# CHAPTER 5

# FUNCTIONS AND POWERS OF HEAD OF STATE

5.1 The next three chapters address term of reference (b), regarding alternative models for an Australian republic. Chapter 5 addresses the possible functions and powers of a republican head of state and related issues. Chapter 6 discusses possible methods for selection and removal of the head of state. Chapter 7 examines some of the key features of various alternative models for an Australian republic.

## Introduction

5.2 This chapter will examine the possible functions and powers of the head of state in an Australian republic (term of reference (b)(ii)). In this context, the Committee considered a number of issues including:

- who is our current head of state?
- what should a republican head of state be called?
- do we need a separate head of state?
- what role should a republican head of state play?
- what powers should a republican head of state have?
- should those powers and associated conventions be codified?
- should those powers be justiciable? And should the head of state be able to obtain independent advice? If so, from whom?
- the relationship between powers and the selection method; and
- the relationship of the head of state with the executive, the parliament and the judiciary.

5.3 While some of these issues are independent of any particular republican model, the answers to some of these questions may vary depending on the actual republican model supported, and particularly the method of selection of the head of state. However, it is useful to consider these issues separately prior to examining some specific republic models.

5.4 It is noted that, as outlined in previous chapters, many submissions suggested that, in the event of further progress towards an Australian republic, the details of the powers of the head of state and related issues should be decided as part of that process.

## Who is our current head of state?

5.5 A focus in the debate over Australia becoming a republic has been on replacing the Queen as head of state of Australia with an Australian head of state.

5.6 A number of submissions argued that Australia already has an Australian head of state: the Governor-General.[1] For example, Major-General 'Digger' James argued that:

> … when convenient, Australians and everybody seem happy to say that the occupant of Yarralumla [the Governor-General] … is our head of state ... If that is not convenient, those who do not like the present system say: "The head of state is not an Australian. We don't want a foreign head of state such as the Queen." The truth is that the Queen is not our head of state. She is the sovereign of the British Commonwealth, which includes Australia.[2]

5.7 Similarly, the submission from Sir David Smith specifically focussed on the argument that the Queen is the Sovereign and the Governor-General is the head of state.[3] Sir David Smith pointed to "a considerable body of constitutional and legal evidence that suggests that we already have an Australian head of state in the Governor-General".[4] According to Sir David Smith, the Queen's role under our Constitution is to approve the appointment of the Governor-General on the advice of the Prime Minister.[5] He then argued that the Governor-General has "two separate and distinct roles"[6] – that of the Queen's representative and a separate and independent role in the exercise of constitutional powers and functions.[7] Sir David Smith argued that the Governor-General is in "no sense a delegate of the Queen, but the holder of an independent office".[8] He also suggested that:

> It has never been explained how a President [of a republic] carrying out the duties, powers and functions of the Governor-General would be a head of state, but that a Governor-General carrying out the very same duties, powers and functions is not a head of state.[9]

5.8 Sir David concluded that:

> We have the Queen of Australia as our Sovereign. We have the Governor-General of Australia as our Head of State. We are a sovereign and

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1 See, for example, Sir David Smith, *Submissions 20 and 20A*; Sean O'Leary, *Submission 19*; Australians for an Informed Discussion on our Constitution (AIDC), *Submission 82*, pp. 4-6; Australian Monarchist League, *Submission 42*, p. 4; Festival of Light, *Submission 540*, pp. 3-4; Mr FS Hespe, *Submission 206*, p. 2; Australians for Constitutional Monarchy, *Submission 455*, p. 4; Professor David Flint, Australians for Constitutional Monarchy, *Committee Hansard*, 13 April 2004, p. 68.

2 *Committee Hansard*, 29 June 2004, p. 3.

3 *Submissions 20 and 20A*; and also *Committee Hansard*, 29 July 2004, p. 9.

4 *Submission 20A*, p. 1.

5 *Committee Hansard*, 29 July 2004, p. 13.

6 Ibid, p. 12.

7 Ibid, p. 9.

8 Ibid.

9 *Submission 20A*, p. 18.

> independent nation. If we can all agree on these three simple propositions … then we just may have the basis for a sensible debate about constitutional change …[10]

5.9 During the Committee's hearing in Canberra, Dr Bede Harris submitted that to argue that we already have an Australian head of state in the form of the Governor-General is, constitutionally, "nonsense".[11] At the Committee's request, Dr Bede Harris directly responded to Sir David Smith's submission. Dr Harris pointed out that:

> The term "Head of State" is not used in the Constitution. It is a political term which means whatever the user wants it to mean. … The fact that numerous constitutional scholars, judges, journalists and politicians have used the term … does not vest the term with any constitutional significance.[12]

5.10 Dr Harris also explained that:

> … the reason why a President would be a Head of State whereas the Governor-General is not, is simply because the office of President would incorporate the role of both monarch and Governor-General.[13]

5.11 Many other submissions similarly stated that the Queen is our head of state, not the Governor-General.[14] For example, Professor George Williams submitted:

> The Constitution makes it clear that the Queen lies at the apex of government. She is expressly vested with executive power by section 61. Where the Governor General is granted power, he exercises those responsibilities as her representative … Section 2 of the Constitution states that: "A Governor General appointed by the Queen shall be Her Majesty's representative in the Commonwealth." If the Governor General were our head of state, it would leave Australia in the anomalous position of having a head of state who is the representative of a foreign power.[15]

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10 Ibid, p. 26.

11 *Committee Hansard*, 29 July 2004, p. 33.

12 *Submission 93B*, p. 1.

13 Ibid, p. 2.

14 Dr Geoff Gallop, Premier of Western Australia, *Submission 73*, p. 1; Mr Bill Peach, *Submission 37*, pp. 4-5; Mr Andrew Cole, *Submission 41*, pp. 91-93; Mr Andrew Newman-Martin, *Submission 107*, pp.7-9; Mr David O'Brien, *Submission 126*, pp. 34; Mr Glenn Patmore, *Submission 534*, p.1; The Hon Michael Beahan, *Submission 334*, p. 3; Professor George Williams, *Submission 152*, p. 1; Mr Terry Fewtrell, *Submission 340*, p. 2; Associate Professor Kim Rubenstein, *Submission 484*, p. 1; Dr Bede Harris, *Submission 93*, p. 3 and *Committee Hansard*, 29 July 2004, p. 33; Sir Gerard Brennan, *Committee Hansard*, 13 April 2004, p. 19; Mr John Pyke, *Submission 512*, pp. 1-2; Dr Mark McKenna, *Committee Hansard*, 29 July 2004, p. 39; Mr Jon Stanhope MLA, ACT Chief Minister, *Submission 730*, p. 1.

15 *Submission 152*, p. 1; see also Dr Bede Harris, *Submission 93B*, p. 2.

5.12 Sir Anthony Mason, former Chief Justice of the High Court, has also described the statement that the Governor-General is our constitutional head of state as "incorrect" and turning "a blind eye to the express provisions of the Constitution".[16] After reviewing sections 2, 59, 58, 61 and 68 of the Constitution, Sir Anthony Mason concluded that:

> … it is "nonsense" to describe the Governor-General as "our constitutional head of State". The Constitution makes the Queen our constitutional head of State and specifically provides that the Governor-General is "the Queen's representative".[17]

5.13 Several submissions received by the Committee suggested that this debate is not particularly productive.[18] Some submissions argued that the real issue is whether or not the Queen should be removed from the Constitution, our system of government and national symbols.[19] Dr Bede Harris pointed out that "proponents of a republic object to the fact that the monarch of the United Kingdom is our sovereign and is the source of executive power".[20] Dr Mark McKenna explained further:

> … if we think more deeply about what a republic means and we dwell for a moment on the fact that the declaration of a republic does require the removal of the sovereignty of the Crown, one fact becomes clear. The instalment of an Australian head of state is a consequence of becoming a republic. It is not its rationale. A republican constitution is where the Australian people become explicitly the sovereign power. Under a republic it is not our head of state who is the sovereign, but the Australian people.[21]

5.14 Nevertheless, as mentioned earlier in this report, and as pointed out by several submissions, the debate may have implications for the wording or framing of any plebiscite question on a republic.[22] For example, Mr Eric Lockett stated:

> … it would be foolish in the extreme for those who favour us becoming a republic to couch their objectives in terms of having an Australian head of

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16 The Hon. Sir Anthony Mason, "The Republic and Australian constitutional development": paper presented to *The Republic: what next*? seminar, Australian National University, 11 May 1998, p. 2.

17 Ibid, p. 3.

18 Mr Brendan Egan, *Submission 511*, p. 1; Mr Eric Lockett, *Submission 354*, p. 2; Women for an Australian Republic, *Submission 476*, p. 16; Mr Chris Creswell, *Submission 515*, pp. 1-2; Mr Bill Peach, *Submission 37*, p. 5.

19 Mr Mike O'Shaugnessy, *Submission 329*, p. 3; Mr Eric Lockett, *Committee Hansard*, 20 May 2004, p. 6; Women for an Australian Republic, *Submission 476*, p. 16; Mr John Pyke, *Submission 512*, pp. 1-2.

20 Dr Bede Harris, *Submission 93B*, p. 2.

21 *Committee Hansard*, 29 July 2004, p. 39.

22 For example, see Dr Mark McKenna, *Submission 201*, p. 2 and *Committee Hansard*, 29 July 2004, p. 44; Mr Andrew Newman-Martin, *Submission 107*, p. 9; Mr Eric Lockett, *Committee Hansard*, 20 May 2004, p. 6; Women for an Australian Republic, *Submission 476*, p. 16.

> state. That would just muddy the waters with arguments about whether or not the Governor-General is our head of state.[23]

5.15 Similarly, Dr Mark McKenna argued that the phrase "Australian head of state" should not appear in any possible plebiscite question on a republic:

> … this idea that the Governor-General is an Australian head of state is a complete furphy. However, in the context of a referendum it is crucial to avoid, politically and strategically, giving people the opportunity to make that case ...[24]

5.16 On the other hand, Mr Bill Peach argued that the debate should not prevent a plebiscite question being put in words along the lines of: "Should we have an Australian head of state?".[25]

## Title of head of state

5.17 The Committee's discussion paper asked for views on the possible titles for a republican head of state.[26] In relation to this issue, the ARM remarked:

> This is a cosmetic, rather than a substantive issue. But some people feel strongly about it nonetheless.[27]

5.18 Evidence received by the Committee appeared divided between three options for the title of head of state – "President", "Governor-General" and "Head of State". Many submissions supported the title of "President", pointing out that the title "President" is used in many other republics.[28] It was also argued that "the role of the head of state will change, the way it is perceived by the Australian people will change and so must the title".[29]

5.19 Others were concerned that the title "President" implies power, which may be inappropriate for a non-executive President.[30] Some also suggested that the title of "President" "conjures up images of existing republics – many of which don't function

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23 *Committee Hansard*, 20 May 2004, p. 6.

24 *Committee Hansard*, 29 July 2004, p. 44.

25 *Submission 37*, p. 5.

26 Note that, although this report refers to the 'head of state' throughout, this does not suggest an endorsement or rejection of any particular title.

27 *Submission 471,* p. 24.

28 For example, Sir Gerard Brennan, *Submission 497*, p. 22; Republic Now!, *Submission 466*, p. 14; Australian Freedom Forum, *Submission 467*, p. 15; Dr Barry Gardner, *Submission 482*, p. 2.

29 Mr Dominic Pellegrino, *Submission 461*, p. 15.

30 Premier of New South Wales, *Submission 721*, p. 2; see also Professor George Winterton, *Submission 319*, p. 4.

as well as the Westminster system".[31] It was also pointed out that there may be some confusion with the President of the Senate.[32]

5.20 A considerable number of submissions supported the title of "Governor-General" for a republican head of state.[33] Some of the reasons for favouring this title included continuity and to avoid confusion with an executive–style presidency.[34] On the other hand, it was suggested that the title "Governor-General" would be inappropriate, particularly due to its ties to the monarchy and Australia's colonial past.[35] Dr Mark McKenna also argued that:

> On no account should it be Governor-General. This would allow monarchists to argue that republicans were asking the electorate to introduce an office that Australians already possessed.[36]

5.21 There was also significant support for the title "Head of State",[37] although some suggested that the term was "too bland" for such a significant office.[38]

5.22 Submissions also suggested that Indigenous Australians could put forward an indigenous title. For example, the ARM suggested that:

> … indigenous groups be consulted and invited to submit some appropriate indigenous titles for consideration.[39]

5.23 Other suggestions for the title of the head of state included: "Honorary President";[40] "Queen of Australia";[41] "Protector";[42] and "Premier-General".[43] Others expressed no particular preference.[44]

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31 Ms Shirley McKenzie, *Submission 694*, p. 1.

32 Mr John Flower, *Submission 447*, p. 6.

33 For example, Mr Andrew Cole, *Submission 41*, p. 14; Major Edward Ruston, *Submission 110*, p. 4; Dr Baden Teague, *Submission 538*, p. 9; Premier of New South Wales, *Submission 721*.

34 See for example ARM, *Submission 471,* p. 24.

35 See for example ARM, *Submission 471,* p. 24; Mr Howard Teems, *Submission 100*, p. 5; The Hon Michael Beahan, *Submission 334*, p. 5; Mr Dominic Pellegrino, *Submission 461*, p. 14; Mr Andrew Newman-Martin, *Submission 107*, p. 39.

36 *Submission 201*, pp. 2-3.

37 Mr John Kelly, *Submission 142*, p. 1; Mr Mark Collins, *Submission 138*, p. 2; Mr John Flower, *Submission 447*, p. 4; Ms Shirley McKenzie, *Submission 694*, p. 1; Ms Joan Dwyer, *Submission 530,* p. 1.

38 Mr Andrew Newman-Martin, *Submission 107,* p. 47.

39 *Submission 471*, p. 24.

40 Mr David Latimer, *Submission 519*, p. 43.

41 Mr Robert Vogler, *Submission 480*, p. 9.

42 Mr Andrew Newman-Martin, *Submission 107,* pp. 45-47.

43 Mr Andrew Newman-Martin, *Submission 107,* pp. 45-47.

5.24 As discussed earlier in this report, the Committee also heard evidence which suggested that the title of the head of state is a question that could be put to the Australian people in a plebiscite.[45]

## Functions of the head of state

### *Do we need a separate head of state?*

5.25 Although the Committee's terms of reference assume the existence of a designated head of state, some submissions argued that a separate head of state was not necessary.[46] This suggestion was considered in the past by the 1988 Constitutional Commission, and the 1993 Republic Advisory Committee, both of which concluded that a head of state should be maintained in our system of government – whether republican or monarchical.[47] The Advisory Committee on Executive Government, which was associated with the 1988 Constitutional Commission, concluded that:

> … a head of state, as a symbol of national identity, is an appropriate and desirable element in our system of government.[48]

5.26 The 1993 Republic Advisory Committee noted that, while the ceremonial functions of a head of state could readily be fulfilled by other officials, the Committee also considered that the role of a separate head of state can play an important role as a "constitutional umpire":

> … a separate head of state may be part of the checks and balances inherent in the system of government, preventing too great an accumulation of power, or even prestige, in the hands of a Prime Minister and the Executive.[49]

5.27 Nevertheless, some submissions to this inquiry suggested that in the move to a republic, an executive-style presidency, with a combined head of state and head of

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44 For example, Mr Peter Bishop, *Submission 113*, p. 5.

45 See for example, Mr Bill Peach, *Submission 37*, p. 9; ARM, *Submission 471*, p. 24; Women for an Australian Republic, *Submission 476*, p. 9; Mr Eric Lockett, *Committee Hansard*, 20 May 2004, p. 9; Mr Richard Fidler, ARM, *Committee Hansard*, 13 April 2004, p. 28; Mr Bill Peach, *Committee Hansard*, 13 April 2004, p. 47.

46 For example, Mr Andrew Nguyen, *Submission 246*, p. 6; Dr Brian Regan, *Submission 696*, pp. 2-3.

47 *Final Report of the Constitutional Commission,* Canberra, 1988, p. 314; *Report of the Advisory Committee on Executive Government to the Constitutional Commission,* Canberra Publishing and Printing Co., Canberra, 1987*,* p. 2; Republic Advisory Committee, *An Australian Republic: the options* (RAC Report), Volume 1, AGPS, Canberra, 1993, pp. 47-51.

48 *Report of the Advisory Committee on Executive Government to the Constitutional Commission,* Canberra, 1987*,* p. 2.

49 RAC Report, Volume 1, 1993, p. 50.

government, should be considered.[50] These submissions proposed that the position of the monarch and the office of Governor-General could be abolished without a separate head of state to replace them. It was suggested that many of the current powers and functions of the Queen and Governor-General could be exercised by some other person or body, such as the Speaker of the House of Representatives, President or the Senate and others, or even a combination of people.[51]

5.28 However, the evidence received by the Committee overwhelmingly supported the retention of a separate head of state.[52] Only a very few submissions supported a combined head of state and head of government.[53] Many submissions also noted that there appeared to be little general support in the Australian community for a combined head of state and head of government.[54] A number of these submissions raised concerns that such a system would require a substantial change from our current system of government.[55] Others were concerned that this would result in too great a concentration of power in one person, and could potentially result in political instability.[56] Despite the apparent lack of support for such suggestions, executive presidency models will be discussed in further detail later in this report, in the discussion of alternative models for an Australian republic.

5.29 At the other end of the spectrum from those who favoured a combined head of state/head of government, were those who suggested that a new republican head of state should replace the Queen, while the position of Governor-General should be retained.[57] This proposal will also be discussed further later in this report.

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50 See, for example, Dr David Solomon, *Submission 457*, p. 1; Mr Andrew Nguyen, *Submission 246*; Dr Bruce Hartley, *Submission 330*, p. 1; Ms Laetitia Legg-Capelle, *Submission 479*, pp. 1-2; Mr Matthew Harrison, *Submission 10*, p. 1; Mr Fred Carter, *Submission 23*, p. 1; Mr James Stack, *Submission 404*, p. 1.

51 For example, Dr David Solomon, *Coming of Age, Charter for a new Australia*, University of Queensland Press, Brisbane, 1998, p. 38, attached to *Submission* 457 from Dr David Solomon; Mr Andrew Nguyen, *Submission 246*, pp. 6-7.

52 Dr Ken Coghill, *Submission 536*, pp. 1-2; Mr Ross Garrad, *Submission 533*, p. 3; Mr John Pyke, *Submission 512*, p. 2; The Hon Michael Beahan, *Submission 334*, pp. 3-4; Mr Jack Hammond QC and Ms Juliette Brodsky, *Submission 719*, pp. 6-7; Sir Gerard Brennan, *Submission 497*, p. 21; Mr Peter Crayson, *Submission 322*, p. 1.

53 For example, Dr David Solomon, *Submission 457*, p. 1; Mr Andrew Nguyen, *Submission 246*, p. 1; Dr Bruce Hartley, *Submission 330*, p. 1; Ms Laetitia Legg-Capelle, *Submission 479*, pp. 1-2; Mr Matthew Harrison, *Submission 10*, p. 1; Mr Fred Carter, *Submission 23*, p. 1.

54 For example, ARM, *Submission 471*, p. 9; Dr Clem Jones, *Submission 492*, p. 4.

55 For example, ARM, *Submission 471*, p. 9; Mr John Pyke, *Submission 512*, p. 2.

56 For example, Mr Peter Crayson, *Submission 322*, p. 1*;* Dr Ken Coghill, *Submission 536*, pp. 1-2.

57 Professor John Power, *Submission 28*; Dr Peter Carden, *Submission 105*, p. 2; Mr David O'Brien, *Submission 126*, p. 1; Mr Robert Vogler, *Submission 480*, p. 4; Mr David Latimer, *Submission 519*.

## Role of a republican head of state

5.30 Before considering the specific powers and functions that could be conferred on a republican head of state, it is important to examine the broader issue of the role of the head of state. As the ARM pointed out, the various options and models for an Australian republic "centre around the key question of what we want an Australian head of state to do for us?".[58]

5.31 Many submissions saw the head of state fulfilling an important role as a symbol of national identity.[59] For example, Mr Gino Cocchiaro shared the following view:

> … it is important that all Australians see their national identity and aspirations reflected in a head of state who is truly Australian: someone who shares our rich, pluralistic culture, someone with whom the people can identify, whatever their background and culture.[60]

5.32 The ARM's submission pointed out the statement by former Governor-General, Sir Zelman Cowen, and former High Court Chief Justices Brennan and Mason on the role of the head of state in the lead up to the 1999 referendum:

> It is a central aspect of the office of president that he or she should always be concerned to promote the unity of the nation. He or she is head of state, and not of government. He or she should possess the capacity, intuition and skills to promote the unity of the nation. By speech, conduct and example, the president can help to interpret the nation to itself, and foster that spirit of unity and pride in the country which is central to the well-being of our democratic society.[61]

5.33 Mrs Janet Holmes a Court expressed her vision for the desired qualities and role of a republic head of state:

> I want someone who can apolitically raise the issues that need raising in this country—someone who is a deep thinker; someone with experience in life who understands what is important, what is not important and what moral values we want to espouse in this nation; someone who can raise the level of debate. It is quite possible to do that non-politically, as we know, and put us in a different ball game.[62]

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58 *Submission 471*, p. 4.

59 For example, Mr David Morris, *Committee Hansard*, 20 May 2004, p. 29; Mr Gino Cocchiaro, *Committee Hansard*, 19 May 2004, p. 7; Ms Ruth Thomson, *Submission 464*, p.1; Mr Gino Cocchiaro, *Submission 487*, p. 1.

60 *Committee Hansard*, 19 May 2004, p. 7.

61 ARM, *Submission 471*, p. 10, quoting Cowen, Z., Brennan, G., Mason, A., Letter to *The Australian*, 3 November 1999.

62 *Committee Hansard*, 18 May 2004, p. 32.

5.34 Many submissions favoured a largely ceremonial and non-executive role for a republican head of state.[63] Others recognised an important aspect of the role of a head of state as a "constitutional umpire"[64] or even "constitutional guarantor of democratic government".[65] For example, Mr John Kelly submitted that:

> The Head of State should be much more than a ceremonial encapsulation of the people, important as this role may be. As well as having the "right to be consulted (by), the right to encourage and the right to warn the government of the day" … the Head of State must have sufficient power to act with wisdom and in accordance with the Constitution should constitutional crises arise in order that effective government will continue.[66]

## Powers of a republican head of state

5.35 In terms of the more specific powers and functions of a republican head of state, the general consensus appeared to be that these should be similar to those powers and functions currently exercised by the Governor-General.[67] For the moment then, it will be assumed the powers of the head of state would be largely the same as the powers presently exercised by the Governor-General. Some submissions did suggest that certain powers could be reduced or updated, and these will be considered further in this report after consideration of the powers that are currently exercised by the Governor-General.

### *Governor-General's current functions and powers*

5.36 The Governor-General currently exercises a range of "ordinary" or "non-reserve" powers, which, by convention, are exercised only with advice from government. The Governor-General's "ordinary powers" are set out in the Constitution and include, for example, the power to:

- issue writs for general elections (section 32);
- summon and prorogue Parliament (section 5);

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63 For example, the Hon Michael Beahan, *Submission 334*, p. 4; Women for an Australian Republic, *Submission 476*, p. 6; ARM, *Submission 471*, pp. 9-10; see also the Hon Michael Beahan, *Committee Hansard*, 14 April 2004, p. 2.

64 Mr Glenn Patmore, *Committee Hansard*, 14 April 2004, pp. 19-20; Mr Jack Hammond QC and Ms Juliette Brodsky, *Submission 719*, p. 8.

65 Mr Glenn Patmore, *Submission 534*, p. 7.

66 *Submission 142*, p. 1.

67 For example, ARM, *Submission 471*, p. 11; Sir Gerard Brennan, *Submission 497*, p. 13; Dr Barry Gardner, *Submission 482*, p. 1; Mr Andrew Cole, *Submission 41*, p. 16; Dr Baden Teague, *Submission 538*, p. 9; Mr Ross Garrad, *Submission 533*, p. 2; Mr Jack Hammond QC and Ms Juliette Brodsky, *Submission 719*, pp. 8-9; Mr Andrew Newman-Martin, *Submission 107*, p. 39; The Hon Bob Carr MP, Premier of New South Wales, *Submission 721*, p. 1*;* The Hon Peter Beattie MP, Premier of Queensland, *Submission 722*, p. 1; Mr Jon Stanhope MLA, ACT Chief Minister, *Submission 730*, p. 3.

- assent to legislation which has been passed by Parliament, in the name of the Queen (section 58);
- appoint and dismiss Ministers (section 64);
- appoint members of the Executive Council (section 62);
- appoint and remove Federal judges (section 72);
- exercise the executive power of the Commonwealth (which includes the prerogative powers) (section 61); and
- act as commander-in-chief of the defence forces (section 68).[68]

5.37 As noted above, the general rule is that these powers are exercised by the Governor-General only on the advice of responsible Ministers, but this rule is largely an unwritten constitutional convention.[69]

5.38 There is also a small number of powers which the Governor-General is entitled to exercise without, or contrary to, the advice of government. These are known as the "reserve powers".[70] Effectively, the "reserve powers" are an exception to the rule that the Governor-General's powers are only exercised on the advice of government. The Constitution does not expressly mention the term "reserve powers", but they are generally considered to include the power to:

- appoint and dismiss the Prime Minister (section 64 of the Constitution);
- refuse to dissolve Parliament (including a double dissolution under section 57 of the Constitution).[71]

5.39 Sir Gerard Brennan explained the background behind the "reserve powers" in his submission:

> The reserve powers exist to protect the people and the Constitution against the possibility that a Government may pursue an unlawful course of conduct or that the elements of our parliamentary democracy are unwilling or unable to discharge their intended function. They enable the Governor-General to act to ensure compliance with the general law and the effective

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68 Note that this list is not exhaustive. See also, for example, Sir Gerard Brennan, *Submission 497*, p. 10; and RAC Report, Volume 2, Appendix 6, pp. 241-273.

69 Technically, certain powers are expressly provided to be exercisable only on the advice of the Federal Executive Council. Others are exercised on the advice of responsible Ministers or the Prime Minister by convention. See Sir Gerard Brennan, *Submission 497*, pp. 6 & 10; Professor George Winterton, *Submission 319*, p. 1; RAC Report, Volume 2, Appendix 6, pp. 243-244.

70 For a comprehensive discussion of the reserve powers of the Governor-General, see RAC Report, Volume 2, Appendix 6, pp. 241-273.

71 For an in-depth discussion of the reserve powers, see RAC Report, Volume 2, Appendix 6, p. 245; *Final Report of the Constitutional Commission,* Canberra, 1988, Volume 1, p. 342, referred to by Sir Gerard Brennan, *Submission 497*, p. 13; see also Professor George Winterton, *Submission 319*, p. 2; and Dr Bede Harris, *Committee Hansard,* 29 July 2004, p. 34.

> working of parliamentary democracy in accordance with the law and custom of the Constitution.[72]

5.40 The exercise of the Governor-General's reserve powers is also regulated to a large extent by unwritten constitutional conventions.[73] It was pointed out to the Committee that one of the advantages of such unwritten constitutional conventions is their flexibility, and ability to adapt and evolve with changing circumstances. However, the very fact that they are unwritten can also mean uncertainty and widely differing interpretations of their content.[74]

***Ordinary powers: the convention of acting on the advice of government***

5.41 Several submissions suggested that the convention that the non-reserve or ordinary powers are exercised only on the advice of government should continue for the powers of a republican head of state, but that the convention should be expressly stated in the Constitution.[75] Professor George Winterton argued that:

> … since this convention and those governing the exercise of the reserve powers may be seen as conventions of the monarchy, rather than more generally conventions of Australian government, a republican Constitution should expressly provide for these conventions to continue under a republic.[76]

5.42 Sir Gerard Brennan proposed that:

> If responsible government is to be retained under a republican form of government, a new legal duty should be imposed on the President, corresponding with the duty which convention now imposes on a Governor-General, to act and to act only on the advice of his or her Ministers, subject to certain exceptions. The duty should be entrenched in the Constitution.[77]

5.43 At the Committee's hearing in Parramatta, Sir Gerard reiterated this point:

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72 *Submission 497*, pp. 11-12.

73 For example, Professor Greg Craven, *Submission 167*, p. 6; Dr Bede Harris, *Submission 93*, p. 5; *Final Report of the Constitutional Commission,* Canberra 1988, Volume 1, p. 342; RAC Report, Volume 1, p. 89.

74 For example, Professor Greg Craven, *Submission 167*, p. 6 and *Committee Hansard*, 18 May 2004, p. 4; see also RAC Report, Volume 1, p. 90.

75 For example, Professor George Winterton, *Submission 319*, p. 2; Sir Gerard Brennan, *Submission 497*, p. 10; A Just Republic, *Submission 281*, p. 5; Dr David Solomon, *Coming of Age, Charter for a new Australia*, University of Queensland Press, Brisbane, 1998, p. 49 attached to *Submission 457*; ARM, *Submission 471*, pp. 9-10.

76 *Submission 319*, p. 2. Professor Winterton pointed out that such a clause was contained in clause 59 and Schedule 2, clause 7 of the Constitutional Alteration (Establishment of Republic) 1999; see also Mr Glenn Patmore, *Committee Hansard*, 14 April 2004, p. 22.

77 *Submission 497*, p. 11.

> I would like to stress the importance of entrenching the presidential obligation to act only on ministerial advice as the basis of parliamentary democracy and as essential to prevent a fixed-term President from acting independently except on the occasion of the exercise of reserve powers.[78]

5.44 Professor George Winterton agreed and warned in particular that:

> … it is critically important that section 61, conferring the Commonwealth's executive power, be made exercisable solely on ministerial advice, whether through the executive council or otherwise. This was quasi dealt with in the 1999 model, but not really adequately. Although the principle was accepted, it was not well drafted. But if you do not do that then you run the risk that the popularly elected President might end up as a quasi-executive President along French lines, for example.[79]

5.45 Others argued that there is no need for this convention (or indeed, other conventions relating to the head of state's powers) to be written into or "codified" in the Constitution. For example, in the context of a non-directly elected head of state, Mr Jack Hammond QC and Ms Juliette Brodksy considered that codification was unnecessary because:

> … the most effective sanction against a head of state's refusal to comply with conventions is the prospect of instant dismissal.[80]

5.46 On the other hand, Sir Gerard Brennan argued that this convention should be included, regardless of the method of selection of the head of state:

> Entrenching the duty would be desirable to avoid any misunderstanding *even if* the President, like the Governor-General, were appointed and could be removed by the Prime Minister.[81]

5.47 Sir Gerard Brennan also pointed out that the 1988 Constitutional Commission recommended that this convention should be incorporated into the Constitution, even without changing from a constitutional monarchy to a republic.[82]

### *Reserve powers and associated conventions*

5.48 The issue of how to deal with the reserve powers and associated conventions in the context of the establishment of an Australian republic was one of the more complex issues examined during the Committee's inquiry. Indeed, Sir Gerard Brennan argued that the critical question for a republic is not how the head of state should be selected, but:

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78 *Committee Hansard*, 13 April 2004, p. 18.

79 Ibid, pp. 61-62.

80 *Submission 719*, p. 9.

81 *Submission 497*, p. 11.

82 Ibid, pp. 10-11, referring to *Final Report of the Constitutional Commission,* Canberra, 1988, pp. 19-20.

> … should the President have any powers which might be exercised without ministerial advice and, if so, what is the mechanism for regulating their exercise?[83]

5.49 The ARM expressed a view that "the office of head of state should carry most of the conventions of the Governor-General with it".[84] At the same time, the ARM also noted that "the scope and extent of the reserve powers are surrounded by significant uncertainty".[85]

5.50 However, Sir Gerard Brennan stressed to the Committee that the uncertainty surrounding the reserve powers related not so much to the reserve powers themselves, but rather to the conventions or circumstances under which those powers might be exercised. For example, Sir Gerard Brennan considered that:

> A distinction must be drawn between the powers of a head of state and the conventions which might govern their exercise without ministerial advice.[86]

5.51 Sir Gerard Brennan elaborated on this issue during the hearing in Parramatta:

> There is not really much controversy about the powers which might be exercised. The controversy is about the circumstances in which the powers might be exercised, and to speak about codifying the circumstances in which powers can be exercised is indeed a very daunting task. But that distinction between powers and the circumstances of their exercise is, I think, basic to much of the misunderstanding which has surrounded this problem.[87]

5.52 Dr Bede Harris submitted:

> … there are circumstances in which the Governor-General can exercise some of his powers independently of advice, albeit subject to conventional rules. These are commonly referred to as the "reserve powers", but this is somewhat misleading — there is no separate set of powers known as the reserve powers, rather there are circumstances in which the statutory powers of the Governor-General (found in s 64 and s 5 of the Constitution) can be exercised independently. The key issue … is precisely what the conventions of the Constitution are in relation to these powers.[88]

5.53 In terms of how these issues should be dealt with under a republic, the ARM submitted that some provision should be made in the Constitution in relation to the exercise of the head of state's powers:

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83 Ibid, pp. 20-21.

84 *Submission 471*, pp. 9-10.

85 Ibid, p. 12.

86 *Submission 497*, p. 13.

87 *Committee Hansard*, 13 April 2004, pp. 18-19.

88 *Submission 93*, p. 5.

> … we do not think it is a viable option to simply leave the provisions conferring powers on the Head of State in their present very broad terms, saying nothing about the constitutional conventions and simply assuming they will continue to apply in a republic.[89]

5.54 The ARM pointed out that "there are several ways to clarify the nature, scope and extent of the powers currently exercised by the Governor-General and the conventions surrounding them".[90] The ARM then noted that some of the ways in which the reserve powers could be clarified were discussed in the 1993 Republic Advisory Committee report including incorporating the conventions by reference, or codification of the relevant conventions.[91]

5.55 The 1998 Constitutional Convention, in resolving that the powers of the President should be the same as those currently exercised by the Governor-General, recommended that the non-reserve powers be spelled out "so far as is practicable"; and that the Constitution should be amended to contain a "statement that the reserve powers and the conventions relating to their exercise continue to exist".[92]

5.56 The republic model put to the 1999 referendum took the approach of exempting the reserve powers from the requirement that the President act on ministerial advice, but did not identify the specific reserve powers. Three of the republic models put forward by the ARM mirrored this approach.[93] However, this approach was criticised by Professor George Winterton:

> … the 1999 Republic Bill [Constitutional Alteration (Establishment of Republic) 1999] clause 59 expressly exempted "a power that was a reserve power of the Governor-General" from the requirement that the President act on ministerial advice, but these powers were not identified. Such a provision is unsatisfactory, especially with a directly elected head of state. The preferable course is either to identify the reserve powers which are to be exempted from the general rule that the head of state must act in accordance with ministerial advice or state how each power is to be exercised.[94]

5.57 The ARM acknowledged that:

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89 *Submission 471*, p. 12.

90 Ibid.

91 As summarised by ARM, *Submission 471*, pp. 12-13; see also RAC Report, Volume 1, pp. 94-112. Note that the RAC Report also discussed two other options: formulation of written conventions; and parliament making laws concerning the conventions.

92 See Constitutional Convention Communiqué, reproduced in the Explanatory Memorandum to the Constitutional Alteration (Establishment of Republic) 1999, p. 39, paras 26 & 27.

93 *Submission 471*, p. 13.

94 *Submission 319*, p. 2; see also Dr Bede Harris, *Committee Hansard*, 29 July 2004, p. 34.

> This "incorporation by reference" begs the question of course as to the complete content of the conventions. On the other hand, it allows them to develop and evolve in the future as they have in the past.[95]

5.58 The Committee also received a considerable amount of evidence supporting some form of codification of the conventions governing the exercise of the reserve powers.[96] The ARM pointed out that there could be either "partial" or "full" codification:

> · PARTIAL CODIFICATION: By setting out the most important conventions about which there is general agreement (such as that the head of state appoints as Prime Minister the person the head of state believes can form a government with the support of the House of Representatives), and providing that the remaining (unwritten) conventions are otherwise to continue; or
>
> · FULL CODIFICATION: By setting out in the Constitution all the circumstances in which the head of state can exercise a reserve power and stating expressly that in all other circumstances the head of state is to act on the advice of the Prime Minister, the Executive Council, or some other minister.[97]

5.59 Of those who supported codification, some supported full codification.[98] However, many considered that only partial codification of the conventions governing the exercise of the reserve powers was necessary.[99] Several of those who supported codification pointed to the 1993 Republic Advisory Committee report and its possible provisions for codification.[100]

5.60 For example, Professor George Winterton expressed the view during the Committee's hearing in Parramatta that "partial codification provides the proper

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95 *Submission 471*, p. 13.

96 Professor George Winterton, *Submission 319*, p. 2; Women for an Australian Republic, *Submission 476,* p. 5; Mr Andrew Cole, *Submission 41*, p. 16; Mr John Pyke, *Submission 512*, pp. 3-4; Dr Bede Harris, *Submission 93*, pp. 2-12; Mr Glenn Patmore, *Committee Hansard*, 14 April 2004, pp. 16 & 22; Dr Ken Coghill, *Submission 536*, p. 3.

97 As summarised by ARM, *Submission 471*, pp. 12-13; see also RAC Report, Volume 1, pp. 101 & 106-107. Note that the RAC Report actually discussed two separate versions of complete codification.

98 For example, Premier of Western Australia, *Submission 73*, p. 2; Dr Bede Harris, *Submission 93*; ARM (Models Four and Five), *Submission 471*, p. 13 and Appendix A, pp. 25-31.

99 Professor George Winterton, *Submission 319*, p. 2; A Just Republic, *Submission 495*, p. 5; Mr Andrew Newman-Martin, *Submission 107*, p. 41.

100 Professor George Winterton, *Submission 319*, p. 2, referring to RAC Report, Volume 1, pp. 101-106; A Just Republic, *Submission 495*, p. 5; ARM (Models Four and Five), *Submission 471*, p. 13 and Appendix A, pp. 25-31.

balance between no codification and full codification".[101] Professor George Winterton has argued that:

> Complete codification would be both inadvisable — because the flexibility necessary for dealing with political crises would be lost — and extremely difficult, if not impossible, because the community is divided on some powers, especially the power to dismiss a Prime Minister denied Supply by the Senate.[102]

5.61 In supporting partial codification, Professor George Winterton has suggested that:

> … the principle underlying codification should be that the President is granted only such power as is *absolutely necessary* to enforce the fundamental constitutional principles of the rule of law and representative and responsible government.[103]

5.62 Several submissions also suggested the conventions and reserve powers should be codified regardless of whether Australia becomes a republic.[104] For example, Dr Bede Harris stated during the Committee's Canberra hearing:

> … codification is a very worthwhile endeavour. Whether we retain the status quo or move to a republic, I think it would be a very valuable constitutional exercise to codify the powers of either the Governor-General or, if we had one, the president.[105]

5.63 At the other end of the spectrum, some submissions argued against any form of codification.[106] For example, Professor Greg Craven argued that:

> First, all attempts at codification of the primary conventions of responsible government in Australia historically have collapsed in a welter of political disagreement, and there is no reason to suppose that this position will differ in the future. Second, there is very considerable room for disagreement on the precise formulation of many of the conventions of the Constitution. Third, codification would leave many of our political-constitutional norms in a straightjacket of legalese, without room to develop.[107]

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101 *Committee Hansard*, 13 April 2004, p. 62.

102 Winterton, G., *Resurrection of the Republic,* Federation Press, Canberra and Sydney, 2001, p. 17, referred to by Professor George Winterton, *Submission 319*, p. 1.

103 Ibid; see also Sir Gerard Brennan, *Submission 497*, p.12.

104 For example, Mr John Kelly, *Submission 142*, pp. 20-21; Professor George Williams, *Submission 152*, p. 2; Dr Bede Harris, *Committee Hansard*, 29 July 2004, p. 33.

105 *Committee Hansard*, 29 July 2004, p. 33.

106 Dr Baden Teague, *Submission 538*, p. 9; Mr Jack Hammond QC and Ms Juliette Brodsky, *Submission 719,* p. 9; Dr Nigel Greenwood, *Submission 303*, pp. 1-2. Some suggested that the issue of codification could be 'postponed' until after Australia becomes a republic: Mr Ross Garrad, *Submission 533*, p. 3; Mr Michael Pepperday, *Committee Hansard*, 29 July 2004, p. 32.

107 *Submission 167*, p. 6; and see also *Committee Hansard*, 18 May 2004, p. 4.

5.64 However, Dr Bede Harris disagreed:

> … codification is an important and certainly an achievable outcome… I am philosophically averse to a Constitution that grows unregulated … I do not like the uncertainty of conventional powers developing in either substance or the circumstances in which they can be exercised… I think that the powers should be stated and the circumstances in which they should be exercised should be stated and I do not think there is that much disagreement on exactly what those powers are.[108]

5.65 In his submission, Dr Harris set out the exact rules which he felt should be included in a republican Constitution.[109] Dr Harris also gave examples of many overseas countries, both republics and monarchies with governors-general, which have codified the powers of their presidents or governors-general.[110]

5.66 While supporting codification of the conventional duty to act on ministerial advice in relation to the exercise of non-reserve powers, Sir Gerard Brennan did not appear to be supportive of the codification of the conventions surrounding, or circumstances relating to, the exercise of the reserve powers:

> … there could be some ambiguity about … the circumstances in which those powers should be exercised. I would be against any attempt to codify this, whereas I think there might be a considerable view that it would be desirable, if we could, to codify the circumstances in which those powers could be exercised.[111]

5.67 Sir Gerard Brennan also argued that:

> It is not possible to foresee the precise circumstances which might warrant an exercise of power without ministerial advice — a question of timing as much as substance — if it became absolutely necessary to ensure compliance with the general law and the effective working of parliamentary democracy in accordance with the law and custom of the Constitution.[112]

5.68 It is important to note that people who did not support codification were more likely to prefer an appointed head of state over an elected head of state. The relationship between powers and selection method will be discussed later in this chapter.

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108 *Committee Hansard,* 29 July 2004, p. 34.

109 *Submission 93*, pp. 11-12.

110 Ibid and also *Committee Hansard*, 29 July 2004, p. 33.

111 *Committee Hansard*, 13 April 2004, p. 20.

112 *Submission 497*, p. 14.

### *Powers of the head of state and the judiciary*

5.69 If the Constitution were amended to codify the rules specifying when the reserve powers can be exercised, it was pointed out that the validity of the exercise of the reserve power could become "justiciable" — that is, an alleged breach of a convention could be reviewed by a court.[113]

5.70 Several submissions felt that the head of state's powers should remain non-justiciable.[114] For example, Mr Jack Hammond and Ms Juliette Brodsky argued that:

> … utilisation of the High Court to preside over crises such as 1975 would require key amendments to the Constitution and permanently disfigure the current balance of power between the government, the Prime Minister and the head of state and the judiciary.[115]

5.71 The Committee notes that codification of powers would not necessarily result in justiciability. It might be possible, for example, to include a provision in the Constitution to make it clear that the exercise of particular powers is not justiciable, although there may also be difficulties with this approach.[116] However, the Committee received little evidence on this issue.

5.72 Others considered that the powers and conventions should be justiciable.[117] However, it was pointed out to the Committee that justiciability would be problematic. For example, Sir Gerard Brennan submitted that:

> In all probability, proceedings would be brought in the High Court with consequent delay and uncertainty and issues that are more political than legal might have to be litigated. Occasions when speedy action is required might pass by while the litigation proceeded. The effectiveness of the Presidential action might be frustrated, placing at risk the constitutional stability of the nation.[118]

5.73 Similarly, the ARM commented that:

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113 Sir Gerard Brennan, *Submission 497*, p. 14; Mr Jack Hammond QC and Ms Juliette Brodsky, *Submission 719*, p. 9. Note that it is generally thought that the current position is that neither an exercise of the reserve powers, nor the content of conventions, are 'justiciable', although there has been some debate on this issue: Joint Select Committee on the Republic Referendum, *Advisory Report on the Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999*, August 1999, pp. 46-50; RAC Report, Volume 1, p. 107.

114 For example, Women for an Australian Republic, *Submission 476*, p. 5; Mr Jack Hammond QC and Ms Juliette Brodsky, *Submission 719*, p. 9.

115 Mr Jack Hammond QC and Ms Juliette Brodsky, *Submission 719*, p. 9.

116 See, for example, the Joint Select Committee on the Republic Referendum Report, 1999, p. 50.

117 Dr David Solomon, *Coming of Age, Charter for a new Australia*, University of Queensland Press, Brisbane, 1998, p. 46, attached to *Submission 457*; Dr Bede Harris, *Submission 93*, p. 8.

118 *Submission 497*, p. 15.

> … the time required for the High Court to deliberate and arrive at an opinion means that such a mechanism may ultimately obstruct the timely resolution of a political crisis.[119]

5.74 At the same time, Sir Gerard Brennan also expressed concern at the proposition that the exercise of reserve powers would be non-justiciable:

> Whenever a rule is made non-justiciable and no other check and balance is provided to enforce it, it ceases to be a legal rule and a party bound thereby is free to disregard it. Some check and balance is always needed when a limited power is conferred.[120]

5.75 As an alternative, some submissions suggested less formal mechanisms for seeking advice from the judiciary in relation to the exercise of reserve powers. In this context, it was pointed out to the Committee that there is currently no formal mechanism for the Governor-General to seek advice from the judiciary,[121] and that the High Court is not currently empowered to deliver advisory opinions.[122]

5.76 Others felt that the head of state should be free to seek constitutional advice from the judiciary, such as from the Chief Justice of the High Court.[123] Some qualified their support by suggesting that the judiciary should be free to refuse to provide advice.[124]

5.77 Others expressed concern at the notion of the head of state seeking advice from the judiciary.[125] Mr Glenn Patmore suggested that such advice should only be sought with the express permission of the Prime Minister.[126] Sir Gerard Brennan argued that:

> The Judiciary should be kept apart from any issue relating to the propriety of the exercise of executive power. There are two reasons: one, in order to ensure that the Judiciary may, without embarrassment, determine judicially any issue relating to the lawfulness of the exercise of executive power that might arise directly or incidentally in a justiciable controversy; two, in order to ensure that the Judiciary is not seen to be involved in the making of

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119 *Submission 471*, p. 36.

120 *Submission 497*, p. 15.

121 For example, Mr Glenn Patmore, *Submission 534*, p. 12; ARM, *Submission 471*, p. 35.

122 ARM, *Submission 471*, p. 35; Mr Glenn Patmore, *Submission 534*, p. 13, referring to *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

123 Mr Ross Garrad, *Submission 533*, p. 7; Dr Bruce Hartley, *Submission 300*, p. 8; Mr Howard Teems, *Submission 100*, p. 7; Mr Andrew Cole, *Submission 41*, p. 21; Major Edward Ruston, *Submission 110*, p. 6; Mr John Flower, *Submission 447*, p. 10.

124 For example, Mr Peter Crayson, *Submission 322*, p. 5.

125 Mr Glenn Patmore, *Submission 534,* p. 12; Mr Bill Peach, *Submission 37*, p. 11; Dr Clem Jones, *Submission 492*, p. 9; Mr John Pyke, *Submission 512,* p. 14.

126 *Submission 534,* p. 12.

> decisions which turn or may be thought to turn on political considerations.[127]

5.78 Professor George Winterton pointed out that:

> It is inappropriate for the head of state to seek the advice of a serving judge and inappropriate for the latter to give it. … However, an express constitutional prohibition to this effect would be inappropriate, especially since future exigencies cannot be foreseen.[128]

5.79 The ARM agreed:

> … a constitutional prohibition on a head of state from seeking informal constitutional advice would be impractical and unrealistic. Moreover, such a prohibition would be extremely difficult to enforce short of placing the head of state in solitary confinement during a constitutional crisis.[129]

5.80 Some submissions proposed that some form of "constitutional council" could be established to provide the head of state with independent advice on the exercise of the reserve powers. Such a mechanism was proposed not only as an alternative to justiciability, but also as a limit on the reserve powers of the head of state, particularly a directly elected head of state. For example, Sir Gerard Brennan, proposed that a "constitutional council" could be established to provide:

> … a non-judicial control mechanism to ensure that Presidential power can be exercised without ministerial advice only when there are reasonable grounds for the opinion that such an exercise of power is absolutely necessary to ensure compliance with the general law and the effective working of parliamentary democracy in accordance with the law and custom of the Constitution.[130]

5.81 Sir Gerard Brennan suggested that such a council could be composed of former heads of state, State Governors, or retired judges. He proposed that the council would be appointed by the Prime Minister within three months of a general election (or in order to fill a casual vacancy).[131] In Sir Gerard Brennan's proposal, the council would act only if the head of state consulted it:

> If the Council certified that there are reasonable grounds for the President's opinion that the President's proposed exercise of power is an absolutely necessary exercise of power, the certificate would be final and conclusive of those grounds. In practice, the existence of a Council's certificate would preclude judicial review of the President's action. If the Council denied a certificate, the President's action would be subject to judicial scrutiny and

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127 *Submission 497*, p. 23.

128 *Submission 319*, p. 6.

129 *Submission 471*, p. 35.

130 *Submission 497*, p. 15; and see also *Committee Hansard*, 13 April 2004, p. 19.

131 *Submission 497*, p. 16.

> disallowance. That consequence would provide a significant disincentive to an exercise of power without ministerial advice.[132]

5.82 Sir Gerard Brennan considered that his proposal for a constitutional council would assist in situations of potential political crises, as it would "be not only a brake on the precipitate use of power without ministerial advice; it would facilitate the exercise of the most appropriate power (if any) to resolve the impasse".[133]

5.83 A similar proposal was also suggested by Professor George Winterton. Professor Winterton pointed out that models for such councils exist in Ireland and Portugal.[134] Under Professor Winterton's proposal, the head of state would be required to consult, but not necessarily follow the advice of a similar council of "constitutional experts" before exercising a reserve power. The council would consist of between three and five members chosen by an independent person or body, such as the state and territory chief justices acting jointly (rather than appointed by the Prime Minister).[135] Provision might also be made for the eventual publication of the council's advice.[136] Professor Winterton also expressed a view that Sir Gerard Brennan's constitutional council model:

> … with all respect, is a little complicated in terms of justiciability. Besides that, some of the exercises of the reserve powers would not really be justiciable, so I think that making their [the Council's] consent a condition of non-justiciability is rather complicated. I would prefer to specify what is justiciable and what is not justiciable and make their consultation a requirement but not their consent.[137]

5.84 Others had reservations about the proposals for a constitutional council to advise the head of state, and were concerned that such a council would be outside the democratic process and might undermine the principle of responsible government.[138] Another concern was whether the advice of the council would be made public, or kept

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132 Ibid.

133 Ibid, p. 19.

134 *Submission 319*, p. 7. Dr Walter Phillips also pointed out that in the German republic model, both the Parliament and the Federal Constitutional Court are involved in judging whether the head of state has acted unconstitutionally or not: *Committee Hansard*, 14 April 2004, p. 13.

135 *Submission 319*, p. 7; see also *Committee Hansard*, 13 April 2004, pp. 62-63.

136 Professor George Winterton, *Committee Hansard*, 13 April 2004, pp. 62-63.

137 Ibid.

138 For example, Dr Walter Phillips, *Committee Hansard*, 14 April 2004, pp. 12-13; Mr Glenn Patmore, *Committee Hansard*, 14 April 2004, p. 16; Professor Greg Craven, *Committee Hansard*, 18 May 2004, p. 8; Mr Glenn Patmore, *Submission 534*, p. 12; ARM, *Submission 471*, pp. 35-36.

confidential.[139] It was also suggested that such a council would not necessarily ensure impartial advice.[140]

5.85 For example, Professor Greg Craven criticised this proposal:

> … it strikes me as extraordinarily cumbersome and slow that suddenly the reserve powers are going to go to another body for debate—another body which is, no matter how you disguise it, effectively a constitutional court largely or significantly composed of people who, again, have virtually no experience in the practice of responsible government.[141]

5.86 Professor Craven argued further that the constitutional council proposal does not solve the problems with a directly elected President:

> … it ignores the main problem with a directly elected President. The main problem with a directly elected President is … the enormous moral power of the office as the only person who is the direct, sole and legitimate elected representative of the Australian people—and a directly elected President in that sense does not need to exercise the reserve powers. This is why the Irish constitution … forbids the president from speaking publicly without the permission of the government—because the Irish understand very clearly that it is the moral power of the president that makes it dangerous. And the constitutional council is not going to be mediating the exercise of the moral stature of the President.[142]

5.87 In the direct election models submitted by the ARM, specific provision was made for the head of state to refer to the High Court in certain circumstances. This reflected the codification provisions proposed by the 1993 Republic Advisory Committee. Under this proposal, the head of state, after giving the Prime Minister an opportunity to demonstrate that the government is acting constitutionally and legally, would be able to refer the matter to the High Court.[143] The ARM explained:

> … we have provided for the highly unlikely situation where the President may need to resolve a political crisis by dissolving the House of Representatives, and/or dismissing the Prime Minister. This proposed amendment is an innovation, designed to retain but limit the Governor General's current powers. With these models, the only circumstances in which the President can sack a Prime Minister who commands a parliamentary majority are where the Prime Minister has been found by a

139 Mr Glenn Patmore, *Submission 534*, p. 12; ARM, *Submission 471*, pp. 35-36.

140 Dr Walter Phillips, *Committee Hansard*, 14 April 2004, p. 13.

141 *Committee Hansard*, 18 May 2004, p. 8.

142 Ibid, pp. 8-9.

143 *Submission 471*, Appendix A, p. 27; see also A Just Republic, *Submission 281*, pp. 5-6; RAC Report, Volume 1, p. 106.

> court to be persisting in a breach of the constitution and refuses to desist from that breach.[144]

5.88 However, Mr Glenn Patmore commented that:

> Any reference power would call into question the conduct of government. Hence, the Head of State would be taking on an overtly political role. This would increase the likelihood of conflict between the Head of State and the Prime Minister. This proposed reference power would also be a radical departure from our system of responsible government …[145]

5.89 The ARM acknowledged that:

> … it might be preferable if the Head of State does not refer matters of illegality to the courts, but only acts once there is a High Court decision declaring a government action illegal and the government refuses to abide by it.[146]

### *Other specific issues relating to the head of state's powers*

5.90 Although the general consensus appeared to be that the powers of a republican head of state should be similar to those currently exercised by the Governor-General, it was submitted to the Committee that some specific powers could be updated or reduced.[147] It was also suggested that some particular powers were "obsolete" or "inappropriate" and could be removed altogether.[148]

5.91 One power which was specifically mentioned for removal was the Queen's power under section 59 of the Constitution to disallow legislation assented to by the Governor-General.[149] Indeed, some suggested that this power should be removed regardless of whether Australia becomes a republic. For example, Sir David Smith stated in evidence that:

> That provision – section 59 – has been there and no government has bothered to waste time and money in having it removed. I wish they had. But it has no effect, it has never had any effect and since 1926 it could no longer have any effect.[150]

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144 *Submission 471*, p. 36.

145 *Submission 534*, p. 13.

146 *Submission 471*, p. 36.

147 For example, Mr Bill Peach, *Submission 37*, p. 6; Dr Barry Gardner, *Submission 482*, p. 1; Mr Andrew Cole, *Submission 41*, p. 16; Women for an Australian Republic, *Submission 476*, p. 5.

148 For example, Women for an Australian Republic, *Submission 476*, p. 5.

149 Winterton,G., *The Resurrection of the Republic*, Federation Press, Canberra and Sydney, 2001, p. 15 referred to by Professor George Winterton, *Submission 319*, p. 1; Sir David Smith, *Committee Hansard*, 29 July 2004, p. 12.

150 *Committee Hansard*, 29 July 2004, p. 12.

5.92 Others suggested that the power to prorogue Parliament may be unnecessary, particularly if parliamentary terms were fixed.[151] Others proposed that the head of state should not have the power to dismiss a Prime Minister, but that he or she should have the power to call an election if the Prime Minister loses the confidence of the House of Representatives.[152]

5.93 On the other hand, there appeared to be general agreement that other specific powers should be retained, such as the powers to appoint and remove Federal judges,[153] and to retain the prerogative of mercy, which is currently part of the executive power.[154]

5.94 Other specific issues were also raised in relation to the functions and powers of the head of state. For instance, Professor George Winterton suggested that an issue to be considered is whether the head of state should enjoy immunity from criminal and/or civil process while in office.[155]

## Relationship between powers and selection method

5.95 As is perhaps apparent from some of the comments above, the extent of the need to clarify and codify the powers and the conventions surrounding their exercise may depend on the method of selection of the head of state. This issue will be discussed further in the examination of various models for an Australian republic later in this report.

5.96 For the moment, it is noted that those who favoured a directly elected head of state were more likely to favour partial or complete codification of the head of state's powers,[156] while those who supported minimalist models often argued that codification would be unnecessary or undesirable.[157] There was a general consensus that it would be more important, if not vital, to clarify and codify the powers in the case of a directly elected head of state, or to provide some other mechanism to limit those powers.[158] It was felt that this would "overcome objections that a directly elected

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151 Winterton, G., *The Resurrection of the Republic*, Federation Press, Canberra and Sydney, 2001, pp. 15-16, referred to in Professor George Winterton, *Submission 319*, p.1.

152 Mr Bill Peach, *Submission 37*, p. 6; Women for an Australian Republic, *Submission 476*, p. 5.

153 ARM, *Submission 471*, p. 33; Sir Gerard Brennan, *Submission 497*, p. 23; Professor George Winterton, *Submission 319*, p. 6; Mr Dominic Pellegrino, *Submission 461*, p. 16.

154 Sir Gerard Brennan, *Submission 497*, p. 23; ARM, *Submission 471*, p. 34.

155 *Submission 319*, p. 8; see also Mr David Denton, *Submission 327*, p. 4.

156 For example, the Hon Michael Beahan, *Submission 334*, p. 4; Premier of Western Australia, *Submission 73*, p. 2; Dr Bede Harris, *Committee Hansard,* 29 July 2004, p. 34.

157 Mr Jack Hammond QC and Ms Juliette Brodsky, *Submission 719*, p. 9; Professor Greg Craven, *Submission 167*, pp. 6-7.

158 See, for example, Associate Professor Kim Rubenstein, *Committee Hansard*, 14 April 2004, p. 38; Mr Glenn Patmore, *Committee Hansard*, 14 April 2004, p. 15; Dr Bede Harris, *Committee Hansard*, 29 July 2004, pp. 34 -35.

head of state will, or could, develop a rival base of political power in opposition to a Prime Minister".[159] For example, Professor George Williams expressed a view that:

> … if you are able to codify the powers I do not see any greater dangers in a directly elected President than in a parliamentary appointed President.[160]

5.97 Similarly, Professor George Winterton pointed out:

> There certainly is a risk that a directly elected non-executive head of state could become a rival power centre. Providing that Commonwealth executive power is exercisable only in accordance with ministerial advice and partially codifying the conventions governing the exercise of the reserve powers will go far to lessen this risk, but such provisions cannot, for example, prevent speech-making or invitations to, or meetings with, people or groups which challenges Government policy. The key to lessening such conflict is to ensure that high quality candidates are nominated.[161]

5.98 Likewise, the Hon. Michael Beahan expressed the view that:

> … if you went to a direct election model, the process for selection would become important. The codification of reserve powers becomes more important there to hem in, if you like, the powers that are currently enjoyed by the Governor-General.[162]

5.99 Mr Glenn Patmore also explained:

> A key question is how the head of state should address a political crisis—for example, whether or not the head of state should dismiss a Prime Minister. The response to this question will vary according to the mode of appointment of the head of state. A popularly elected President will have a popular mandate, which might encourage some inappropriate intervention in parliamentary politics. Conversely, a parliamentary elected head of state may have too weak a mandate to intervene in parliamentary politics to resolve a constitutional crisis.[163]

5.100 In the five republic models submitted by the ARM, the extent of codification varied depending on the method of selection of the head of state.[164] However, the ARM acknowledged that:

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159 Premier of Western Australia, *Submission 73*, p. 2; see also Professor George Winterton, *Committee Hansard*, 13 April 2004, pp. 61-62; Dr Bede Harris, *Committee Hansard,* 29 July 2004, p. 34. For counterarguments as to whether it would actually overcome these objections, see further discussion in the later chapter on alternative models for an Australian republic.

160 *Committee Hansard*, 13 April 2004, p. 45.

161 *Submission 319*, p. 3.

162 *Committee Hansard*, 14 April 2004, p. 3.

163 Ibid, p. 15.

164 *Submission 471*, p. 13.

> … although codification of powers under these "minimalist" models may not be strictly necessary, it may still be desirable. The ARM acknowledges there is a strong case for codifying the conventions even in a "minimalist" republic, just as there is a strong case for codifying the conventions today.[165]

5.101 Indeed, it was submitted that clarifying the powers of a republic head of state and their exercise should be the first priority, and that this would be required regardless of the method of selection of the head of state.[166] For example, Sir Gerard Brennan expressed a view that:

> Concentration really has to be on the powers that you are going to allocate to this person rather than on the method of election or dismissal.[167]

5.102 Sir Gerard Brennan argued further:

> By entrenching the Presidential duty generally to exercise power only on ministerial advice and by virtually ensuring that Presidential power is not otherwise exercised unless the non-justiciable certificate of a Constitutional Council is first obtained, the essential characteristics of responsible and representative government under the Constitution can be preserved if Australia should become a Republic. Whatever the mode of election of the President might be, those essential characteristics can be preserved by governing the powers of the President and the manner of their exercise.[168]

5.103 Professor George Williams even suggested that the Governor-General's powers should be codified, regardless of the move to a republic:

> We could also look at codifying the powers of the Governor-General; they ought to be codified today in any event. Frankly, if they cannot be codified with the Governor-General via legislation at the moment, it seems unlikely to me that we would be able to agree on any such codification as part of a more difficult referendum process.[169]

## Relationship with executive, parliament and judiciary

5.104 The Committee notes that term of reference (b)(iii) for this inquiry requires an examination of the relationship of the head of state with the executive, the parliament and the judiciary. This is an issue which has arisen throughout this chapter, and also arises in the next two chapters of the report.

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165 Ibid.

166 Sir Gerard Brennan, *Submission 497*, p. 11; Dr Walter Phillips, *Committee Hansard*, 14 April 2004, pp. 12-13; Mr Glenn Patmore, *Committee Hansard*, 14 April 2004, p. 16.

167 *Committee Hansard*, 13 April 2004, p. 23.

168 *Submission 497*, p. 17.

169 *Committee Hansard*, 13 April 2004, p. 40.

5.105 Some of the main issues relating to the head of state's relationship with the judiciary have been discussed in this chapter, such as whether a republican head of state should be able to seek advice from the judiciary, or indeed, whether those reserve powers should be justiciable. The head of state's role as a "constitutional umpire" is also relevant to the head of state's relationship with the executive and parliament. Certain specific powers of the head of state will also directly impact on this relationship, such as the powers to dissolve Parliament; appoint and dismiss Ministers and Prime Ministers; and powers to assent to legislation.

5.106 Other issues relevant to this term of reference will be discussed in the next two chapters, including the effect of appointment methods on the powers and political mandate of the head of state compared to the head of government; and whether Parliament should have a role in the selection or appointment of the head of state.