

"A Republic by Stealth?"

The Robert Harris Oration

*Royal Australian College of Dental Surgeons - Twelfth Convention*

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ROYAL AUSTRALASIAN COLLEGE OF DENTAL SURGEONS

THE ROBERT HARRIS ORATION

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A REPUBLIC BY STEALTH

The Hon Michael Kirby AC CMG \*

## ABSTRACT

In this address, the Robert Harris Oration to the Twelfth Convocation of the College, Justice Kirby identifies what he sees as the moves by stealth towards a republic in Australia. He lists, amongst other things, the change in the Oath of Allegiance, the removal of the title of Queen's Counsel and many other alterations in Australian public life, as illustrations of the drift to a republic without a firm decision on the part of the people of Australia that the constitutional monarchy should be abandoned and replaced with a republican form of government, still to be defined. He then outlines the positive arguments for adhering to the constitutional system of government chosen by the people of Australia at the time of Federation. That system cannot be changed except by referendum. The author's thesis is that the drift to a republic by stealth should be arrested and the merits, as well as the possible demerits, of our present constitutional arrangements should be considered openly and honestly before the people, before fundamental changes are made. He suggests that this is a topic appropriate for consideration by members of a Royal Australasian College.

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A TOPIC FOR A ROYAL COLLEGE

I wanted to speak to this Convocation about informed consent to medical and dental treatment. It is something that has long interested me. Upon the subject there are a number of recent decisions of the Courts. One of them, *Rogers v Whittaker*, is a decision of which every dental and medical practitioner, indeed health care provider, in Australia should be aware.

Trapped in the tender ministrations of your President - who seems sometimes intolerant to the notions of informed patient consent - I muttered my interests and concerns. But he would have none of it. It is in this way that I came upon the subject assigned to me. To speak about an Australian republic. It may seem a subject remote from a dental Convocation. I see that on your agenda is the subject of the human immuno deficiency virus. My previous service on the WHO Global Commission on AIDS might have made this a topic worth exploring. But faithful to the undertaking extracted in a moment of extreme weakness and vulnerability, I will turn to the republic. A Royal College - and one that links two Dominions of the Crown - may be a happy and reflective venue for its consideration. Sadly, the general public debate on this topic in Australia has been extremely disappointing. Either the advent of a republic has been presumed; or the combatants have hurled insults at each other with little appeal to reason.

My theses are two. The first is that we in Australia have undergone, in the space of a decade or two, almost imperceptible changes by which the monarchical features of our polity have been eroded. We have failed to recognise an incoming tide of republicanism by stealth. We should be alert to these moves.

Secondly, we have been so lulled into a sense of fatalism and inevitabilism that we have failed to attend to the serious arguments which support the retention of the form of government secured by our Constitution.

I hope, in these few words, to put the spotlight on stealthy republicanism so that no one will have an excuse for failing to recognise its manifestations whenever in future they appear. I hope, by voicing the rational argument for our constitutional form of government, to redress some of the hype that has attended the recent debates in Australia and to call my fellow citizens back to the Australian Constitution, which is a proud document with unique features of monarchy and republic woven together in a form which has served us well.

### REPUBLICANISM BY STEALTH

In the busy life of a dental surgeon, it may be easy to miss changes in the symbols of government. But the law is full of symbols. It is, therefore, less easy, and less forgivable, for lawyers to overlook the changes and to fail to see their significance.

Like many of you present, I grew up in the closing days of the British Empire. At school every Thursday we honoured God, served the King and saluted the flag. As often as not, the flags we saw were the Union Jack. At the cinema on Saturday, we stood in the dark for the National Anthem - *God Save the King*.

When King George VI died, my High School in Sydney was summoned to a solemn assembly. The significance of the passage of the Crown was explained to us. I shall never forget the photographs of the young Queen descending from her plane which had brought her on the sad journey back from Kenya to be greeted, symbolically enough, by her United Kingdom Prime Minister and Leader of the Opposition: Churchill and Atlee. The Queen, the Queen Mother and the Dowager Queen

Mother, dressed in black veils, reminded us of our link to an ancient constitutional history and to a worldwide family of nations.

Fortunate were we in the dutiful Queen who acceded to the Crown in February 1952. Australia, and much of the world, came to a stop in June of the following year for the Coronation. There, the Queen took her solemn oaths to her Dominions. She promised to govern them according to their laws and customs. I believe she has kept her promise faithfully. No one disputes that Queen Elizabeth II has been an exemplary constitutional monarch.

When the Queen arrived in Sydney in February 1954, the crowds were unforgettable. Those old enough will remember the decorations in the streets and on the buildings. The vast Anthony Hordern's Emporium was completely repainted. There was something dazzling and rather romantic about the young Queen. Perhaps it is the fact that she was, and is, the living embodiment of a history of a thousand years that captured the imagination. We in Australia were an integral part of that history. That was part of our national character.

Over the years, changes have occurred. The Queen has become older. The Duke of Edinburgh once said that the fascination of the Royal couple was at its peak in their youth and would trough in middle age but, like Victoria, would rise again in venerable years. That may yet prove to be so.

The Queen's visits to Australia became less formal and briefer. The modes of transport changed. The degree of formality was dropped, in keeping with our more egalitarian ethos. To all of this the Queen adapted. She came when invited. She did not intrude.

Some changes that occurred were natural and desirable. Thus, the gradual abolition of appeals to the Privy Council in London followed the failure of successive British Governments to build a true Commonwealth international court. Dropping the old National Anthem at the cinema was appropriate. For that was hardly a place of reverential patriotism. Inappropriately, the last bars of the Anthem were usually merged in the first discordant notes of the cartoon. Slowly the second flag disappeared. It became less common to see the Australian flag and the Union Jack flying together on public and other buildings. Even the BBC ceased to play *God Save the Queen* before the World News on the Queen's Official

Birthday. These were relatively minor changes and they caused no real heartburn.

But now I invite your attention to some of the other changes we have witnessed. Separately and together they amount to creeping republicanism. Republicanism not by a proud choice of an informed people. But republicanism by stealth - and often done by leaders afraid to consult the people honestly and to accept their verdict.

1. The Royal Anthem was replaced by the Australian National Song. Fair enough. At least on that there was a poll. But then there was an attempt actually to prevent the playing of the old Anthem, even when people wished to sing it. Odd this, given that the Queen whom the Anthem asked God to save was also the Queen of Australia.
2. At dinners in universities, clubs and other occasions, the Loyal Toast gradually disappeared. It is now very rare to honour that Toast. If nothing else, in years gone by, it saved us from the smokers for the better part of our dinners.
3. The appointment of Privy Councillors - the exclusive band of "Right Honourables" was terminated. Labor Governments of recent years had made no appointments to the Queen's Privy Council. But Curtin, Chifley and Evatt were all Privy Councillors. It was Whitlam who first declined. The last political Privy Councillor appointed in Australia still sits in Federal Parliament, the Right Hon Ian Sinclair. But he sits alone. None of the Justices of the High Court of Australia are now sworn of the Privy Council.
4. Then anxiety set in amongst some circles about our national flag because it bears the Union Jack, as a sign of our history and links with the Sovereign, in its corner. For the first time, a Prime Minister (Mr Keating) declined to fly that flag on his official car. Or even to be seen with it if it can be avoided. Proposals for change of the flag is legitimate and even understandable. But whilst it remains the flag, it might be thought that it should be flown with pride. The disharmony of this attitude, and the logo of the Federal governing party, was quickly pointed out. Now that logo has been changed. The stars remain. Only a sweep of red at the base reminds us

of the Union flag that clings resolutely to the corner of the standard - apparently with overwhelming popular support.

5. Portraits of the Queen were no longer put up in public buildings. The Australian Government Publishing Service, which hitherto had carried photographs for sale, was reported to have discontinued this service. In some government and local government venues, portraits of the Queen of Australia were even removed often to crowing stories by young journalists, taking apparent pleasure in the denigration of a Sovereign who has only given dutiful service to this country.
6. The Imperial Honours came to an end. The last of the knighthoods was conferred. Advice was tendered to the Queen to terminate the dual system of honours. Dutifully, she complied. The Order of Australia is now well established and most distinguished. But it has not replaced, in number and variety, the wealth of people formerly recognised under the old system. In a word, the Order of Australia is more exclusive and selective.
7. Then there was a battle to remove the Queen's image from the first denomination currency note. The King or Queen had always appeared on that note. Pressure was applied to the Reserve Bank for the Queen's removal. All of this, I ask you to note, in advance of any change in our system of government by the people's will.
8. Crowns began to disappear where formerly they had been in relative abundance. Arrive now at the new terminal at Sydney Airport and the Crown on the badge of the Australian Customs logo no longer stands to greet the visitor. The logo has not been changed. The transfer has simply been deleted altogether.
9. In some parts of Australia, the title of Queen's Counsel has been abolished. This was not part of government policy mandated at an election. It was simply announced overnight, as on a whim. The result has been the creation of a new rank of "Senior Counsel". So nothing significant has been secured except the abolition of the Queen's name and of an historic office of hundreds of years duration.

10. If you look at the statutes of Parliament, they have also been changed. In the Federal statutes, the original formulation, apt for a constitutional monarchy, was:

*"Be it enacted by the King's Most Excellent Majesty, the Senate and the House of Representatives of the Commonwealth of Australia, as follows."*

In due course, this was simplified. But until 1990, the formula of enactment was:

*"Be it enacted by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia as follows."*

Now, without consulting the people, the Queen has been deleted, at least by name. The formula of enactment of Federal statutes now reads only:

*"The Parliament of Australia enacts".*

Every lawyer knows that the Queen is still part of Parliament under our Constitution. But the deletion is another symbol of the removal of the reference to the Sovereign. Most people think that the Parliament is confined to the politicians in Canberra. Clearly that is the message desired by the change.

In the State statutes, the change is even more noticeable. Until quite recent years, the State statutes of New South Wales bore the logo of the Royal Coat of Arms and a reference to the year of the reign of the Queen or King as English statutes have done from ancient times. Now that too has been dropped. No reference is made to the Queen at all. The reference at the foot of Proclamations to "God Save the Queen"! has also been deleted from the Government Gazette.

11. If you happen to be an Anglican, you will discover that in Church services in Australia it is now much less common to pray for the Queen and "all the members of the Royal Family". Although it is in the *Book of Common Prayer*, the prayer is now often skipped.

12. The old Empire Day with its crackers merged into Commonwealth Day. Little publicity is now given to that day by governments or the media. And then the media note with mock surprise that nobody noticed the day come and go.
13. The Oath of Allegiance to be taken by migrants was changed to delete the promise of fealty to the Queen of Australia. This was done in advance of any change of the Australian polity to a republic. More difficult was the removal of the Oath (or Affirmation) of Allegiance contained in the Constitution and required of Federal Ministers of the Crown. To avoid the embarrassment of such a promise, solemnly undertaken but not always to be faithfully fulfilled, such oaths are now sometimes administered behind closed doors.
14. The media appear extremely biased on the issue of the republic. A recent instance is the broadcast on the Australian Broadcasting Corporation's radio programme on 26 March 1994. It was built up by constant advertising "In the headlong rush to the republic ... ". Who says there is a headlong rush? Only those who know nothing of the history of Australian referenda.
15. Finally, there is the way the Australian Republican Advisory Committee was established and operated. Its task was not to consult the people about whether our polity should change. Instead, it was required to presume that change and asked how it should be done. Contrast that procedure, if you will, with the grass roots movement for federation which so enlivened the history of our nation a hundred years ago. There, indeed, was a movement of the people for the change and development of an Australian national government. The move to a republic presents a sorry spectacle by way of comparison. There is no grass roots movement. In a recent Sydney by-election, a republican candidate gained fewer than 1% of the vote. The push for a republic is an elite thing. It fails to attend to the history of this country or its abiding national character. It is not, I believe, in tune with its spirit, at least at this time. Moreover, it all too often overlooks the positive arguments for the system of government we have. Putting it quite bluntly, we in Australia by our Constitution,

which we adopted, have established a polity which has all the advantages of a republic in a setting that remembers our history and secures to us the unquestionable advantages of a constitutional monarchy.

### ADHERING TO THE CONSTITUTION

I want to give some practical, hard-nosed, Australian thoughts as to why our *system* of constitutional government has advantages which should not be dismissed lightly. Certainly not by changes achieved by stealth without a proper debate before, and decision by, the Australian people concerning the nature of their polity.

These are the perspectives of a reformer. Reform means more than change. It means change for the better. I am not convinced that the republican options on offer are better than the constitutional arrangements which history has given Australians. The basic question is what is best for Australians. In my view we should stick with the Constitution that Australians made, fought for, and have kept. Let me say why.

When you look around the world at the countries which seem to be the most stable, liberal in their laws and tolerant of diverse opinions, overwhelmingly those countries tend to be constitutional monarchies. The Netherlands, Belgium, Sweden, Denmark, Norway, Spain, Japan, the United Kingdom, Canada, Australia and New Zealand. Why should this be so: It cannot be an entire coincidence that so many of the members of the Organisation for Economic Co-operation and Development (OECD) are constitutional monarchies. The advanced, democratic, rule of law societies with the best economic records tend to be constitutional monarchies, although the world is full of countless republics which do not make the grade. Is this just chance: Or is it something to do with checks on unbridled power and reminders of the historical perspective in the holding of office which constitutional monarchy constantly provides?

It might be said that Australia would remain stable and tolerant as a republic, with its own local Head of State. So indeed it might. But before we change, we have to weigh up the risks:

- \* Having as a Head of State a person chosen by accident of birth and living far away, means that our politicians simply cannot aspire to the number one job. In this sense, the Queen of Australia keeps out of the top position the pushing and shoving types who are vitally

necessary for our democracy, but who do not always engender universal respect, affection and trust;

- \* In the case of Australia, the monarch is not ever present as a local Head of State would certainly be. We have the Governor-General and Governors, it is true. Henceforth they will always be Australians. But because the Governor-General is the representative of our normally absent Head of State, this puts a limitation on Head of State protections. Not for us the stretch-limousine, the First Lady and the schoolchildren pressed into dutiful flag waving. With an ever-present republican Head of State, we would surely go down the road of pretension. Anyone in doubt about this should observe what happens when there is a change. In South Africa, the President was soon unsatisfied with that title. He quickly became the "State President". Very soon after he sprouted an orange sash. This is worn everywhere important. When you replace a monarch there is a mighty void. And especially if the monarch is as long serving, professional and dutiful as Queen Elizabeth II;
  
- \* The republicans want the "minimalist" Head of State to be appointed like the Governor-General by the politicians in power. But whereas that will do for a Governor-General, representing a monarch who has a link with a thousand years of history, it will not, I am afraid, satisfy the Australian people if they are to have a President of their own. They will (as repeated opinion polls show) insist in that case upon a President elected by them. Yet as every politician knows, if you elect the President you give him or her a legitimacy which may imperil the stability of our Parliamentary democracy. The President may claim a mandate and a legitimacy for that office. Unless you wrap up and throw away the reserve powers, the President may just be tempted to use the powers to sack the Prime Minister. Look what has happened in Pakistan twice in recent years. Look even at the recent strife in Russia;
  
- \* There is the very fact that we are all - judges, ministers, politicians, police, defence forces, citizens cast by our system into the state of mind that we are all but temporary office-holders *under* the Crown. This involves a self-conception (and a conception of our offices) which puts a brake on delusions of grandeur and a check on arbitrary power. The very fact that the Head of State serves, here as elsewhere, in a line which can be traced back a thousand years, puts a brake upon the temptation to a *coup d'état* or to a breach of valid

constitutional conventions. This safety might, or might not, pass to a new republic. But the very continuity of constitutional monarchy, in a country like Australia, is a symbolic assurance against the brutal assertion of oppressive power. It thus provides one ingredient for tolerance and diversity where the symbols of a republic may fall into the trap of democratic majoritarianism. Constitutional monarchy, of its nature, demands and ensures careful checks;

- \* To the suggestion that we must have in Australia a home grown President and that the Queen is a foreigner, I say: Tell that again to the Scots and the Welsh and the Northern Irish and all the other people who accept Queen Elizabeth as their Head of State. In an internationalist age we should regard this common link as a bonus. And reject the call back into the bosom of primitive South Seas nationalism. It is so *passé*;
- \* To the complaint that the Queen is not, when overseas, seen as a representative of Australia, a ready answer may be given: The Prime Minister should be the main representative of Australia overseas. We can survive the shame of a 19 gun salute. Our system is Parliamentary. That means a Prime Minister. Let him or her be Australia's representative overseas. And in the unlikely event that the people of Asia, or anywhere else, care the slightest about our constitutional arrangements, let them mind their own business. Just as we mind ours in relation to their constitutions. Such things are the product of history and sentiment and are not always susceptible to easy explication to neighbours;
- \* To the complaint that the Queen is not always amidst us, I say that I regard this as actually a positive advantage of our system. Basically, we have the perfect blend of a monarchy and a republic. The people have the ultimate say. Great power is divided as befits a republic. But the Crown, as the symbol of continuity, is there. All of us serve it and, through it, the people - beyond our partisan causes. That is the strength of our historical monarchy. The Queen comes when she is invited. But not too rarely or too often. We basically get by *without* a Head of State and with the Governor-General and Governors doing those modest functions which we think necessary to us. As we have so many politicians, this is at least one way we can save money. All this may seem, to some, an anarchist's view of the Constitution. But, to the extent that a President has power and legitimacy, the Prime Minister must watch out. For we then run the

risk of tension at the top. At the moment there is no such risk. The Prime Minister is the undisputed top dog in power. But he or she is deprived of the symbols of ultimate power and this to remind him or her of the temporary hold enjoyed upon it. I hope I may say, without offence, that this is a reminder which come, at least, of the incumbents of the highest office in recent years have needed, occasionally, to receive;

- \* To the suggestion that the Asian and Arab, the Latin-American and the Islander and other people of Australia have no affinity with the Queen of Australia I would say: They probably think as little about her as the Australians of Anglo-Celtic stock. It is the *system* of stable democracy and parliamentary government that is, to them, one of the chief attractions of this country. A system that puts a brake on extremes and keeps all in their respective place has rational advantages which may not be fully understood, but is instinctively felt. And will be reflected in safety if a vote comes;
- \* And to the assertion that the republic is inevitable and that we should therefore lie back and accept it, I would answer in the words of John Maynard Keynes:

*"The inevitable never happens. It is the unexpected always."*

The passage of the communism referendum, in the frenzy of the Cold War, was inevitable; but it was lost. The bicentennial referenda that have succeeded in recent years in Australia have enjoyed bipartisan support and carried not the slightest risk of affording significant new powers to politicians. So when I hear the assertion of "inevitably" I spare a thought for history and reach for a pinch of salt. There is a certain impatience in some Australians who resent the constitutional conservatism of their fellow citizens. It is unfashionable just now in Australia to support the Constitution. But as its centenary approaches, I hope and expect that, as a people, we will come to reflect upon and appreciate the blessings we have enjoyed, living under it.

The Australian Constitution of 1901 - one of the oldest in this unstable world, has assured us of stable parliamentary democracy. We have avoided civil wars. We have defended ourselves in war and peace. Governments have changed without bloodshed. The law has been

administered in tranquillity. If you doubt that these are great achievements by the world standards, look around.

The Constitution has itself changed over the century principally through court decisions. Our relationship with the Crown has changed. The Queen herself has adapted and changed the royal role during her long reign. Indeed, in many ways the monarchy has changed most of all amongst the elements of Australia's government over the century past.

These elements of our Constitution are appreciated by many of our fellow citizens, in all parts of Australia. But they are most appreciated in the less populous States and in the country towns and districts. It is here, in the heartland of Australia, that the republicans must carry their cause or lose the battle. Or worse still, win it at the price of shattering the unity of the continent in this Federal Commonwealth under the Crown.

The evidence does not suggest that the republicans have made any headway whatever in the less populous States or in the country districts of Australia. There, the merits of our Constitution are clearly seen. The dangers of changing its fundamental character are feared.

We have so many other *real* challenges in Australia to which we could be called as a united people, that the question must go out: Why divide us unnecessarily, as divide us you will, upon the one feature of the Constitution that shows no urgent need of change? Lead us instead to an attack on the problems of the long-term unemployed. Lead us to a new reconciliation with the indigenous peoples of this continent: the Aboriginals and the Torres Strait Islanders. Lead us to solutions to the urgent needs of our internal waterways. Lead us to a new relationship with Asia and the Pacific and the Indian Ocean states so that we come to terms with our geography and make the most of its opportunities. Lead us to better health services, educational opportunities and employment prospects for our people. Lead us to a better understanding of the causes of drug dependence and a more effective response to HIV/AIDS. Lead us to a more tolerant society, respectful of minorities and determined to break the stereotypes which have limited women and other disadvantaged groups. Lead us, if you will, to an honest and open debate about our Constitution when *all* the cards are on the table and the fundamental character of the compact can, if necessary, be re-negotiated from scratch.

It is perfectly possible that Australia and Australians will one day opt for a republican form of government. There are, I acknowledge,

powerful intellectual arguments which support that system of government. But there are also strong practical arguments for keeping to the system of government which our people chose a hundred years ago. It has provided us with a stable political system which has very few equals in the world.

Above all, if we are to change our system of government, let us do so frankly and proudly, as the Australian people boldly and assertively did at Federation. Let us debate the merits and demerits of doing so. Not foreclose that debate by assumptions made which need to be most carefully considered. And let there be no more drift to an Australian republic by stealth.