

THE OFFICE OF GOVERNOR-GENERAL

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The office of Governor-General, previously analysed by Sir Paul Hasluck and Sir Zelman Cowen, has evolved as part of the 'Australianisation of the Crown' since 1901. It has been consolidated as a de facto headship of state with important constitutional, ceremonial, and community functions, while the Queen remains Australia's de jure head of state. Among desirable attributes of a Governor-General is the ability to 'interpret the nation to itself'. Doing this, Cowen brought 'a touch of healing' after 1975, and Dame Quentin Bryce balanced the traditional and contemporary. Their subsequent returns to universities have been appropriate for former Governors-General. Bryce's actions in 2010 and 2013 reflect the occasional need for the Governor-General to have independent advice, on which the Governor-General retains an important discretion.

CONTENTS

I	Introduction.....	1098
II	The Existence of the Office of Governor-General, and 'Headship of State' ...	1106
III	The Occupants of the Office	1108
IV	Sources of Advice	1111
V	Conclusion	1116

I INTRODUCTION

March 2014 saw events to farewell and thank Dame Quentin Bryce on her retirement as Governor-General, and the swearing-in of her successor, General (now Sir) Peter Cosgrove. I have no doubt that, while wishing the new Governor-General well, Sir Zelman Cowen would celebrate the great success in office of Dame Quentin Bryce, and think that the office of Governor-General was handed on in good shape.

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The title of this short paper, ‘The Office of Governor-General’, was the title given by Sir Paul Hasluck to his Queale Memorial Lecture delivered in Adelaide in October 1972, republished with additional material in 1979 after increased interest in the office arising from the 1975 constitutional crisis and its aftermath.¹ Sir Zelman himself published under the title ‘The Office of Governor-General’ in a symposium on Australia published in 1985 in *Daedalus*, the journal of the American Academy of Arts and Sciences.²

Sir Zelman’s paper began with much discussion of the then relatively recent circumstances that gave the Governor-Generalship prominence in 1975; so I thought that I might similarly begin with some assessment of developments of recent years relating to the office of Governor-General. I then want briefly to discuss three aspects of the office: first, its existence, and the notion of the headship of state; secondly, occupants of the office; and thirdly, sources of advice to the Governor-General.

In a public lecture on ‘The Crown and Australia’ in London in 1987, presided over by Sir Zelman Cowen, I argued that there had been ‘a very considerable “Australianization” of the Crown’.³ This was reflected in four major developments in the 20th century:

the abandonment of any imperial role for the Governor-General; the appointment of the Governor-General on the advice of the Australian Prime Minister; the appointment of Australians as Governor-General; and [what I called] the ‘Australianization’ of the Queen.⁴

The latter point was illustrated by what Prime Minister Gough Whitlam said in moving a vote of thanks to Governor-General Sir Paul Hasluck for opening the Constitutional Convention of 1973. Mr Whitlam said of the Governor-General:

He holds a great office; he represents the Head of State of our nation. In this century how much that office has grown. The first Governor-General swore fealty to the Queen of the United Kingdom of Great Britain and Ireland. Henceforth the Governor-General will swear fealty to the Queen of Australia and her

¹ Sir Paul Hasluck, *The Office of Governor-General* (Melbourne University Press, 1979).

² Sir Zelman Cowen, ‘The Office of Governor-General’ (1985) 114(1) *Daedalus* 127.

³ D J Markwell, *The Trevor Reese Memorial Lecture 1987: The Crown and Australia* (Australian Studies Centre, Institute of Commonwealth Studies, University of London, 1987) 10. A more recent balanced and judicious account may be found in Peter Boyce, *The Queen’s Other Realms: The Crown and Its Legacy in Australia, Canada and New Zealand* (Federation Press, 2008); see especially at chs 6, 9.

⁴ Markwell, *The Crown and Australia*, above n 3, 15.

other Realms and Territories, Head of the Commonwealth. In this office and in those titles is shown the development of our nation.⁵

Much has, of course, happened in the 27 years since that reference to the ‘Australization’ of the Crown, including ‘the evolution of the office of Governor-General to one much more distinctly Australian’,⁶ with ‘the Crown ... developing an Australian identity in line with the growth of Australia as a nation’.⁷ There has, of course, been the rise and the near-triumph, especially in the 1990s, of republicanism, now in some form of abeyance. But I also think that we have seen the consolidation of the office of Governor-General as one that is widely respected and valued in Australian constitutional, ceremonial, and perhaps especially community life. One sign of this consolidation is that so much was made in early 2014 of the retirement of Dame Quentin Bryce and of valuing her contribution, and of the appointment of Sir Peter Cosgrove as her successor.

By ‘consolidation’ I do not mean consolidation *against* republicanism. I mean that I think we have come as a nation more fully to respect and appreciate a distinguished Australian serving in our nation’s highest office and playing, as I have said, a valued constitutional, ceremonial, and especially community role. The office has been consolidated as a de facto headship of state which could, I think quite readily, convert to a respected presidency.

This consolidation of the office of Governor-General in the decades since it became generally accepted that — royalty perhaps excepted — only an Australian would serve as Governor-General, and since the tumult of 1975, has of course seen its own ups and downs: what seem from a distance to have been the ‘touch of healing’ of Sir Zelman Cowen (1977–82), the further calming and dignified energy of Sir Ninian Stephen (1982–89), the initially controversial but then largely quiet years of Mr Bill Hayden (1989–96), the energetic — some say too energetic — focus of Sir William Deane on Indigenous issues and reconciliation and the clever symbolism of the Deane years (1996–2001), the controversy that unfairly engulfed Dr Peter Hollingworth (2001–03),⁸ the stabilisation and energetic if unobtrusive conscientiousness of Major General Michael Jeffrey (2003–08), and the vibrant inclusiveness of Dame Quentin Bryce (2008–14). Prime Minister Abbott recently said: ‘No one

⁵ Ibid 10.

⁶ Ibid 4.

⁷ Ibid 25.

⁸ See, eg, Boyce, above n 3, 197–201.

has added more to the office than the current Governor-General [Dame Quentin Bryce] who has lent enormous grace and style to our national life'.⁹

Before discussing aspects of the Governor-Generalship of Dame Quentin Bryce, I ought to issue the disclaimer that it is always possible that my views are influenced by the fact that she was my tutor in administrative law at the University of Queensland in, I think, 1979. She has been remarkably kind in keeping in touch at many points over the subsequent decades. Like Sir Zelman Cowen, she has a great gift for friendship and for mentorship, and for nurturing her students — even decades on.¹⁰

Dame Quentin Bryce left office to very widespread acclaim for having, in the words of the Prime Minister, 'discharged her duties as Governor-General with distinction and grace'.¹¹ Others have commented on her ability to combine both empathy and dignity, and on her effective inclusiveness. The tributes to her from so many groups and individuals throughout Australia show how effectively she has acted as encourager and affirmer of countless activities around the country, including those in her particular interests of women and children, and human rights.

Dame Quentin Bryce has sought, in her own words in the Boyer Lectures in late 2013 (reiterated in her farewell speech at Parliament House in March 2014), 'to strike a balance between observing traditions and protocol and being thoroughly contemporary'.¹² Those Boyer Lectures also, of course, reflect progressive instincts and advocacy on her part which some more conservative Australians do not welcome. This was, of course, especially true of the closing words of the Lectures in which she imagined a future Australian nation '[w]here people are free to love and marry whom they choose. And where, perhaps, my friends, one day, one young boy or girl may grow up to be our nation's first head of state'.¹³

While the apparent endorsement by the incumbent Governor-General of gay marriage and of a republic seemed to some as entering too far into controversy, and indeed of disowning the office in which she was serving, others warmly welcomed these and other statements. They may reflect in our

⁹ Tony Abbott, 'Press Conference' (25 March 2014) <<https://www.pm.gov.au/media/2014-03-25/press-conference-parliament-house-canberra>>.

¹⁰ See Donald Markwell, *Instincts to Lead: On Leadership, Peace, and Education* (Connor Court, 2013) 102–6.

¹¹ Tony Abbott, 'Appointment of the Governor-General' (Media Release, 28 January 2014) <<https://www.pm.gov.au/media/2014-01-28/appointment-governor-general>>.

¹² Dame Quentin Bryce, *Boyer Lectures 2013: Back to Grassroots* (HarperCollins, 2013) 74.

¹³ *Ibid* 87.

time what Sir Paul Hasluck in his Queale Memorial Lecture had in mind when he said: 'I have received encouraging indications ... that Australians both expect and appreciate statements by a Governor-General on matters of current concern at a level different from that of party political controversy'.¹⁴

My understanding is that Governor-General Bryce sent the text of her Boyer Lectures to the Prime Minister well in advance of delivery, and that he expressed no unhappiness with her proposed words. He spoke well of her when she was attacked for these particular remarks. I return later to the notion of the 'headship of state', on which Dame Quentin's formulation ('our nation's first head of state') is somewhat surprising.

There is no doubt in my mind that Dame Quentin Bryce has been extremely successful in her speech-making, honouring and delighting audiences around the country and overseas with carefully prepared speeches which reflect both human empathy and considered thought. I cannot imagine that, in her focus on her speech-making, Dame Quentin was uninfluenced by the example, which she knew well, of Sir Zelman Cowen. He, of course, gave such care to his speeches that three volumes of his speeches from his years as Governor-General were published under the title *A Touch of Healing*.¹⁵ As I mentioned at Sir Zelman's funeral, Dame Quentin Bryce knew of his genius as a speaker from at least when in the 1970s she invited him, at little notice, to give a lecture to one of her lecture groups in the Law School at the University of Queensland, and he gave what she described as the best lecture she ever heard anyone give.¹⁶ In her speech-making, I think that Dame Quentin Bryce has undertaken the role of the Governor-General described in words variously attributed to Sir Zelman and to Sir Ninian Stephen as 'interpreting the nation to itself'.¹⁷ Her speech-making, travelling around Australia embracing community groups and diverse individuals, and welcoming so many to Yarralumla and Admiralty House, have helped her fulfil this role. I especially note her acceptance of the Patronage of the New Colombo Plan after it was

¹⁴ Hasluck, above n 1, 23.

¹⁵ See W G Walker (ed), *A Touch of Healing: Speeches by Sir Zelman Cowen 1977-1982 — Society* (University of Queensland Press, 1986) vol I; M D Kirby (ed), *A Touch of Healing: Speeches by Sir Zelman Cowen 1977-1982 — Law and Society* (University of Queensland Press, 1986) vol II; H S Houston (ed), *A Touch of Healing: Speeches by Sir Zelman Cowen 1977-1982 — Education and Society* (University of Queensland Press, 1986) vol III.

¹⁶ Markwell, *Instincts to Lead*, above n 10, 88.

¹⁷ See, eg, *ibid* 93.

clear that it had bipartisan support (a Patronage enthusiastically continued by her successor, Sir Peter Cosgrove).¹⁸

A number of other episodes from Dame Quentin's tenure as Governor-General merit mention. She was criticised for travelling to several African countries as Governor-General by critics concerned that she may have sought to encourage support for Australia's bid for a seat on the United Nations Security Council.¹⁹ Whatever criticisms may be made of that bid, it seems to me they should be directed at the government of the day, not at the Governor-General. Sir Paul Hasluck in his Queale Memorial Lecture spoke of what were then still early precedents of a Governor-General representing the country overseas — in Sir Paul's case, at the 2500th anniversary celebrations of Iran's imperial dynasties (less than eight years before the overthrow of the Shah, of course). Over subsequent decades, the ability of a Governor-General usefully to represent Australia overseas has, I think, become well-established.

In late 2013, the unusual circumstance arose that a son-in-law of the Governor-General became Leader of the Opposition. It is obviously not sustainable for long to have such a situation. My view is that the Governor-General acted wisely in offering to resign, and that Prime Minister Abbott acted wisely in declining that offer, given that the Governor-General had agreed to the extension of her term to see the country through an election, that she would serve only for a few further months, and that no matter calling for exercise of a vice-regal discretion was likely to arise in that time.

A brief note on the extension of Dame Quentin Bryce's term: there is strictly speaking no term of office for the Governor-General, who serves at Her Majesty's pleasure. But the practice has been to regard the appointment as being for approximately five years, and Dame Quentin Bryce's term was extended by a little over six months beyond that, so that her term — which commenced in September 2008 — did not end around the date of the September 2013 election. I believe that she agreed to serve longer than five years to see the nation through a period of political instability and intensity.

¹⁸ For the speeches at New Colombo Plan events by both Governors-General, see Quentin Bryce, 'Speech on the Occasion of the Launch of the Colombo Plan' (Speech delivered at Launch of the Colombo Plan, Parliament House, Canberra, 10 December 2013); Sir Peter Cosgrove, 'Speech on the Occasion of the New Colombo Plan Scholarship Presentation Dinner' (Speech delivered at New Colombo Plan Scholarship Presentation Dinner, Canberra, 25 June 2014).

¹⁹ Troy Bramston, 'Abbott Stands to Gain as Cosgrove Steps Up', *The Australian* (Sydney), 25 March 2014, 10.

Earlier in her Governor-Generalship, of course, there was a real risk that the Governor-General might have to exercise her individual discretion or reserve powers. When the 2010 election failed to produce a majority government, had it not become clear through the statements of Independent and Green Members of Parliament which leader could command the confidence of the House, the Governor-General might have been faced with difficult choices: though my own view is that she would in that case have been right to allow the incumbent Prime Minister to test on the floor of the House whether she could command its confidence. I will return to the 2010 post-election episode.

As the leadership question resurfaced within the Government from time to time during the years 2010–13, it was also evident that the Governor-General might conceivably be faced with a need to exercise an independent discretion. This might have arisen had, for example, the incumbent Prime Minister, facing loss of the leadership of her own party, sought the dissolution of the House of Representatives to pre-empt a leadership challenge to herself. This did not happen; but, as will be discussed further later, when Mr Rudd replaced Ms Gillard as Leader of the Labor Party in June 2013, with the Labor government in a minority and dependent on Independent and Green Members of Parliament in the House of Representatives, the Governor-General did have the question of whether to commission Mr Rudd as Prime Minister and, if so, on what conditions if any. These circumstances show that on appointment and dismissal of Prime Ministers, and regarding dissolution of the House of Representatives and (I should add) regarding a double dissolution, the Governor-General retains an individual discretion or reserve power — infrequently arising, but crucial when it does. I would add that I think it is an element of wise statesmanship for political leaders to act so as to minimise, and if possible wholly to avoid, the need for the exercise of that discretion, because its exercise is almost always liable to be divisive.

At the time of Dame Quentin's retirement as Governor-General, a newspaper columnist pointed to two instances in which, in his view, the office of Governor-General may have been shown inadequate respect by Prime Minister Gillard: Ms Gillard announcing in January 2013 what she intended to be the election date in September 2013 without prior consultation with the person who would in fact need to dissolve the House of Representatives, the Governor-General; and the announcement of the sacking of a minister, Simon Crean, in March 2013 without reference to the Governor-General whose

unhappy lot it was formally to undertake that dismissal.²⁰ I think that both criticisms are justified, but I do not think there is much likelihood that the prescription of the writer — the Prime Minister treating the Governor-General as a sort of mentor-confidant — is likely to be sustained for long, even if there is between Prime Minister Abbott and Governor-General Cosgrove that ‘tightness of confidence and ready communication’ which Sir Paul Hasluck said existed between him as Governor-General and his three Prime Ministers (Gorton, McMahon, and Whitlam).²¹ Sir Zelman thought that Australian Prime Ministers just were not interested in, for example, the kind of regular conversations that British Prime Ministers have with the Queen.²²

The re-creation in March 2014 of the titles of Dames and Knights in the Order of Australia, with Dame Quentin Bryce the first new Dame and her successor to be the first new Knight, attracted much comment, both favourable and critical. One aspect worth mentioning is that, for as long as this practice lasts, it is likely to resolve the question of title for a Governor-General. Indeed, in making the announcement, Prime Minister Abbott said that ‘[b]y virtue of appointment as Governor-General, henceforth the Governor-General will be a Knight or a Dame in the Order of Australia’.²³ When Archbishop (as he then was) Peter Hollingworth was announced as Governor-General, Sir Zelman Cowen was not alone in puzzling over what title he would use; neither ‘Bishop’ nor ‘Mr’ seemed right. Sir Zelman regarded the award to Archbishop Hollingworth of a Lambeth doctorate so that he was then styled ‘Dr Hollingworth’ as a fitting solution.²⁴ This may seem trivial to some, but in Sir Zelman’s view, I believe, it affected the respect and warmth with which the new Governor-General was likely to be received, or not received, in diverse parts of the community. Some have expressed the view that it is better for the new Governor-General to be Sir Peter Cosgrove than ‘Governor-General General Peter Cosgrove’.

On her retirement, Dame Quentin Bryce returned to her hometown, Brisbane, where she is basing her office at the Queensland University of Technology, with the intention of taking part in a range of activities there. Especially given her academic background, and her commitment to students,

²⁰ Ibid.

²¹ Hasluck, above n 1, 32.

²² Sir Zelman Cowen, *A Public Life: The Memoirs of Zelman Cowen* (Miegunyah Press, 2006) 321–4.

²³ Abbott, ‘Press Conference’, above n 9.

²⁴ See Boyce, above n 3, 199.

this seems particularly fitting. It raises the issue of what activities it is appropriate for a former Governor-General to undertake.

In 1979 notes additional to his Queale Memorial Lecture, written after controversy about Sir John Kerr's abortive appointment as Australia's Ambassador to the United Nations Educational, Scientific and Cultural Organization, Sir Paul Hasluck wrote:

As for further appointments after retirement I take a narrow view that for an Australian the Governor-Generalship is the apex. There is no office higher than it and one should not go below it. ... Furthermore, as in the case of a person like a Chief Justice, a Governor-General would imperil the reputation for detachment and independence necessary for his office if it were to appear that he was under an obligation to anyone or was inclined by his own hopes to seek special consideration in the future. While I take this strict view about appointment to new offices after retirement, it would not seem to me to be either inappropriate or improper for a retired Governor-General to accept public engagements [he mentioned public lectures as an example] which do not place him under an obligation or make him subject to the direction of another authority.²⁵

Sir Zelman rightly regarded his appointment as Provost of Oriel College, Oxford, in 1982 as 'solving' the post-retirement problem, and on his and Lady Cowen's return to Australia in 1990, he was again active in Australian public, academic, and commercial life. Sir Ninian Stephen in his retirement represented Australia diplomatically and took part in international judicial and other activities. It seems accepted that a former Governor-General may rightly have an active retirement, continuing to contribute to Australian life but not taking a role which they might have sought from the government when in office.²⁶ Dame Quentin Bryce's retirement plans seem well-fitted to this — though I suspect that she will sometimes stir controversy on issues close to her heart through her advocacy and activism.

II THE EXISTENCE OF THE OFFICE OF GOVERNOR-GENERAL, AND 'HEADSHIP OF STATE'

Had this conference been held 15 years ago, we would undoubtedly have been considering the high possibility that the office of Governor-General would be replaced by the office of President under the republican model presented to

²⁵ Hasluck, above n 1, 46–7.

²⁶ Interesting discussions are in Boyce, above n 3, 138–40, 195–6.

the referendum of November 1999. This is not the place to detail the ups and downs of Australian republicanism since 1788, or since 1975, or since Prime Minister Keating's powerful advocacy of it — in which he convinced, amongst others, Sir Zelman Cowen that Australia's head of state should be, in Keating's words, 'one of us'.²⁷ Nor is this the place to discuss why opinion polls suggest that support for a republic is at its lowest level in about 20 years, including how much such current sentiment may be attributable to the popularity of Prince William, the Duchess of Cambridge, and Prince George.

In this long debate, at present largely in abeyance, one proposition has been asserted that Sir Zelman Cowen strongly disputed. This is the proposition that, in the words of the distinguished former Official Secretary to successive Governors-General, Sir David Smith, '[t]he Governor-General is Australia's head of state'.²⁸ I quoted Gough Whitlam earlier as saying that the Governor-General 'represents the Head of State of our nation'.²⁹ Sir Paul Hasluck in his Queale Memorial Lecture also treated it as clear that the Queen is our head of state. In describing the role of the Governor-General, he quoted s 61 of the *Constitution*:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth.³⁰

Sir Paul spoke of 'an Australian Governor-General, representing and acting on behalf of the Australian head of state, the Queen'.³¹

In his 1985 *Daedalus* paper on 'The Office of Governor-General', Sir Zelman Cowen wrote:

The Commonwealth constitution recognized the queen as head of state and the governor-general as her representative, charged with the performance of a variety of functions assigned by her. The constitution, however, vested important functions in the governor-general *without* reference to the queen, and these in-

²⁷ Cowen, *A Public Life*, above n 22, 378; see at 374–81. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 7 June 1995, 1435 (Paul Keating).

²⁸ Sir David Smith, *Head of State: The Governor-General, the Monarchy, the Republic and the Dismissal* (Macleay Press, 2005) 85.

²⁹ See above n 5 and accompanying text.

³⁰ *Constitution* s 61, quoted in Hasluck, above n 1, 11.

³¹ Hasluck, above n 1, 24.

cluded power to appoint and dismiss ministers, to summon, prorogue, and dissolve Parliament, and to appoint judges.³²

Sir Zelman referred to the 1975 dismissal, and said: ‘On November 12, 1975, the Speaker of the House of Representatives, which had been dissolved the previous day, made an approach to the queen as head of state of Australia’.³³ Sir Zelman continued: ‘While the queen is unquestionably head of state and the governor-general her representative, the power to dismiss ministers is one which, by the constitution, is specifically vested in the governor-general’.³⁴

I quote Whitlam, Hasluck, and Cowen at length on the point to show that the classical view is that the Queen is Australia’s head of state, and the Governor-General her representative. But in the republican debates of the 1990s, it came to be argued that Australia does not need to change to a republic to achieve an Australian head of state because we already have one: the Governor-General. Hence Sir David Smith’s statement that ‘the Governor-General is [our] head of state’.³⁵

I would argue that, in any strict constitutional meaning of the term ‘head of state’, the Queen is Australia’s head of state — so to speak, *de jure* — but that the Governor-General has come to play such a role in our national life that the Governor-General has become day-to-day our *de facto* head of state.

III THE OCCUPANTS OF THE OFFICE

In considering the desirable attributes of a person to be appointed as Governor-General, it is useful to start with observations of Sir Paul Hasluck in his Queale Memorial Lecture:

I have spoken on the assumption that Governors-General will be active and I fervently hope that Australia in the future will never have the misfortune to have an inactive one. It will also be plain that an active Governor-General would need to have some knowledge of both the theory and practice of government and the more he [or she] knows of Australian usage and of the Australian constitutional background and the Australian administrative structure the better he [or she] will be able to do his [or her] job. I fervently hope that Australia in the future will always have the good fortune to have Govern-

³² Cowen, ‘The Office of Governor-General’, above n 2, 132 (emphasis in original).

³³ *Ibid.*

³⁴ *Ibid.* 133.

³⁵ Smith, above n 28, 85. See also Boyce, above n 3, 28–9, 216–17.

General with some experience of the working of government. To be an eminent citizen is not a full enough qualification for this post. That does not mean that I suggest that every Governor-General has to be a specialist or an expert in public administration. His [or her] role requires qualities that would enable him [or her] to consider wisely advice given to him [or her], rather than to try to tell others what to do. ... He [or she] has to be free of partisanship. He [or she] cannot start promoting particular causes, for his [or her] dominant role is as one who uses his [or her] influence to ensure that there is care and deliberation, a close regard both for the requirements of the law and the conventions of the *Constitution* and for the continuing interests of the whole nation, and that the government which the Australian people choose should be a stable government acting consistently and responsibly.³⁶

In his notes additional to the Queale Memorial Lecture, Hasluck recounted how in 1973, when Prime Minister Whitlam was wondering whom to nominate to succeed him as Governor-General, he had written down some names meant 'to be suggestive of various classes of persons who might be considered'.³⁷ Hasluck wrote:

The categories I discussed were: Ministerial; judiciary; academic; big business and men prominent in public movements; trade unions. In our previous conversations any idea of making an appointment from among the Governors of the States or from military circles had been discarded so those two categories were omitted.³⁸

The suggestion has more recently been made that the best Governors-General are former military personnel or former judges. It is possible that the basis of this judgement includes a survey of the occupants or former occupants of state Governorships as well as the Governor-Generalship. To consider this judgement would require comparing the Governors-General who are Australians and who have been judges or career military personnel (Isaacs, Kerr, Stephen, Deane, Jeffrey, and now Cosgrove) and those who have not (McKell, Casey, Hasluck, Cowen, Hayden, Hollingworth, and Bryce).

³⁶ Hasluck, above n 1, 21–2. Hasluck's view of the Governor-Generalship has been criticised by some as requiring too active a role: see, eg. Boyce, above n 3, 127–8. For an interesting recent (if brief) account of the views of the great Canadian constitutionalist (and socialist), Eugene Forsey, see Helen Forsey, *Eugene Forsey: Canada's Maverick Sage* (Dundurn, 2012) 77–81, 316–20.

³⁷ Hasluck, above n 1, 44.

³⁸ *Ibid* 44–5.

Other issues that arise regarding whom to appoint include whether there is advantage in appointing a former state Governor (Michael Jeffrey and Dame Quentin Bryce are the only Australians to have been appointed Governor-General after serving as a state Governor, as some of the British Governors-General also were); whether to appoint former politicians (such as Isaacs, McKell, Casey, Hasluck, and Hayden,³⁹ and several of the British Governors-General, some of whom returned to active political life in the United Kingdom after serving in Australia); whether it is appropriate or wise to appoint clergy (Archbishop Peter Hollingworth being the only clergyman appointed Governor-General of Australia, with precedents at the state level in Australia such as Pastor Sir Douglas Nicholls in South Australia and Rev Dr Davis McCaughey in Victoria, and Archbishop Sir Paul Reeves in New Zealand); and whether to appoint a member of the Royal Family as Governor-General (the Duke of Gloucester providing the precedent, but the opposition to the appointment of Prince Charles as Governor-General decades later suggesting this is unlikely in future, even with as popular a figure as Prince William).

In addition to the attributes which Sir Paul Hasluck described, it is now likely to be thought desirable to emphasise that a nominee for the Governor-Generalship be someone able to engage the Australian community, and 'interpret the nation to itself'. Sir Zelman Cowen is a clear exemplar of this; he had for many years been prominent in Australian public life, including through extensive media and public speaking engagements.⁴⁰ Hasluck's warning against partisanship (which does not preclude past political service) and the narrow advocacy of particular causes remains apposite. Clearly in the selection of the person to nominate to the Queen, some Prime Ministers will be more concerned than others to use the office to reflect the diversity of modern Australia; Governors-General of Australia appear to have come from less diverse backgrounds than those of Canada and New Zealand.⁴¹ We have heard little in recent times of the notion, once considered traditional and necessary, that in the selection of the Governor-General there be informal conversations between the Prime Minister and the Queen.⁴²

³⁹ Three of the five have been Foreign Minister. Interesting evidence of Sir Robert Menzies's sustained opposition to appointing a person direct from active politics is evident in Heather Henderson (ed), *Letters to My Daughter: Robert Menzies, Letters, 1955–1975* (Pier 9, 2011) 206–9.

⁴⁰ See Markwell, *Instincts to Lead*, above n 10, 88.

⁴¹ See Boyce, above n 3, 197.

⁴² For a recent addition to knowledge of Menzies's approach, see Henderson, above n 39, 29. A valuable discussion of the appointment process is in Boyce, above n 3, 121–4.

IV SOURCES OF ADVICE

Since the 1975 dismissal, there has been considerable controversy about the appropriate sources of advice for a Governor-General in the exercise of his or her discretions. During the 1975 constitutional crisis, the Governor-General consulted both the Chief Justice of the High Court, Sir Garfield Barwick, and another High Court judge (later Chief Justice), Sir Anthony Mason.⁴³ Both encouraged the Governor-General in his decision that, if the Prime Minister did not advise the dissolution of the House of Representatives, he should be dismissed and a caretaker Prime Minister appointed who would advise a dissolution and the holding of an election. The propriety and wisdom of these consultations have been much debated, even fiercely so.

It is interesting to consider attitudes prior to 1975 on the appropriateness of the Governor-General consulting judges. Sir Paul Hasluck wrote that in 1972 he 'asked a friend eminent in the law to read the manuscript' of his Queale Memorial Lecture 'lest I had made any gross errors'.⁴⁴ My understanding is that this was Sir Garfield Barwick, then Chief Justice of the High Court. It is likely that Hasluck knew that Barwick had advised the Governor-General, Lord Casey, in December 1967 about whom to appoint as Prime Minister after the disappearance of Prime Minister Holt. Hasluck said that in a situation where the Prime Minister requests a premature dissolution of the House of Representatives

[i]t is open to the Governor-General to obtain advice on the constitutional question from other quarters — perhaps from the Chief Justice, the Attorney-General or eminent counsel — and then a solemn responsibility rests on [the Governor-General] to make a judgment on whether a dissolution is needed to serve the purposes of good government by giving to the electorate the duty of resolving a situation which Parliament cannot resolve for itself.⁴⁵

In the recurrent controversy since 1975 over the appropriateness of the Governor-General consulting High Court judges, reference has been made to research showing the very extensive consultation of early High Court judges, specifically Chief Justice Sir Samuel Griffith and Sir Edmund Barton, by

⁴³ The involvement of Sir Anthony Mason was revealed in January 1994 by Sir Garfield Barwick and Mr Gerard Henderson. The publication of Jenny Hocking, *Gough Whitlam: His Time — The Biography* (Miegunyah Press, 2012) vol II, 304–7, discussing Kerr's consultation of Mason, added less to public knowledge than was claimed by some.

⁴⁴ Hasluck, above n 1, 1.

⁴⁵ *Ibid* 15.

successive Governors-General.⁴⁶ These instances included occasions in 1904 and 1909 when the Prime Minister had lost the confidence of the House of Representatives and advised the dissolution of the House, and the Governor-General rejected this advice and, on the resignation of the incumbent Prime Minister, appointed a new Prime Minister. It also included, amongst many other cases, the 1914 dissolution of both Houses of Parliament, and the abortive suggestion that this double dissolution be reversed (and the old Parliament restored) on the outbreak of World War I. Research on these and several other cases of advice from judges to Governors-General and Governors was in part inspired by private comments of Sir Zelman Cowen to the current writer.⁴⁷

In 2009, the current Chief Justice of the High Court, Chief Justice Robert French, quoted extensively from this and other research before concluding a discussion on ‘The Chief Justice and the Governor-General’ in these terms:

it is difficult to conceive of circumstances today in which it would be necessary or appropriate for the Chief Justice to provide legal advice to the Governor-General on any course of action being contemplated by the holder of that office, whether such advice were tendered with the prior consent of the government of the day or otherwise. If, in some constitutional crisis requiring consideration of the possible exercise of reserve powers, the Governor-General felt the need to seek independent legal advice, there are plainly sources other than the Chief Justice to whom he or she could resort. Indeed, it might be that some agreed mechanism could be established against the rare event that it is thought desirable to have access to independent counsel. A small group of independent experts, perhaps even including one or more retired Justices of the High Court, could be established for the purpose.⁴⁸

Chief Justice French quoted a eulogy for Sir Garfield Barwick in 1997 in which Sir Gerard Brennan, then Chief Justice, said of Barwick’s tendering of advice to Sir John Kerr: ‘It was, and remains, a controversial matter but, if only on that account, will not happen again’.⁴⁹ Chief Justice French said that he agreed with ‘that sentiment’.⁵⁰

⁴⁶ Don Markwell, ‘Griffith, Barton and the Early Governor-Generals: Aspects of Australia’s Constitutional Development’ (1999) 10 *Public Law Review* 280.

⁴⁷ Markwell, *Instincts to Lead*, above n 10, 91–4.

⁴⁸ Chief Justice Robert French, ‘The Chief Justice and the Governor-General’ (2009) 33 *Melbourne University Law Review* 647, 656.

⁴⁹ *Ibid*, quoting ‘The Late Sir Garfield Barwick’ (1997) 187 CLR v, viii.

⁵⁰ Chief Justice French, above n 48, 656.

Nothing has come of the suggestion, made by Chief Justice French and by others from time to time, that a panel of advisers for the Governor-General be nominated. It should be evident from the frequency with which Governors-General have felt the need for independent advice (very many times in the early decades of federation, from time to time over subsequent decades, and at least twice in the case of Governor-General Bryce, in August 2010 and June 2013, as will be discussed below) that this is not necessarily best characterised as being a 'rare' need.

The fact that unexpected circumstances can arise on which the Governor-General reasonably believes that they need independent advice was illustrated in August 2010 when the federal election produced a hung Parliament. A Parliamentary Secretary in the incumbent government was the Governor-General's son-in-law, Bill Shorten. On 23 August 2010, two days after the election, the Governor-General wrote to the Solicitor-General, Stephen Gageler SC,⁵¹ in these terms:

Dear Solicitor-General

Matters have arisen which have given me considerable concern about the exercise of very important obligations of my office under the *Constitution*.

It has been suggested in some quarters that the fact that my daughter is married to the Honourable Bill Shorten MP creates some sort of conflict of interest that might impugn my ability to carry out the functions of my office.

The issue of integrity and trust in the office is obviously of the utmost importance not only to me but to the Australian people.

I am therefore seeking your urgent advice as to whether these circumstances create any constitutional or other legal impediment to the proper exercise of my functions, particularly in the current circumstances where the outcome of Saturday's election remains to be determined and may involve me as the Governor-General playing some role.

Yours sincerely,

Quentin Bryce.⁵²

On 26 August 2010, the Solicitor-General provided an opinion to the Governor-General saying that 'the marriage of her daughter to Mr Shorten gives rise to no constitutional or other legal impediment to the proper

⁵¹ Later appointed a Justice of the High Court of Australia.

⁵² Letter from Quentin Bryce to Stephen Gageler, 23 August 2010 <<https://www.gg.gov.au/media-release/advice-solicitor-general-governor-general-her-excellency-ms-quentin-bryce-ac>>.

discharge of her functions of office'.⁵³ He observed, however, that 'connections and relationships' between a Governor-General and Members of Parliament 'fall to be managed as a matter of prudence, not of legal obligation or legal impediment'.⁵⁴ Mr Gageler pointed out that the functions of the Governor-General could be temporarily vested in an Administrator,⁵⁵ or a Deputy whom the Governor-General could appoint.⁵⁶

The next day, the Governor-General's letter and the Solicitor-General's opinion were made public on the Governor-General's website.⁵⁷ It is a matter for judgement as to whether the Governor-General asked the right question of the right person, whether she received the most appropriate advice in the circumstances, and whether she acted most prudently in the circumstances in herself handling the commissioning of the Prime Minister in a hung Parliament in which her son-in-law was a frontbencher, rather than leaving the matter to an Administrator or a Deputy. In the event, it became clear through the statements of the Independent and Green Members of Parliament as to which leader could command the confidence of the House, and the Governor-General commissioned that leader, Ms Gillard, as Prime Minister.

In June 2013, Prime Minister Gillard was defeated by her predecessor, Kevin Rudd MP, in a ballot for the leadership of the Australian Labor Party. Ms Gillard, whose minority government depended on the votes in the House of Representatives of a number of Independent and Green Members of Parliament, advised the Governor-General to commission Mr Rudd as Prime Minister. That evening, 26 June 2013, the Governor-General's Official Secretary wrote to the Acting Solicitor-General, Robert Orr QC, in these terms:

Dear Mr Orr

This is to confirm the meeting that took place at Government House this evening, at the Governor-General's request, in which she sought your advice as to the course of action she should take in responding to the Prime Minister's letter recommending that the Governor-General commission the Honourable Kevin Rudd MP as Prime Minister.

⁵³ Stephen Gageler, 'In the Matter of the Governor-General' (Opinion, SG No 33 of 2010, 26 August 2010) 4 [7] <https://www.gg.gov.au/sites/default/files/files/media/2010/SG_Letter_26_8_2010.pdf>.

⁵⁴ *Ibid* 4 [5].

⁵⁵ Typically the most senior State Governor.

⁵⁶ Gageler, above n 53, 3 [4].

⁵⁷ See above nn 52–3.

I would be grateful if you would confirm in writing your oral advice to Her Excellency that the Governor-General should commission Mr Rudd as Prime Minister based upon the Prime Minister's tendered advice.

I confirm the Governor-General's view conveyed to you, that it would be her intention, if your advice is to commission Mr Rudd as Prime Minister, that she seek an assurance that he will announce his appointment at the first possible opportunity to the House of Representatives in order to give the House the opportunity for whatever, if any, action it chooses to take.

Yours sincerely

Stephen Brady

Official Secretary to the Governor-General⁵⁸

The Acting Solicitor-General replied by letter that same evening. He confirmed that in his opinion the Governor-General should commission Mr Rudd as Prime Minister. He further stated that, though the Governor-General could seek an assurance from Mr Rudd that he would announce his appointment to the House of Representatives, it was his opinion that she could not require such an assurance nor make the appointment conditional on it; these latter views are, in my view, open to question. Mr Orr stated that he had consulted the Solicitor-General, Justin Gleeson SC, who 'agrees with this advice'.⁵⁹

The letters between the Governor-General's Official Secretary and the Solicitor-General were placed on the Governor-General's website.⁶⁰

It is striking that the Governor-General should, at least twice in three years, seek the counsel of the Solicitor-General or Acting Solicitor-General, and that in the second case she should handle this in part through correspondence through her Official Secretary. It should be noted that the 'advice' from the Acting Solicitor-General to which Mr Brady referred was 'advice' in the sense of informal counsel rather than official 'advice' such as given by Ministers and ordinarily regarded as ultimately binding on (though open to question by) the Governor-General. The wording of the Official Secretary's

⁵⁸ Letter from Stephen Brady to Robert Orr, 26 June 2013 <<https://www.gg.gov.au/media-release/advice-acting-solicitor-general-governor-general-honourable-quentin-bryce-ac-cvo-commissioning-new-prime-minister>>.

⁵⁹ Letter from Robert Orr to Stephen Brady, 26 June 2013 <<https://www.gg.gov.au/media-release/advice-acting-solicitor-general-governor-general-honourable-quentin-bryce-ac-cvo-commissioning-new-prime-minister>>.

⁶⁰ See *ibid*; above n 58.

letter which expressed the Governor-General's intention 'if your advice is to commission Mr Rudd as Prime Minister' should not be taken as meaning that she was in any way bound to act on the Acting Solicitor-General's advice; she most certainly was not. Nor, in my view, should it be treated as a settled matter that the optimal or necessary source of informal 'advice' to the Governor-General is the Solicitor-General. The Governor-General retains an independent discretion on sources of advice on matters on which she or he has an independent discretion.

In his Queale Memorial Lecture, Sir Paul Hasluck stressed his view that staff at Government House were not in any sense sources of advice on constitutional matters: 'If he [or she] wishes for guidance on any legal or constitutional points that may arise he [or she] will seek it from the Attorney-General or from eminent authorities of his [or her] choosing, and not from any staff of his [or her] own'.⁶¹ It is an interesting contrast, reflective of the growth of the significance of the role of the Official Secretary to the Governor-General in the intervening decades, that on her retirement as Governor-General in 2014, Dame Quentin Bryce paid a warm public tribute in these terms:

Stephen Brady, Official Secretary, has given first rate leadership and professionalism as adviser, sounding board and confidant to me.

I have learnt much from his acumen, experience and diplomatic skills.

Stephen has built the Office of the Official Secretary into an exemplary small agency where efficiency, accountability and transparency are hallmarks of performance.⁶²

V CONCLUSION

Sir Zelman Cowen set out as Governor-General to bring 'a touch of healing' to a divided nation after the 1975 constitutional crisis, including to restore the public standing of the position of Governor-General after much controversy. Dame Quentin Bryce set out as Governor-General 31 years later to balance the traditional and the contemporary in the office of Governor-General. That both individuals succeeded in these goals has contributed to what I have here

⁶¹ Hasluck, above n 1, 21.

⁶² Dame Quentin Bryce, 'Speech on the Occasion of Reception Hosted by the Prime Minister' (Speech delivered at Reception Hosted by the Prime Minister, Parliament House, Canberra, 25 March 2014). The growth of 'the Governor-General's establishment' is discussed in Boyce, above n 3, 140–3.

suggested has been the consolidation of the office of Governor-General into a mature and modern de facto headship of state exercised in distinctively Australian style, and handed on in 2014 in good shape. Time will tell whether the continuing evolution, modernisation and Australianisation of the office of Governor-General enables it to fulfil the hopes of an evolving Australia with its evolving Australian national identity, or whether the office of Governor-General is succeeded in time by the office of President. Sir Zelman Cowen and Dame Quentin Bryce are two who have held the office of Governor-General who have believed that such a change, on appropriate terms, would be a positive development for Australia.