions through the referendum procedure in section 128? In relation to the NSW Constitution Act the main issue is: is the monarchy entrenched under the Act, thereby requiring a State referendum? In relation to the Australia Act the main issue is: does section 7 of that Act entrench the monarchy in the States, thereby requiring amendment or repeal of that section?

Note that the significance of these issues, all of which relate to the method by which the republican system of government is to be introduced, varies considerably depending on which strategy is adopted for achieving that goal at State and/or Federal level. The issue of strategy is important for a number of reasons, not least because it has a direct bearing on many of the questions relevant to the States which flow from the republican debate. For example, the question as to whether constitutional monarchy is entrenched under the NSW *Constitution Act 1902*, thus requiring a State referendum if it is to be removed, would not arise if the decision was taken to establish a republic at all levels of Australian government by means of a national referendum under section 128 of the Commonwealth Constitution (the question of the legal validity of that strategy is discussed below). One point to make, therefore, is that legal and strategic issues often intersect in the context of the republican debate. Another is that there will be occasions when considerations of legal validity must give way to practical political concerns.

What are the main strategic options open to the States? Following George Williams, it can be said that three broad strategic options are available to the States:

- retain the present system of constitutional monarchy irrespective of any federal changes;
- tie the fate of the State to that of the Commonwealth, so that the State will only move to become a republic if and when the Commonwealth does so;

¹¹⁹ G Winterton, ‘The Constitutional Position of Australian State Governors’ from *Australian Constitutional Perspectives* edited by HP Lee and G Winterton, The Law Book Company 1992, pp 333-334.

- make the move to a republic in the State whether or not the Commonwealth does so.¹²⁰

Could NSW retain the present system of constitutional monarchy irrespective of any federal changes? Whether, as a practical matter, the Queen would agree to be a party to an arrangement where Australia became a republic at a federal level (and perhaps in some States) but remained a monarchy in certain jurisdictions is a moot point. In law, however, the answer is ‘yes’, certainly if one accepts the idea that Australia is a ‘heptarchy’, in which there is a separate Crown in right of each of the States and the Commonwealth. Thus, the Republic Advisory Committee argued:

It would follow from the existence of seven separate Crowns that the removal of the Crown from the system of government of the Commonwealth would have no necessary effect on the relationship between the six States and their Crowns.¹²¹

The difficulty is that the doctrine of ‘heptarchy’ is something of a minority answer to the question of the divisibility of the Crown between the States and the Commonwealth. Most constitutional lawyers take the view that, even though the Crown in right of the States and the Commonwealth are separate juristic persons under the Australian Constitution, Australia itself is still but a single, indivisible monarchy. How, then, even as a matter of logic, could NSW retain the monarchy if the Commonwealth had abolished the Queen of Australia?

A possible, if unlikely, answer is found in the advice of Dennis Rose QC, where legislation approved under section 128 of the Commonwealth Constitution ‘could conceivably provide for the Queen to continue as Queen of Australia - ie. as Head of State of Australia - but to cease to have any role in the Commonwealth Parliament or Government’. Alternatively, a State monarchy could be *established*, either by the State itself (providing the altered Commonwealth Constitution permitted the State to do so), or by stipulating that a monarchy was to be established in any State in which there was no majority vote in the national referendum to establish a republic. Either way, this option would involve the monarch of the UK being appointed as ‘sovereign of NSW’ with his or her agreement.¹²²

Does the NSW Constitution Act 1902 entrench a system of constitutional monarchy?¹²³

¹²⁰ G Williams, ‘The Australian States and an Australian Republic’ (1996) 70 *The Australian Law Journal* 890 at 891.

¹²¹ Republic Advisory Committee Report, Volume One, p 125.

¹²² Republic Advisory Committee Report, Volume Two, pp 305-307.

¹²³ Note that in Queensland and Western Australia, provisions of the Constitution relating to the Crown and the State Governor are directly entrenched by a referendum requirement. Whereas in South Australia the position is similar to that in NSW, where the question is whether the Crown is indirectly entrenched under the Constitution. In Victoria and Tasmania there is no requirement that a referendum be held for any changes to the constitutions of those States - J Waugh, ‘Australia’s State Constitutions, Reform and the Republic’ (1996) 3 *Agenda* 59 at 62.

This question would arise if the States addressed the republican issue independently of the Federal process, that is: if NSW were to go it alone and seek to establish a republican system of government before the issue had been resolved at a national level; or, as in the model associated with the Republic Advisory Committee, the States were left to deal with the matter separately. Either way, the answer to the entrenchment question is uncertain.

One view is that the monarchy is indirectly entrenched under sections 7A and 7B of the Constitution Act, particularly when read with the definition of ‘Legislature’ in section 3. Both sections 7A and 7B are themselves entrenched, which means that a State referendum would have to be held if they were to be altered. Indeed, neither section can be ‘*expressly or impliedly repealed or amended*’ without a referendum. In both, express reference is made to the Crown (the requirement that Bills for the amendment of certain entrenched provisions ‘shall not be presented to the Governor for Her Majesty’s assent until the Bill has been approved by the electors...’). Direct reference is also made to the Legislature¹²⁴ which, under section 3, is defined to include the Crown as one of its constituent parts. In other words, the argument is that establishing a republic would require that amendments be made to both sections 7A and 7B, which include express and implied references to the Crown, and this in turn would require that such amendment be put to a State referendum. This was the view favoured by the then Acting Solicitor-General, Dennis Rose QC, in his advice to the Republic Advisory Committee.¹²⁵

Associate Professor Gerard Carney also maintains that the monarchy is indirectly entrenched under the NSW Constitution, on the basis that both sections 7A and 7B ‘require Bills repealing or amending certain provisions of their Constitutions to be approved by a referendum in the State before they can be presented to the Governor for royal assent’.¹²⁶ Whether the Acting Solicitor-General intended to carry the argument a stage further, that is, to include the direct references to ‘the Legislature’ in section 7A as a second limb to the case for entrenchment is not clear.

In any event, on the other side, Professor George Winterton has maintained that the monarchy is not entrenched under the NSW Constitution, at least as a consequence of the argument articulated by Carney.¹²⁷ Winterton states in this regard:

¹²⁴ It can be said that the requirement of royal assent of itself implies the notion of ‘The Legislature’, this being one of the powers of the Crown in its capacity as the ‘Sovereign in Parliament’. Also, express reference is made to ‘the Legislature’, in particular under section 7A where, for example, the date for holding a State referendum ‘shall be appointed by the Legislature’. Under section 7B, on the other hand, express reference is only made to ‘both Houses of the Legislature’, which would seem to exclude the Crown.

¹²⁵ Report of the Republic Advisory Committee, Volume Two, p 308.

¹²⁶ G Carney, ‘Republicanism and State Constitutions’ from *Australia: Republic or Monarchy? Legal and Constitutional Issues* edited by MA Stephenson and C Turner, University of Queensland Press 1994, p 199. According to Carney, the same argument applies to the South Australian Constitution.

¹²⁷ In fact, Winterton cites the opinion of Dennis Rose QC in the same context.

it may be queried whether the mere reference to Bills being presented to the Governor for ‘her Majesty’s consent’ entrenches the monarchy in New South Wales and South Australia, as suggested by these commentators. Like s 7 of the *Australia Act*, these provisions seem merely to presume the continued existence of the monarchy, rather than impliedly to require its continuation, so that upon abolition of the monarchy those provisions may be satisfied merely by the (republican) Governor’s assent.

Reviewing this debate, George Williams of the ANU seems to prefer the entrenchment argument, although he does not make it clear if this is for political or strictly legal reasons. He does say, however, that ‘Sections 7A and 7B are certainly predicated upon the continued existence of a constitutional monarchy in New South Wales’ and he raises fears of court challenges if a State referendum was not held.

Perhaps the better view is that the monarchy is entrenched under the NSW Constitution Act. With respect to the requirement for royal assent, it is hard to see how the abolition of the Crown would not involve at least an implied amendment of sections 7A and 7B. The same might be said of where direct reference is made to ‘the Legislature’, although the entrenchment case may be limited in this regard to section 7A. As Anne Twomey has said, ‘A further consideration is the importance of a State Constitution being comprehensible to the people that it governs’.¹²⁸ At the very least, a republican constitution which still made reference to the requirement for royal assent would own a tendency to confuse.

Does the NSW Parliament have the power to legislate to eliminate the Crown from the State Constitution? Subsequent to the enactment of the *Australia Act 1986*, but subject to what is said later in this paper about section 7 of that Act, the answer is ‘yes’. Before 1986 certain cases suggested that there were limitations on the types of constitutional change which State Parliaments can effect. This refers back to the fact that State Parliaments owe their existence and authority to statutes passed in the nineteenth century by the Imperial UK Parliament. One such Act was the *Colonial Laws Validity Act 1867*, section 5 of which gave to colonial representative legislatures the power to make laws respecting the constitution, powers and procedure of the Legislature. For the High Court, however, that power had to be understood in its historical context. Thus, Isaacs J observed in 1917, ‘When power is given to a colonial legislature to alter the constitution of the legislature, that must be read subject to the fundamental conception that, consistently with the very nature of our constitution as an empire, the Crown is not included in the ambit of such power’.¹²⁹ Likewise, in 1960 it was said by Dixon CJ, McTiernan, Taylor and Windeyer JJ that ‘There are many reasons for assuming that the assent of the Crown must always remain necessary...’.¹³⁰

¹²⁸ A Twomey, ‘State Constitutions in an Australian republic’ (1997) 23 *Monash University Law Review* 312 at 314.

¹²⁹ *Taylor v Attorney General of Queensland* (1917) 23 CLR 457 at 474.

¹³⁰ *Clayton v Heffron* (1960) 105 CLR 214 at 251.

That situation changed in 1986, with the termination of the power of the UK Parliament to legislate for the States and, with that, the enlargement of the powers possessed by State Parliaments under the Australia Act. As Professor Enid Campbell has said ‘there seems now to be no impediment to the enactment by State Parliaments of legislation to eliminate the Queen or Governor as a constituent part of the State Parliament or to vest powers of issuing writs for elections, of summoning, proroguing or dissolving Houses of Parliament in someone other than the Governor’.¹³¹ Associate Professor Gerard Carney agrees with this interpretation, stating ‘there would seem to be no legal impediment to the States enacting the necessary constitutional changes for republican government. The basis of this power is the plenary power of each State Parliament to make laws for the peace, welfare (or order) and good government of the State’.¹³²

The limitations on the powers of State Parliaments which remain are those contained in the Commonwealth Constitution, as well as in the Australia Act itself.¹³³ Of particular note in this regard is section 7 of that Act.

Is the system of constitutional monarchy in the States entrenched under section 7 of the Australia Act 1986? Possibly, but as with so many of these questions the issue has not been tested in the courts and so remains uncertain. Section 7 of the Australia Act establishes that ‘Her Majesty’s representative in each State shall be the Governor’; it then defines the Governor’s powers vis a vis the Queen. Both the issue at stake and the contending viewpoints are explained by Carney in these succinct terms:

The question here is whether section 7 prescribes a monarchical system for each of the States or whether it simply defines the relationship between the Queen and a State Governor for so long as the States maintain a monarchical system. If the former, then section 7 needs to be repealed before the States can adopt a republican system. If the latter, no repeal is required. The former view is supported by the assumption made in section 7 that the Queen possess certain powers and functions and by the exception in section 7(4) that the Queen may exercise her powers when personally present within the State. The latter view is advocated by Professors Winterton¹³⁴ and Zines¹³⁵ on the basis that section 7 *assumes* a monarchy but does not prescribe one. The Commonwealth’s Republic Advisory Committee preferred the latter

¹³¹ E Campbell, ‘State constitutions and the Commonwealth of Australia Constitution’, *unpublished discussion paper prepared for the Constitutional Commission*, February 1987, p 12.

¹³² G Carney, ‘Republicanism and State Constitutions’ from *Australia: Republic or Monarchy? Legal and Constitutional Issues* edited by MA Stephenson and C Turner, University of Queensland Press 1994, p 200.

¹³³ A third category is legislation enacted pursuant to section 15 of the Australia Act.

¹³⁴ G Winterton, ‘An Australian Republic’ (1988) 16 *Melbourne University Law Review* 467 at 479.

¹³⁵ L Zines, *The High Court and the Constitution*, Fourth Edition, Butterworths 1997, p 308.

view but recommended the safer course of repealing section 7 to avoid any doubt.¹³⁶

The difficulty for any State wishing to unilaterally abolish constitutional monarchy is that, if that system is entrenched, the State itself could not control either of the two possible means of repealing or amending section 7.¹³⁷ Under section 15(1), it is provided that the Australia Act can only be repealed or amended by a Federal Act ‘passed at the request or with the concurrence of the Parliaments of the States’. Thus, all the Australian Parliaments would have to agree to change, although not all States would have to agree to adopt a republican system.¹³⁸ Alternatively, section 15(3) provides that sub-section (1) does not limit the power of the Federal Parliament to alter the Commonwealth Constitution pursuant to section 128.¹³⁹ In theory, then, the Commonwealth Constitution could be changed to give the Federal Parliament the power to amend section 7 of the Australia Act. But, again, a State Parliament could not control this process. In any event, as George Williams has suggested, the first approach under section 15 (1) may be the better option, avoiding as it does the uncertainties associated with referenda under section 128. Of the need to amend section 7, Williams states that, in order to avoid any lingering doubts:

the sounder position is to accept that s 7 should be amended if a State were to seek to sever its legal ties with the British monarchy, particularly if this were to be in the absence of an equivalent change at the Commonwealth level...An amendment to s 7 might be along the lines of inserting a new subsection reading: “(6) This section does not prevent a State from dispensing with the office of Governor or from severing its legal ties with the Crown of the United Kingdom or of Australia”. Such an amendment would give each State a freedom of choice. It would not bind any State to any particular form of government, monarchical or republican.¹⁴⁰

On this basis, the NSW Parliament has the power to legislate to eliminate the Crown from the State Constitution, but subject to amendment of the Australia Act.

¹³⁶ G Carney, ‘Republicanism and State Constitutions’ from *Australia: Republic or Monarchy? Legal and Constitutional Issues* edited by MA Stephenson and C Turner, University of Queensland Press 1994, pp 196-197

¹³⁷ Together, sections 5 and 15(1) of the Australia Act provide that State legislation cannot repeal, amend or be repugnant to the Australia Act, including section 7 - G Williams, ‘The Australian States and an Australian Republic’ (1996) 70 *The Australian Law Journal* 890 at 894.

¹³⁸ Williams states in this regard: ‘Section 7 need only be altered so as to incorporate an amendment that would make it clear that the people of each State may exercise a free choice as to their own form of government, and need not be constrained to a monarchical system’ - *Ibid*, p 895.

¹³⁹ For a detailed discussion of the relationship between sections 15(1) and 15(3) of the Australia Act see - A Twomey, ‘State Constitutions in an Australian republic’ (1997) 23 *Monash University Law Review* 312 at 323.

¹⁴⁰ *Ibid*, pp 894-895.

Could a republican system of government be imposed on NSW? Possibly, at least from a purely legal standpoint, although areas of doubt and uncertainty remain. One view is that a republican system of government could be imposed on any State. This is because the abolition of the monarchy throughout Australia could be achieved by a referendum under section 128 of the Commonwealth Constitution, underpinned as this is by the doctrine of the ‘sovereignty of the people’.

On this view, therefore, the Commonwealth Constitution could be altered by an overall majority of voters and by a majority in at least four of the States electing to adopt a republican system of government at the Federal, State and Territory level. For the States, this alteration would apply because section 106 of the Commonwealth Constitution provides that the Constitutions of the States shall be ‘subject to this Constitution’. Indeed, the argument is put that, by force of section 106, the State Constitutions are part of the Commonwealth Constitution.¹⁴¹ The Republic Advisory Committee concluded in this regard:

the power of amendment of the Constitution which section 128 gives to the Parliament and people of the Commonwealth extends to changing the relationship between the Commonwealth and the States and the constitutional arrangements of the States themselves.¹⁴²

Thus, it can be argued that, as a matter of law, it is possible for the majority of voters in NSW to vote to retain a constitutional monarchy, but for the referendum to succeed in at least four other States and with an absolute majority of the votes cast, thereby satisfying the requirements of section 128. Practically, this is an unlikely scenario for NSW, Australia’s most populous State. To date, only one of the eight successful referenda to alter the Commonwealth Constitution has been carried without gaining a majority in NSW.¹⁴³ That was as far back as 1910, prior to the introduction of compulsory voting when more than a third of eligible voters in this State were not issued with ballot papers. All the same, while the scenario is improbable, on the basis of the above argument it is not impossible. Amongst constitutional monarchists themselves, there are those who would accept this argument as matter of legal analysis.¹⁴⁴

¹⁴¹ G Winterton, ‘The States and the republic: a constitutional accord?’ (1995) 6 *Public Law Review* 107 at 121. Winterton cites the argument that, by section 106, the State Constitutions are incorporated into the Commonwealth Constitution, thereby creating ‘a national plan of government having a Federal structure’: J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus and Robertson 1901, p 930. In fact, Quick and Garran did not themselves endorse this argument, but nor did they suggest that it was untenable.

¹⁴² Report of the Republic Advisory Committee, Volume One, p 131.

¹⁴³ The alteration amended section 105 of the Commonwealth Constitution to give the Commonwealth unrestricted power to take over State debts. It obtained a majority of votes in all the other States and an overall majority of 128, 782.

¹⁴⁴ RD Lumb, ‘The framework of constitutional monarchy in the Australian States’ from *The Australian Constitutional Monarchy* edited by G Grainger and K Jones, ACM Publishing 1994, pp 57-67.

Against this view are the arguments presented by some constitutional monarchists that the power to ‘alter’ the Commonwealth Constitution under section 128 may be limited in nature.¹⁴⁵ These arguments include:

- on its face, Craven suggests, section 128 only permits the amendment of the Commonwealth Constitution and not the constitutions of the States, referring as it does to the alteration of ‘This Constitution...’.¹⁴⁶ Against this, Quick and Garran suggest that the scope of the amending power in section 128 extends ‘to the structure and functions of the Governments of the States’.¹⁴⁷
- as for section 106, the argument that it incorporates the State Constitutions within the Commonwealth Constitution is uncertain as a question of constitutional interpretation. Moreover, as a ‘point of federal principle’ Craven says it is unclear what legitimate interest the Australian people as a whole can have in seeking to alter the isolated constitutional arrangements...against the wishes of the local population’.¹⁴⁸
- that ‘a change of this nature cannot be forced on the States because the Constitution is a compact of States and the entity created by the compact - the Commonwealth - cannot alter the fundamental character of the parties to the compact without requiring the renegotiation of the entire agreement’.¹⁴⁹ This was considered by the Republic Advisory Committee which concluded that, while it may have some force as a ‘political proposition’, as a legal argument it is not persuasive because the Commonwealth Constitution ‘declares itself to be based on the agreement of “the people” of the colonies, rather than the colonies themselves’.¹⁵⁰
- that the penultimate paragraph of section 128 limits alterations affecting the States. Again, the response of the Republic Advisory Committee was that the phrase ‘*in relation thereto*’ in that paragraph refers ‘only to the specific matters mentioned in

¹⁴⁵ G Craven, ‘The constitutional minefield of Australian republicanism’ (Spring 1992) *Policy* 33. Craven raised a number of doubts only to say that these are ‘plausible’ and not that ‘all or any of these arguments are necessarily correct’ (at 36).

¹⁴⁶ *Ibid*, p 36.

¹⁴⁷ J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus and Robertson 1901, p 930.

¹⁴⁸ G Craven, ‘The constitutional minefield of Australian republicanism’ (Spring 1992) *Policy* 33 at 36.

¹⁴⁹ This view is associated with Sir Harry Gibbs and is discussed in some detail in G Winterton, *Monarchy to Republic*, Oxford University Press 1994, pp 13-14.

¹⁵⁰ Republic Advisory Committee Report, Volume One, pp 130-131; G Winterton, ‘The States and the republic: a constitutional accord?’ (1995) 6 *Public Law Review* 107 at 115; G Winterton, *Monarchy to Republic*, Oxford University Press 1994, p 14. Winterton has said in this regard: ‘the existence of the monarchy was merely an ordinary provision of the federal compact, inherently subject to alteration pursuant to section 128, not a fundamental term’.

the paragraph - the limits of the State and its representation in federal Parliament'.¹⁵¹

- that section 128 cannot be used to vary the preamble and those covering clauses to the Commonwealth Constitution which refer to the Crown.¹⁵² A distinction is to be made for this purpose between the Imperial Act which encompasses the preamble and covering clauses, as well as the Constitution, on one side, and the Constitution itself.¹⁵³ Recognising this distinction, section 128 then states, 'This Constitution shall not be altered except in the following manner...', thereby leaving the preamble and covering clauses outside its field of operation. On this issue, the Republic Advisory Committee was guided in its approach by the then Acting Solicitor General, Dennis Rose QC, who advised that it would be legally possible 'to amend the Constitution so as to make Australia a republic while leaving the preamble and covering clauses as they are'.¹⁵⁴ That is not to say that, from a republican standpoint, the Crown should not be removed from the preamble and covering clauses, only that it should

¹⁵¹ Republic Advisory Committee Report, Volume One, p 130; A Twomey, 'State Constitutions in an Australian republic' (1997) 23 *Monash University Law Review* 312 at 321. Twomey discusses the relevant views of Quick and Garran and Professor Harrison Moore. She states, on the basis of this authority, that the penultimate paragraph of section 128 would not require majorities in every State to approve a referendum as long as the republican referendum did not affect the representation of the States in the Federal Parliament or the boundaries of the States or perhaps amend the penultimate paragraph of section 128 itself.

¹⁵² In more detail, the argument is that 'the preamble records the sovereignty of the Crown within the Commonwealth as a pre-condition stipulated in the federal pact by which that Commonwealth was brought into being. On this view, the provisions of the Federal Constitution operate subject to, and must be read in the light of, that pre-condition - including the power to amend the Federal Constitution under section 128, so that the latter power cannot be used to displace the sovereignty of the Crown': The South Australian Constitutional Advisory Council Report, p 128. The argument is attributed to WAN Wells QC, former South Australian Solicitor General and Supreme Court Judge, and Sir Harry Gibbs, former Chief Justice of that Court.

¹⁵³ The latter is really only clause 9 of the Commonwealth of Australia Constitution Act, which was enacted by the Imperial UK Parliament at the request of the governments of the Australian colonies. Clause 9 states 'The Constitution of the Commonwealth shall be as follows...'.¹⁵⁴

¹⁵⁴ Republic Advisory Committee Report, Volume One, p 118. Professor Winterton agrees. Winterton's view is that section 128 alone can be used to amend or repeal the preamble and covering clauses, but he acknowledges that this is a 'minority view'. Of the preamble, he says that it does not purport to be prescriptive, 'at least not on the issue of the Crown'. He argues further that covering clause 2 is 'essentially an interpretation provision' which does not mandate continuation of the monarchy, either expressly or by implication: 'If references to the Crown were removed from the Constitution, yet covering cl 2 were left intact, it would simply cease to have any function since the word it defined had disappeared from the document' - G Winterton, 'The States and the republic: a constitutional accord?' (1995) 6 *Public Law Review* 107 at 119-120. This is contrary to the view of RD Lumb who says that covering clause 2 is the only one which 'appears to have a continuing operation'. He continues: 'As well as providing for the continuation of the Monarchy, it prevents an indigenous Monarchy from being instituted' - RD Lumb, 'The framework of constitutional monarchy in the Australian States', p 66 (Footnote 144).

be done so for merely ‘cosmetic’ reasons.¹⁵⁵

The difficulty is that, in the absence of an authoritative ruling on the scope of section 128, any answer to the initial question must be tentative in nature. With that qualification in mind, perhaps the better view is that, in theory at least, the section could be used to impose a republic on NSW, especially if altering the covering clauses remains a cosmetic exercise for this purpose.

However, it needs to be emphasised that even if, as a matter of law, section 128 could be used in this way, at present most republicans and monarchists alike seem to agree that such an approach is ‘politically unwise’.¹⁵⁶ Winterton has acknowledged that, ‘as a general principle, State Constitutions should be amended by the States...’.¹⁵⁷ But if this option is not at present advocated by any of the major players in the debate, it can be seen from the above

¹⁵⁵ The same issue was discussed at considerable length in the First Report of the South Australian Constitutional Advisory Council, which rejected outright the argument that there is no strictly legal way of eliminating the Crown from the Commonwealth Constitution Act, as well as from the Commonwealth Constitution itself. If the Crown is to be eliminated, the Council advocated the cautious approach of using both section 128 and section 51 (38), thereby ensuring the legal validity of any constitutional alterations. Some commentators suggest that the sovereignty of the Crown could only be displaced under section 51 (38) of the Commonwealth Constitution. This section empowers the Federal and State Parliaments acting in concert to do anything which, as at the establishment of the Constitution, could only be done by the Imperial UK Parliament - The South Australian Constitutional Advisory Council Report, p 310 (discussion paper prepared by Michael Manetta). As Greg Craven points out, the catch to section 51(38) is that it would require the simultaneous and unanimous consent of all the States, a requirement he considers to be virtually impossible to achieve - G Craven, ‘The constitutional minefield of Australian republicanism’, p 35. Dennis Rose QC advised the Republic Advisory Committee of other ‘less direct’ methods of altering the Constitution Act, both of which arise under the Australia Act itself and the Statute of Westminster ‘at the request or with the concurrence of the Parliaments of all the States’. By this method section 8 of the Statute of Westminster could be altered to the extent necessary to allow certain specified amendments to the Constitution Act to be made, thereby overcoming the objection (perhaps valid up to 1986) that UK legislation was the only means by which the Constitution Act could be amended. Secondly, section 15(3) of the Australia Act could allow section 128 of the Commonwealth Constitution to be used to confer on the Federal Parliament the legislative power to alter the Constitution Act: Republic Advisory Committee Report, p 121. The Committee thought that section 15(1) was the better option, for the reason that section 15(3) might be seen as ‘overriding the interests of the States in some way’. Indeed, it may be that a republican referendum would employ a combination of section 15(1) of the Australia Act, together with section 51(38) and 128 of the Commonwealth Constitution. This was in fact recommended by the South Australian Constitutional Advisory Council - at page 136 of the report.

¹⁵⁶ G Winterton, ‘The States and the republic: a constitutional accord?’, p 123; G Winterton, *Monarchy to Republic*, Oxford University Press 1994, p 142.

¹⁵⁷ G Winterton ed, *We, the People*, Allen and Unwin 1994, p 45. On the other hand, the draft republican Australian Constitution published by Winterton in the same text does seem to provide the Federal Parliament with the power to prescribe whatever new legal arrangements a recalcitrant State would require for an effective republican constitution (clause 110(3) at page 33) - see J Waugh, *Australia’s State Constitutions, Reform and the Republic* (1996) 3 *Agenda* 59 at 66.

discussion that it does throw light on the technical legal questions associated with the process of constitutional reform.

What are the preferred methods for achieving a republican system of government in the States? Of the various options discussed to date, three can be said to be the result of detailed analysis, that is, one associated with the Republic Advisory Committee, the second suggested by the South Australian Constitutional Advisory Council, and the third with the Western Australian Constitutional Committee.

First, the Republic Advisory Committee discussed the strategy of leaving it to the States to determine their own constitutional future. In other words a future federal government would conduct a referendum to sever the Commonwealth's association with the monarchy but leave the constitutional arrangements of the States untouched. This plan was then endorsed by the former Prime Minister, Paul Keating, in June 1995.¹⁵⁸

On the other hand, the South Australian Constitutional Advisory Council preferred the 'one in, all in' strategy, in which the Commonwealth and the States all change together to a republican system. However, the Council recommended that the process should start with the holding of a State plebiscite, to be conducted well in advance of any likely federal referendum. That State plebiscite should offer three options:

- (a) the people agree that the State Government may negotiate with the Commonwealth to ensure that any federal referendum, if passed, would also change the State's constitutional instruments to republican forms. If a federal referendum, in terms which are acceptable to the State government cannot be negotiated then the State government will oppose the federal referendum, or
- (b) the people agree that the State government should oppose any federal referendum to sever the links with the monarchy, or
- (c) neither of the above.¹⁵⁹

The Council went on to say that the State government 'should support option (a), on the basis that this is not a vote for a republic, but only a vote for a process'. It continued:

Assuming option 1 succeeded, then the State would negotiate with the Commonwealth to achieve the desired result. That result may well involve the use of both section 51(xxxviii) and section 128 of the Commonwealth Constitution. If the resulting federal referendum is passed, then there is no need for a further State referendum. There is a republic.¹⁶⁰

¹⁵⁸ CPD (House of Representatives), 7 June 1995, pp 1434-1441.

¹⁵⁹ South Australian Constitutional Advisory Council Report, p 102.

¹⁶⁰ Ibid.

In its 1995 report the Western Australian Constitutional Committee also favoured a ‘one in, all in’ approach, though again it did not support the notion of imposing a republic on any State. Its view was that ‘Whatever the legal position, a change to a republic at the Commonwealth level should not proceed without majority approval in all the States’.¹⁶¹ Further, the Committee stated:

A republican Commonwealth of Australia containing one or more monarchist States is possible, but it would be preferable for the Commonwealth not to become a republic unless all the States chose to become republics as well.¹⁶²

In the hypothetical situation where Western Australia was the ‘odd one out’, all other jurisdictions having voted for a republic, the Committee recommended that a State referendum take place after the national referendum (possibly in conjunction with the next State election), ‘because knowing that Australia was going to be predominantly republican might well influence people’s decisions about what should happen in Western Australia’.¹⁶³

7. THE REPUBLICAN DEBATE - IMPLICATIONS FOR AUSTRALIA’S FEDERATION

Are there any implications? It may be that there are none, at least as far as the minimalist model is concerned. That was the view of the Western Australian Constitutional Committee in January 1995, but on the condition that the States be allowed to make their own decisions about whether to sever their links with the monarchy.¹⁶⁴ The Committee’s report was quoted in the former Prime Minister’s statement on the republic on 7 June 1995 to the effect that, under the minimalist approach, ‘the position of the States within the federation would not be substantially affected’.¹⁶⁵ Mr Keating failed to mention the important rider to this conclusion in the Western Australian Constitutional Committee’s report. Significantly, the report went on to say:

The Committee does not mean to imply that the argument about Australia becoming a republic is unimportant for the States. The present republican agenda seems to include promoting a vision of Australia that downplays the role of the States. The States, if they are to avoid being marginalised, will need to change the agenda to ensure that any republican proposal that goes

¹⁶¹ The Report of the Western Australian Constitutional Committee, p 69.

¹⁶² Ibid, p 85.

¹⁶³ Ibid, pp 84-85.

¹⁶⁴ The Report of the Western Australian Constitutional Committee, p 65.

¹⁶⁵ CPD (House of Representatives), 7 June 1995, p 1440.

to the people of Australia is not inconsistent with federalism.¹⁶⁶

Should there be a State - Commonwealth constitutional accord? Recognising such concerns and bearing in mind the legal uncertainties involved in any method of transition to a republic at Federal and State level (plus the practical political need for cooperation between the various levels of government), Professor Winterton has suggested a strategy based on a constitutional accord between the Commonwealth and the States. What he had in mind was a constitutional reform ‘package’ in which, in order to secure cooperation, ‘the Commonwealth would probably have to offer the States something which they might not otherwise be able to achieve’. For Winterton, the most promising subject for such an accord is some arrangement to reform the vertical fiscal imbalance between the States and the Commonwealth, perhaps ‘a constitutional amendment which guarantees the States a percentage of Commonwealth revenue, as occurs in Germany’.¹⁶⁷ However, although an amendment of this kind is needed more than ever in the wake of the recent decision in *Ha v Hammond*, the prospect of any government relinquishing power of revenue in order to secure a symbolic change of the sort envisaged under the minimalist model of republicanism must be extremely remote. Much would depend of course on the commitment of the federal government of the day to the republican cause itself.

Perhaps an alternative may be to use the republican debate as the basis for securing State involvement in the making of new appointments to the High Court, something which would be of practical significance yet may prove to be reasonably open to negotiation. Also, an accord on this issue would not require formal constitutional amendment.

Should the States participate in a Federal electoral college to appoint the President? If it was decided to appoint the President using the mechanism of an electoral college the question would then arise as to whether the States should participate. The Republic Advisory Committee thought not, stating ‘The interests of the States in the matter are... questionable: the duties of the head of state are tied to Commonwealth responsibilities just as Governors, or their successors, would be tied to State responsibilities’.¹⁶⁸ In any event, the Committee opposed the notion of an electoral college on the basis that it would be dominated by party discipline and a partisan appointment would result.

On the other hand, some members of the Western Australian Constitutional Committee favoured the electoral college approach, arguing that the problem of party politics could be overcome by the requirement of a two-thirds majority. In the event that this proposal was adopted, all members supported participation by State and Commonwealth representatives

¹⁶⁶ The Report of the Western Australian Constitutional Committee, p 65 and see Chapter 2 of the report generally for a discussion of the present distribution of powers between the States and the Commonwealth.

¹⁶⁷ G Winterton, ‘The States and the republic: a constitutional accord?’ (1995) 6 *Public Law Review* 107 at 129.

¹⁶⁸ Republic Advisory Committee Report, Volume One, p 73.

as a means of importing a federal element into the process of appointment.¹⁶⁹

8. CONCLUSIONS

The Prime Minister, Mr Howard, has said that the forthcoming Constitutional Convention is to work through the complexities involved in the republican debate for the purpose of presenting a favoured model for subsequent consideration. Whether a similar process of public consultation should occur at the State level in NSW sometime in the future remains to be seen. What is clear is that, if NSW is to move towards a republican system of government, then many questions of a detailed nature will have to be answered. It may be that, as at the Federal level, the debate will revolve largely around the question of whether the head of state should be appointed by popular election. If that method of appointment is chosen, at either level, its implications for our system of government and Australian federation generally will need to be scrutinised with great care.

In formulating the framework of that federation the Convention Debates of the 1890s achieved an impressive level of informed and constructive discussion. To that extent at least the Constitutional Convention of 1998 has a model ready to hand..

¹⁶⁹

The Report of the Western Australian Constitutional Committee, p 79.