

**IMPLICATIONS OF A
REPUBLIC FOR
WESTERN AUSTRALIA**

By Greg Craven

**Foundation Dean and Professor of Law
University of Notre Dame Australia**

THIS SERIES OF PAPERS WAS COMMISSIONED TO ASSIST WESTERN AUSTRALIANS
TO ENGAGE IN INFORMED DISCUSSION ON A RANGE OF CONSTITUTIONAL ISSUES
OF IMPORTANCE TO THE STATE

IMPLICATIONS OF A REPUBLIC FOR WESTERN AUSTRALIA

A STATE PERSPECTIVE

This paper focuses on the particular issues Western Australia would face in converting to a republic. Wider questions of republicanism confronting Australia as a whole are considered only where relevant to these issues.

Key issues which would have to be addressed include :

- the role of Western Australia in the process of Australia becoming a republic;
- whether, if Australia became a republic, Western Australia would have to follow;
- the nature of the amendments to Western Australia's constitutional arrangements that would be required if the State were to become a republic;
- the form that a Western Australian republic might take.

THE CONSTITUTIONAL BACKGROUND

Australia is a constitutional monarchy. The Queen of Australia is Queen Elizabeth II, and her representative is the Governor-General of Australia. The Governor-General is appointed by the Queen on the advice of the Prime Minister of Australia.

It is important to note that Western Australia possesses its own separate State monarchy, operating within the Western Australian constitutional system. Queen Elizabeth's functions in respect of this State are distinct from the operations and existence of the monarchy at Commonwealth level. The State monarchy operates in a manner similar to the working of the monarchy in the Commonwealth sphere; the Queen is the formal and symbolic head of the State Government, who generally acts through the Governor. In practice, the exercise of executive power is carried out by the Governor, Premier and State Ministers.

The separateness of our State monarchical system follows the general federal principle of the Commonwealth Constitution, that the constitutional arrangements of the States are matters for the electors of those States, and not for the people of the Commonwealth as a whole. Just as every element of Western Australia's internal constitutional system (including the monarchical elements) derives from the endorsement of the Western Australian electors or their elected representatives, so it follows that these elements should be altered only with their approval.

DIRECT IMPLICATIONS OF AN AUSTRALIAN REPUBLIC FOR WESTERN AUSTRALIA

There seem to be no direct legal implications for this State of the Commonwealth of Australia becoming a republic. That is, the abolition of the monarchy at Commonwealth level would not appear to abolish the monarchy in Western Australia. However, broader constitutional implications for this State might flow from the creation of an Australian republic. There might, for instance, as a result of increased popular concentration on the national level of government, be some diminution in the significance of the States within Australia's federal system. In particular, a popularly elected President would be likely to become a powerful focus of national sentiment, and therefore to act as an impetus for further centralisation. And if a referendum for such a republic were accepted nationally and in four States, but not in Western Australia, there would be the potential for political and constitutional division.

Supporters of a minimalist approach to Australian republicanism – whereby the smallest possible changes to the Australian Constitution would be made, and the greatest possible attempt to achieve consensus made – regard it as offering the best way to maintain stability while achieving a republic.

THE ROLE OF WESTERN AUSTRALIA

Any attempt to convert Australia to a republic will require amendments to the Commonwealth Constitution. Section 128 of the Constitution permits amendments to be made if a majority of the electors in the Commonwealth, and the majority of electors in a majority of States (that is, at least four States) vote in favour of a referendum proposal. Taking section 128 at face value, if Western Australians voted against a republican proposal that met those requirements, the republic would be incorporated into the Commonwealth Constitution.

However, there are arguments that a referendum under section 128 could not be used to abolish the monarchy at national level, and that a republic could only be introduced with the consent of all States. For example, section 128 authorises the amendment of 'this Constitution'. The conventional view is that 'this Constitution' does not include the covering clauses of this Constitution, which are the first nine sections of the British Act (the Commonwealth of Australia Constitution Act 1900) in which the Constitution is contained. Since the covering clauses refer to the monarchy, it can be argued that any attempt to create an Australian republic under section 128 would be invalid because of lack of power to amend the covering clauses. (The covering clauses might be amended according to section 51 (xxxviii) of the Constitution. However, this would require the consent of all State Parliaments.)

On balance, however, the High Court would probably find that section 128 does permit the creation of a republic. It is unlikely that Western Australia would be able to prevent the creation of an Australian republic, although opportunities for legal challenge would arise.

It is sometimes suggested that, if Western Australia did not want an Australian republic, the State should secede. The Strong view of legal experts, however, is that secession is constitutionally impossible.

MUST WESTERN AUSTRALIA BECOME A REPUBLIC IF AUSTRALIA BECOMES A REPUBLIC?

There is no logical necessity for Western Australia to become a republic if Australia does. It would be possible for the Commonwealth to become a republic that included within it one or more States which had chosen to remain a constitutional monarchy. Even so, such an arrangement would strike most outsiders as less than coherent, and would frustrate most Australian republicans.

One question is whether Buckingham Palace would wish to continue a constitutional relationship with a State within an Australian republic. The Palace would probably not withdraw until legal action was taken to end the relationship. The real issue, therefore, is whether Western Australia could be obliged to become a republic.

COULD WESTERN AUSTRALIA BE OBLIGED TO BECOME A REPUBLIC?

Any attempt to require a State to become a republic would involve major political consequences. A national referendum proposal that included provisions requiring States to convert their Constitutions would risk being defeated on issues of federalism and State rights.

The central legal question is whether any referendum proposal under section 128 could validly compel Western Australia to become a republic. Some commentators consider this would not be only constitutional but also desirable as a means of ensuring national coherence. Others argue that such an attempt would contravene the basic federal principle, that the electors of the States are entitled to determine their own constitutional arrangements.

In any event, the notion that section 128 could be used to impose republicanism upon the States faces some constitutional difficulty. The first problem lies in the terms of section 128 and its relationship with section 106. Section 128 confers a general power to amend 'this Constitution'. On that basis one might think that any change to the constitutional machinery of the States could be achieved under section 128. However, section 106 provides that the Constitutions of the States shall continue until they are amended in accordance with their own provisions. It is arguable that the implication to be drawn from sections 128 and 106 combined is that while section 128 can be used to effect any change in the constitutional arrangements of the Commonwealth itself, alterations which intrinsically affect the States' internal constitutional arrangements are to be made only pursuant to State Constitutions. This is a difficult question, whose resolution may require constitutional litigation.

Another major difficulty concerns section 7 of the *Australia Acts 1986* (Cwlth and UK). Section 7 assumes the existence of the monarchy within the States by providing that the Queen's representative in each State will be the Governor. It can be argued that section 7 would require amendment before the States could become republics. An alternative view is that section 7 does

not positively require the continued existence of State monarchies. Either way, section 7 poses an impediment and its amendment would be desirable from a republican point of view.

The most obvious way of amending section 7 is under section 15(2) of the Australia Acts, but that requires the consent of all State Parliaments. Another means of amending section 7 is contained in section 15(3), which provides that nothing in the Australia Acts prevents the use of section 128 to make an amendment to the Constitution that is inconsistent with the Australia Acts themselves. The argument would be that any amendment made under section 128 – including one imposing republican Constitution on the States – would be valid despite section 7. The problem here, however, is that if section 128 – read with section 106 of the Constitution – does not confer power to impose a republican form of government upon the States in the first place, then section 15(3) would not apply. Again, this is an area where legal experts differ.

Two points emerge. The first is that imposing a republic on Western Australia would be difficult to justify in light of the federal principle that the electors of the States should be free to devise their own constitutional arrangements. The second is that the capacity of a national referendum to achieve that result is open to doubt.

CONSTITUTIONAL CHANGES REQUIRED FOR WESTERN AUSTRALIA TO BECOME A REPUBLIC

There would not appear to be any necessity for amendments to be made to the Commonwealth Constitution. Nor is there anything in the covering clauses of the Commonwealth of Australia Constitution Act 1900 which seems to require a monarchy for the States, as opposed to the Commonwealth. Section 7 of the Australia Acts is more problematic and might require amendment. In general, however, the major issues would concern the necessary amendments to the Western Australia *Constitution Act 1889*, the *Constitution Acts Amendment Act 1899* and associated State legislation.

Amendments would be required regarding a number of matters, including the identity, nomenclature, appointment, removal and powers of the republican head of state. The most important of these amendments, particularly those creating the new office of head of state, would require the holding of a State referendum under section 73(2) of the Constitution Act 1889. Thus, regardless of the outcome of any national republican referendum under section 128, the State Constitution would require a separate State referendum for the internal conversion of Western Australia to a republic.

DEVELOPING A MODEL FOR A WESTERN AUSTRALIAN REPUBLIC

The issues which arise in developing a model for a Western Australian republic are similar to those involved in the conversion of Australia into a republic.

Would a head of state be needed?

The first question is whether a republican Western Australia would need a head of state, by which is meant an office equivalent to that of Governor. Sometimes it is argued that the Governor's functions could be discharged by other officials, such as the President of the Legislative Council and the Speaker of the Legislative Assembly. Such arguments seem to ignore the fact that the 'reserve' powers of the Governor to dismiss a Government, and the politically fraught capacity of the Governor to choose a Government in times of parliamentary confusion, would be difficult to entrust to parliamentary officials involved in party politics. As long as Western Australia wishes to adhere to its present system of responsible government without major alteration, a head of state seems to be required.

Who should be head of state

There are a number of possibilities as to who should be head of state. One would be for the Australian head of state to be simultaneously head of state for Western Australia. This would not appear to be a viable option, partly because it might diminish the status of Western Australia as a distinct constitutional entity, but also because confusion could arise as to whose advice the head of state would follow on Western Australian matters: that of the State Premier; or the Prime Minister of Australia.

Another option is for Western Australia to retain a head of state who is independent of that of the Commonwealth. This is the most natural option, not only for reasons of constitutional independence, but also because it sits most easily with the practice of responsible government within Western Australia and would provide Western Australia with a unifying figure to perform ceremonial duties.

What should the head of state be called?

In deciding what to call the head of state, the most plausible option would be to retain the designation of 'Governor'. The term has a long and honourable tradition within Western Australia and is used in the United States of America, which is a republic.

How would the head of state be appointed?

The options for appointing a republican head of state include the following : popular election; appointment by State Parliament; appointment by some form of constitutional commission; appointment by the State Government.

Popular election has the clear advantage of involving the electors in the process. A major difficulty, however, is that it is inconsistent with our system of responsible government. At present, the Governor acts upon the advice of the Premier and Ministers, because Governors have no democratic legitimacy. Consequently, conflicts such as those of 1975 between the Governor-General (Sir John Kerr) and the Prime Minister (Mr Gough Whitlam) are rare. However, a popularly elected head of state would have a degree of democratic support exceeding that of the Premier, who normally requires no more than the confidence of the Lower House of Parliament to hold office. Consequently, there would be the potential for instability caused by disagreement between the head of state and the Premier.

An alternative would be for the head of state to be chosen by the State Parliament, with a special majority requirement. For example, the Australian Republican Movement has proposed that an Australian head of state be appointed by a two-thirds majority vote of the Commonwealth Parliament. In Western Australia, such a method of appointment would limit the capacity of the head of state to challenge the position of the Premier. It could still be argued that a head of state appointed by a two-thirds majority of both Houses of Parliament might be tempted to challenge the Premier.

Another option would be for the head of state to be appointed by some form of constitutional commission. Thus, for example, a commission composed of former Governors and Chief Justices could appoint the head of state on the recommendation of the Premier, just as the Queen appoints the Governor. This option approximates existing practice under our system of responsible government.

At present, the Governor of Western Australia is appointed by the Queen on the advice of the Premier. In the absence of the Queen, the closest to the current arrangement would be appointment by the government of the day.

How could the head of state be removed?

Removal of the head of state would normally reflect the method of appointment. Thus, a head of state appointed by a two-thirds majority of Parliament could be removed in a similar manner. Likewise, a head of state appointed by a constitutional commission on the recommendation of the Premier would be removed by the commission on the Premier's advice. Given the expense and inconvenience, an elected head of state would need to be removable without another election. The most obvious possibility would be for the head of the state to be subject to removal by a two-thirds majority vote of both Houses of State Parliament.

Consideration also would need to be given as to whether grounds should be specified in the Constitution Act 1889 for removal of the head of state. Specific grounds used for removing other officials, such as judges, include misbehaviour; conviction of a criminal offence; or mental or physical infirmity.

What should be done about the powers of the head of state?

Within the wider Australian republican debate the assumption has tended to be that the powers of the head of state would remain essentially unchanged; that is, the head of state would retain the existing powers to appoint and dismiss Governments and Ministers; to summon and dissolve Parliaments; and to make important appointments. It is also assumed that these powers would continue to be exercised on the advice of the government of the day. Few Australians have advocated an American-style 'executive presidency', with a head of state who exercises independent power.

The real issue concerning the powers of a republican head of state is whether those powers should be set out comprehensively in the State Constitution. It has been argued that the unwritten traditional practices which regulated the exercise of the unwritten powers of the Crown might not effectively restrict the

activities of a republican head of state, particularly one who was popularly elected. Accordingly, both powers and practices should be written into the State Constitution. Some might argue, however, that a popularly elected head of state should exercise more power than the Governor does at present.

Other issues

There would need to be a review of Western Australian legislation, for example to remove references to the Queen and her representative, the Governor, and to ensure that governmental processes were consistent with a republic. This would range from a review of the institution of the Executive Council and its functioning to consideration of matters as the use of the word 'Royal' in the title of public and private organisations.

Conclusion

The position of the States within an Australian republic is a difficult one, which has yet to be addressed adequately within the wider republican debate. Many of the issues relating to the conversion of Western Australia to a republic are open to conflicting interpretations and debate. As the republican debate progresses, clear answers will need to be given to critical questions concerning the constitutional position of Western Australia. These are not only questions for legal experts; it is important for all Western Australians to consider and discuss the issues raised in this paper.