



Governors, Democracy and the Rule of Law

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Constitutional reform is a serious matter. Unlike ordinary law reform whose effects are confined to specific areas and which may be modified or repealed if it turns out to have been ill-advised, constitutional reform impacts upon the entire system of law and government and is virtually irreversible. It follows that we have an obligation not only to ourselves but to our descendants to consider any proposals to change the constitution of the Commonwealth or a State rationally, deliberately and with a complete understanding of the nature of that which is being changed and of what the consequences of the change will be.

There is currently before the Australian people a proposal to sever the remaining links between the Crown and the Commonwealth of Australia and in due course some or all of the States may consider taking a similar step.¹ Merely severing the links between the Crown and the Commonwealth or the States although a very significant step in other respects would not entail great constitutional change. As a result of a succession of constitutional developments culminating in the Australia Acts 1986 it can now be said that virtually all the powers and functions of Governors-General and Governors are derived from the constitutions and laws of the Commonwealth and the States not from the fact that Vice-Regal officers nominally represent the Crown. So severing our links with the Crown would mean that the present holders of Vice-Regal office would no longer be appointed by or represent the Crown but would not of itself require any other change to their functions.

But a heady mixture of millenarianism and the romantic connotations which the word *republic* has for some people has generated a climate in which more extensive proposals for the adoption of what is called a republican form of government in Australia are being promoted. Those proposals include reviewing the nature of the functions performed by Governors-General and Governors and even questioning the continued existence of those offices. Such proposals appear to be founded upon a belief that the word *republic* describes a particular form of government. That is a misconception. There is no one constitutional system which answers the description of a republic. Over the years the word has been used in many confused ways to describe all sorts of different systems. Sometimes the word is merely used in a negative sense to refer to a system which does not have a monarch as its head of state and sometimes it is used to describe a group of concepts, the most prominent of which are the essential equality of all citizens and that supreme power rests with the people and their representatives. In that broad sense we have had a republic in Australia since federation - the very name Commonwealth conveying that idea. Indeed as long ago as 1867 the English political and constitutional writer Walter Bagehot observed that even the England of Queen Victoria was in substance a republic.² As the Republic Advisory Committee reported:

¹ Severing the links between the Crown and the Commonwealth will have no impact on the States. The constitution of a State may only be amended by that State.

² St John-Stevas Norman, *Walter Bagehot* p.257.

(Republican) concepts are more philosophical than constitutional and need not entail specific constitutional consequences or structures. Indeed, advocates of wider 'republican' principles are often hard pressed to cite concrete constitutional change which ought to result from 'republicanism'.³

In particular it cannot be said that there is any one prescription which defines what constitutional powers or functions the head of state in a republic should have. There are republics which have a President who is both head of state and head of government, others which have a President and a Prime Minister and yet others where the President has little constitutional power at all. But misconceived as the reasons for doing so might be it is the case that the powers and functions of Vice-Regal officers - or their successors if the links with the Crown are severed - are under review. In order to responsibly consider whether any changes should be made to those powers and functions it is necessary to understand that which is being changed and what the consequences of such changes will be.

I propose addressing in particular one important but largely neglected aspect of the powers and functions which Vice-Regal officers currently exercise. For convenience I shall confine my remarks to State Governors but for the purposes of this discussion their powers and functions are in essential respects the same as those of the Governor-General.

Governors exercise two main sets of constitutional functions. First, they are responsible for taking the steps necessary for the dissolution of the parliament or a house of parliament, the holding of elections and the appointment of a Premier and Ministers. By convention those powers are exercised on the advice of the Premier. But in exceptional situations the Governor may have to exercise what are called the reserve powers and dissolve the Parliament or a House of Parliament or refuse to do so or dismiss or appoint someone as Premier without advice or even contrary to advice. The existence of those powers is essential in order to resolve deadlocks and ensure the continuity of government when ordinary constitutional processes and conventions break down and to enable a Governor to take appropriate action in the event of a government acting unlawfully. When constitutional and political writers discuss the powers of Governors to act without or contrary to advice they concentrate almost exclusively on those reserve powers. But those powers are exercised very rarely. The other main constitutional functions of Governors comprise the exercise of a great variety of mainly statutory powers through which the day to day business of government is conducted. A former Governor of Victoria records that a few years ago a count of those powers in Victoria was commenced and reached 4,000 when it was discontinued.⁴ That side of the role of Governors receives little public or academic attention but it is in fact the most significant part of their constitutional function and it is about that function that I would like to speak today.

The powers of a Governor in relation to the day to day business of government are in the main exercisable on the advice of the Executive Council which in practical terms means the Premier and Ministers of the government of the day.

Although Executive Councils as we know them have been a part of our constitutional system since the advent of responsible government in the Australian colonies there are remarkable differences of opinion about the nature of the relationship between the Executive Council and the Governor.

³ *An Australian Republic* - The Report of the Republic Advisory Committee Volume 1 p.41.

⁴ McGarvie Richard E., *Democracy - choosing Australia's republic* p.282 n.50.

Three distinct models of the Governor's role can be identified: the interventionist, the benign mentor and the mechanical idiot.

The interventionist model is represented by the view taken by a former Governor-General Sir Paul Hasluck that as well as ensuring the legality and regularity of any action which Governors are advised by the Executive Council to take, they have a responsibility to go behind that advice and have regard to substantive aspects as well. Thus Sir Paul regarded himself as having the "responsibility to make sure that decisions are consistent with what is known of government policy". On what he described as controversial matters he felt that he should go even further. In respect of such matters "I would seek" he said "to satisfy myself that there was no conflict between the action recommended and any agreements, commitments or decisions of the government" and that "if the subject matter obviously was of interest to several Ministers and departments I required an assurance that there had been interdepartmental consultation and that the recommendation was supported by all those directly concerned in that area of administration. I was also watchful for possible conflicts in policy."⁵

The strongest support for the benign mentor model comes from the decision of the High Court in *FAI Insurances Ltd v Winneke*.⁶ In that case an insurance company instituted proceedings against the Governor of Victoria and others seeking a declaration that the refusal of its application for approval to carry on the business of workers compensation insurance was void on the ground inter alia that in breach of what were then called the rules of natural justice the Governor in Council had not given it a reasonable opportunity to be heard. The Court held that the Governor in Council was subject to the rules of natural justice and that therefore the refusal of the application was void. In order to arrive at that conclusion the Court had to consider the nature of the role of Governors when they are exercising a power or function on the advice of the Executive Council. With varying degrees of emphasis four of the Justices accepted that the Governor has the right to call in question the advice which has been tendered, suggest modifications to it and ask the government to reconsider it. But the court also held that if in the end the Council persisted in tendering its advice notwithstanding the Governor's questions, suggestions or reservations the Governor was bound to accept and act upon that advice. The view taken by the majority of the Justices in the *FAI* case also represents the views expressed by the great majority of constitutional and political writers who have discussed the matter.

Under the mechanical idiot model the Governor in Council does not appear to be a living being at all, he she or it being variously described as a figurehead, rubber stamp, cypher or automaton. That model was espoused by Justice Murphy in the *FAI* case. In his view the Governor's function in the Executive Council was purely formal, the Governor being bound to accept the advice being tendered and whilst he recognised that a Governor "is sometimes given the courtesy of explanations" Justice Murphy asserted that "he is not entitled to them."⁷ Justice Murphy's view receives support from the position taken by Professor Geoffrey Sawer and others who emphasise the "formal" or "ceremonial" role of Governors. Professor Sawer drew a parallel between the development of the Privy Council in England and the subsequent development of the Executive Councils in the Australian colonies in the 19th century and concluded that "There may be some good reason why Australians should continue to imitate an historical eccentricity of the British constitution, but this writer has not been able to discover it."⁸ In essence, Professor Sawer would do away with the Executive Council because it is an anachronism and because its functions merely duplicate those of the Cabinet with which he thought it should be merged.

⁵ Hasluck Paul, *The Office of Governor General* pp.38 and 39.

⁶ (1982) 151 CLR. 342.

⁷ *op.cit.* p.373.

⁸ Sawer, Geoffrey, *Federation Under Strain - Australia 1972-1975* p.104.

I turn to consider those three models. Although others have expressed support for the general tenor of Sir Paul Hasluck's approach I am not aware of any authority which would support such an intrusion by a Governor-General into the policy considerations and political processes which eventually produce the advice tendered by the Executive Council. It is not supported by precedent, the law or the principles of responsible government.

The mechanical idiot model can also be rejected fairly summarily. Justice Murphy's opinion was based upon a political theory which he advanced in his reasons for judgment that the Cabinet is the highest political organ of the State and upon conclusions he drew from his view of how Cabinets operate or should operate. However his views are unsupported by any legal analysis or citation of authority. In any event it would not be easy to accept a view of the role of Governors which not only denied them the right to question the advice which was being tendered to them but by denying them the right to an explanation of that advice even denied them the right to know the nature of what it was that they were being asked to do.

Professor Sawyer's view that the Executive Council is an anachronism is based upon a false premise. The modern Executive Council bears no resemblance to the English Privy Council of earlier centuries. Interestingly Professor Sawyer does seem to accept that under present arrangements the Executive Council and the Governor do help to guarantee the legality and propriety of government decisions.⁹ Presumably by proposing that the Executive Council should be merged with the Cabinet Professor Sawyer is indicating either that he believes that cabinets could always be relied upon to monitor the regularity of their actions with detachment and uninfluenced by political considerations, which some might find unconvincing, or that the urgency of disposing of what he sees as an imperial relic is more important than retaining a system which helps to ensure the legality and regularity of government actions.

Let us now turn to what I have called the benign mentor model of the Governor in Council. This can be regarded as the standard model of the Governor's role and is the most widely accepted.

One of the most frequently cited authorities in support of this model is the opinion of Walter Bagehot that under a constitutional monarchy the Sovereign has "three rights - the right to be consulted, the right to encourage, the right to warn."¹⁰

That aphorism has been cited with approval again and again by political scientists, constitutional writers, vice-regal officers and even by the High Court in the FAI case. It has received such a high level of recognition and been accepted without question by so many authorities that it has virtually been elevated to the status of an axiom of our system of government. It is therefore with some diffidence that I suggest that we look at the basis of that opinion.

The aphorism is contained in a chapter on the Monarch in Bagehot's work *The English Constitution*. It is introduced by a reference to differences which had arisen between Queen Victoria and her Foreign Secretary, Lord Palmerston, as a result of her complaints that he was failing to consult her or keep her informed about foreign affairs. She eventually sent a memorandum to the Prime Minister, Lord John Russell, in which inter alia the Queen indicated that she required: "(1) That he will distinctly state what he proposes in a given case, in order that the Queen may know as distinctly to what she has given her Royal sanction; (2) Having once given her sanction to a measure, that it be not arbitrarily altered or modified by the Minister; ..." and that "She expects to be kept informed of what passes between him and the Foreign Ministers before important

⁹ *op.cit.* p.105.

¹⁰ *op.cit* p.272

decisions are taken, based upon that intercourse;"¹¹ Having referred to that memorandum Bagehot then expresses his understanding that the First Minister also keeps the Queen informed about important decisions and "takes care that she knows everything which there is to know as to the "passing politics of the nation" and that by "rigid usage" she has a right to complain if she is not given advance notice of actions which her Ministry proposes taking. To "state the matter shortly" Bagehot concludes "The Sovereign has ... the right to be consulted, the right to encourage, the right to warn."

In other words this opinion which has been cited so often as authority for the existence of a fundamental constitutional principle of the relationship between Governors and the Executive Council is not based upon reasoned analysis and gains its only support from a direction given by Queen Victoria relating to a particular branch of government and Bagehot's very general understanding of some of the practices governing Queen Victoria's relationship with her Ministers in other areas of government.

Despite its insubstantial foundations Bagehot's opinion is in a limited sense correct. The Sovereign and Governors certainly have the rights to which he refers. The real objection to Bagehot's aphorism is that he advanced it as a complete statement of the Sovereign's rights. In his opinion "A King of great sense and sagacity would want no other (rights)".¹² But the pragmatic considerations Bagehot then advances in support of that opinion are unconvincing and certainly not sufficient to establish any general constitutional principle applicable to Governors.

The most substantial support for the standard model of the role of the Governor in Council including in particular the principle that in the end a Governor must always accept the advice tendered by the Executive Council, is that it is a corollary of the principles of responsible government. The argument supporting the derivation of that obligation from those principles was encapsulated by Professor George Winterton in these terms:

"One of the fundamental principles of Australian constitutionalism is parliamentary supremacy, which is enforced politically through ministerial responsibility to Parliament or, more accurately, ministerial responsibility to the lower House and answerability to both Houses. The corollary of responsible government for intra-executive relations between the Governor and the government is that, except when exercising the few remaining "reserve powers", the Governor, like the Queen, acts only on, and must ultimately follow, ministerial advice, for which the government is responsible to the lower House. This has been acknowledged by virtually every commentator, including the High Court."¹³

The requirement that a particular power may only be exercised if the Governor has been advised by the Executive Council to exercise it is certainly a corollary of the principles of responsible government and is also a condition which is sometimes expressly imposed by law.¹⁴ But to say that Governors may not take a certain action unless they have been advised to do so is by no means the equivalent of saying that they must always take that action when they are advised to do so. The tendency to gloss over the distinction between saying that a Governor may not act without advice and saying that a Governor must always accept advice has been productive of much confusion in discussions about

¹¹ Young G.M. and Handcock W.D., *English Historical Documents 1833-1874* p.71.

¹² *op.cit.* p.272.

¹³ Lee H.P., Winterton George, *Australian Constitutional Perspectives* p.290.

¹⁴ Some jurisdictions have statutory provisions which define "Governor" as meaning the Governor acting on the advice of the Executive Council.

this issue. However, subject to that qualification statements such as that by Professor Winterton do correctly reflect a fundamental principle of our system of government. But such statements are incomplete because they fail to recognise that the principle of responsible government is not the sole or even the main principle upon which our system is founded. An even more important principle is the rule of law.

The rule of law is not merely a political or legal theory. It is an integral part of the substantive law which governs our system.¹⁵ For present purposes it is not necessary to explore all the ramifications of the concept of the rule of law. It is sufficient to refer to two elements which it embodies: that everyone including in particular the executive arm of government is subject to the law and that in contrast to private citizens who may do anything which is not prohibited by law or which does not infringe the rights of others, organs of the executive government may not do anything save that which the law has authorised them to do.

It is certainly the case that if one has regard to the principles of responsible government alone it can be persuasively argued that a Governor must always follow the advice of the Ministry. But the application of the principles of the rule of law leads to a different conclusion. The rule of law also imposes an obligation upon a Governor to see that the processes of the Executive Council and the action being taken are lawful and to refuse to act when they are not. That duty is not confined to refusing to be a party to an action which is unlawful in the sense of being contrary to say the criminal law but includes acts which are beyond power or acts which are within power but are being exercised irregularly as was the case for example in *FAI v. Winneke*.

It has been argued that Governors should not concern themselves with the legality or regularity of Executive Council processes, that being a matter for the courts. That reflects a failure to recognise that the ubiquity of the law throughout our society and all its institutions is a key element of the rule of law. It follows that the law is not some specialised field which is mainly the province of judges and lawyers and to which others only need to have regard when they are compelled to do so. Certainly it is the judiciary which has the ultimate responsibility for determining the lawfulness of any action but as the Solicitor-General of South Australia recently observed "It is an essential aspect of the rule of law that the Executive ascertain for itself what the law is and that the Executive comply with it."¹⁶

However the responsibility of the Governor in Council does not extend to undertaking a full legal analysis of any proposed action or making a final determination of the lawfulness of such action in the sense in which a court does. The Governor's duty is to see that the processes of the Executive Council and the form of the advice which is given are such as to demonstrate that the question of legality has been addressed and satisfactorily answered. The simplest way of ensuring compliance with those obligations is to require that the advice in respect of each item on the agenda of a meeting of an Executive Council always includes:

- A clear statement of precisely what it is that the Governor is being asked to do
- A reference to the source of the power to take that action.
- Particulars of any conditions which need to be satisfied before that power can be exercised.
- Explicit assertions by a Minister stating how those conditions have been satisfied.

¹⁵ Walker Geoffrey de Q., *The Rule of Law - Foundation of Constitutional Democracy* ch.1; Lumb, *Australian Constitutionalism* p.3; Dixon Sir Owen, *Jesting Pilate*, p.101; *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 at 193.

¹⁶ Selway B *The Rule of Law, Invalidity and the Executive Public Law Review* vol.9 p.205.

In the event of any of those requirements not being satisfied a Governor could not be satisfied about the legality or propriety of the proposed action and would have a duty to postpone the item or even to refuse to accept the advice. But a Governor would not refuse to accept advice unless the proposed action was clearly unlawful or there had been a failure by a Minister or the Council to provide information about an aspect of the advice which was crucial to the determination of whether it was unlawful.

What I have outlined above is not merely a theoretical description of how Executive Councils should operate. A recent survey revealed that Governors or the Secretariats of Executive Councils in Australia do in practice exercise an effective monitoring function by raising significant queries with the Ministers or departments presenting items to the Council. In some jurisdictions this occurs "very frequently".

In practice there is rarely any conflict between the application of the principles of responsible government and the duty of a Governor to see that the executive government is subject to the law. However the blunt fact of the matter is that the standard model of the role of the Governor means that in the end a Governor would be obliged to accept the advice of the Executive Council even if the action to be taken was unlawful. And that would involve a breach of the principles of the rule of law.

So the crucial question arises: which takes priority - the principles of responsible government or the principles of the rule of law? Before answering that question, two preliminary observations may be made.

First, it is generally accepted that one of the reserve powers of a Governor is to dismiss a government or a Premier who is acting unlawfully.¹⁷ Such a power was exercised by the Governor of New South Wales, Sir Philip Game, in 1932 when he dismissed the Premier, J.T. Lang, for instructing State public servants to transfer moneys in breach of the Financial Agreement Enforcement Act 1932. It would be a strange anomaly to accept that a Governor is entitled to take the very serious step of dismissing a Premier for illegal conduct but deny him or her the right to take the less serious step of declining to accept advice from the Executive Council to do something which is unlawful.

Secondly let us imagine ourselves at a meeting of the Executive Council of Victoria held the day after the High court had handed down its decision in *FAI v. Winneke*. At the meeting the Council tenders advice to Sir Henry Winneke that he should refuse a fresh application by FAI for approval to conduct workers compensation insurance. In response to a question from the Governor the relevant Minister indicates that once again the rules of natural justice have not been complied with. Could anyone be comfortable with a rule which obliged the Governor to act on the advice of the Executive Council in those circumstances? But that is what the standard model dictates.

In my view there can be no doubt that where there is conflict the principles of the rule of law must prevail over the principles of democracy and responsible government. "The rule of law" Professor Geoffrey Walker observed "is the one essential component of the common law constitutional system and legal order. "It is" he went on "the unifying concept of our whole system of judicial review and government under law. Without some theoretical foundation of this nature, our constitutional doctrine would lack an organizing principle and a basis for action."¹⁸ The rule of law antedates the emergence of democratic institutions and the principles of responsible government and is a condition of their effective operation. A fully representative parliament, free elections, universal suffrage and bills of rights mean nothing unless the rule of law prevails and the executive government is itself subject to the law. And the constitutional organ which has

¹⁷ *The Laws of Australia* 19.3.24

¹⁸ *op.cit.* 401

the primary responsibility for seeing that the executive government is subject to the law is the Executive Council.

In the Southey Memorial Lecture delivered at this university in 1981 Sir Ninian Stephen observed that "Governments of the present day necessarily pose a greater threat to individual liberties than did those of last century. Modern governments are expected to intervene in areas previously little regulated and the result is a greater intrusion into the private lives of those they govern."¹⁹ One of the conditions of our liberties is the existence of the rule of law and a system which ensures that power is not unduly concentrated in one place but is distributed amongst a number of individuals and institutions, each exercising a restraining influence on the others. In Australia today that system of mutual constraints is being eroded by amongst other things an increase in the power and influence of the executive arm of government and a corresponding reduction in the power and influence of Parliament as a distinct institution, a diminution in the strength of the conventions governing ministerial accountability and responsibility to Parliament and the politicisation of some sections of the public service. I make no judgment or comment about those developments but simply note their impact upon the traditional system of checks and balances.

I am not suggesting that the Governor in Council is one of the great champions of our liberties. But at little cost and without impeding the proper operation of government it performs an important supervisory function which makes a significant contribution to the system of checks and balances and the maintenance of the rule of law. In those circumstances irrespective of whether our links with the Crown are severed good reason would have to be advanced to justify any changes to the functions of the Executive Council or the office of Governor.

¹⁹ Southey Memorial Lecture 1981: Judicial Independence - A Fragile Bastion (1982) 13 *Melbourne University Law Review* 334 at 338-339.