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28 March, 2003

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Senate Legal and Constitutional References Committee  
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Room S1.61  
Parliament House  
Canberra, ACT 2600

**RE: Inquiry into an Australian Republic**

Dear Sir/Madam,

Please accept the following submission to the Inquiry into an Australian Republic. This submission addresses the second term of reference, “(b) alternate models for an Australian republic” etc.

I would be happy to appear at the public hearing in Parramatta on 13 April.

Yours sincerely,

Peter Crayson

# **SUBMISSION TO THE INQUIRY INTO AN AUSTRALIAN REPUBLIC**

## **PART I**

BY PETER CRAYSON

March, 2004

This document accompanies Part II of my Submission to the Inquiry into an Australian Republic.

Part I consists of a response to the terms of reference of the Inquiry and an explanation of the Constitutional Council model for an Australian republic. Part II consists of a draft Constitution, which codifies the “Constitutional Council” model.

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## Executive summary

This submission proposes a popular election republican model, called the “Constitutional Council” model. This model reconciles the two main republican camps – the “minimalists” and the “direct electionists” – by moving beyond the “minimalist” and “direct electionist” paradigms, neatly combining the best elements of the existing constitutional arrangements and those of the most popular republican models. It provides for the popular election of a President who, like the Queen, does not exercise the reserve powers, but rather assigns these powers to the Speaker, with the office of Speaker reformed so as to be more independent and impartial.

## Terms of reference addressed by this submission

This submission addresses only the following terms of reference:

- (b) alternative models for an Australian republic, with specific reference to:
  - (i) the powers and functions of the Head of State
  - (ii) the method of selection and removal of the Head of State, and
  - (iii) the relationship of the Head of State with the executive, the parliament and the judiciary

## Questions posed by the discussion paper

The following questions, posed throughout the discussion paper, are answered very briefly here in order to set the scene, but many will be answered in greater detail within the content of Part I of this submission and within the provisions of the draft Constitution in Part II of this submission.

*Should Australia consider moving towards having a head of state who is also the head of government?*

No. This would compromise the separation of powers, minimise checks and balances, concentrate enormous power in one person and radically alter our form of government.

*What powers should be conferred on the head of state?*

This is an incomplete question, as it assumes that powers such as the reserve powers can only be conferred on the head of state rather than on some other body or officer, and it does not ask what checks and balances apply in respect thereof.

The Constitutional Council model confers mainly symbolic powers on the President (head of state), confers the reserve powers on the Speaker (in addition to existing powers), and confers mainly review, appointment/dismissal and advisory powers on the Constitutional Council. Any exercise of the reserve powers by the Speaker may be reviewed (and vetoed) by the Constitutional Council.

*What powers (if any) should be codified beyond those currently specified in the Constitution?*

In the Constitutional Council model the reserve powers are minimally codified so as to clarify the circumstances under which they may be exercised (and reviewed), but not so as to restrict the exercise of discretion. (See under the heading “The reserve powers”.) As there is no competing popular mandate between the Prime Minister and the Speaker, the case in favour of fully codifying the reserve powers is not as compelling. Also codified are certain discretionary powers of the President, the Constitutional Council, the Prime Minister and the

Federal Executive Council. Failure to at least minimally codify such powers could result in constitutional uncertainty, instability within and weakening of the machinery of government.

*Should some form of campaign assistance be available to nominees, and if so, what assistance would be reasonable?*

This is a matter for Parliament to consider. However, I would suggest that campaign conditions for the Constitutional Council be similar to that for the 1998/99 Constitutional Convention, with candidates permitted to submit a supporting statement which would be published in an information booklet (perhaps mailed to all households). Conditions should be more informal than parliamentary elections to emphasise the non-political nature of the elections to the Constitutional Council. I would suggest that voting be non-compulsory and that postal voting or voting at post offices or other government offices be permitted over the course of a number of days.

*Should/can political parties be prevented from assisting or campaigning on behalf of nominees? If so, how?*

It is difficult to imagine how political parties could be prevented from assisting or campaigning on behalf of nominees. Even if it were possible, it would be difficult to effectively and fairly implement and enforce. For example, what sort of penalties would apply, and to whom? Should a nominee be penalised for unsolicited support from a political party? Preventing assistance and campaigning by political parties would, to some extent, stifle the democratic process – if a partisan figure is the choice of the people, this choice should be respected.

An association with a political party would not affect the ability of an Executive Government to govern. The President does not exercise the reserve powers, and most powers which are exercised by the President also require the support of the Constitutional Council. In many democracies with non-executive Presidents, candidates are backed by political parties; e.g., Ireland and Israel. However, this political association does not necessarily impair the ability of the incumbent to act impartially, as has been demonstrated here by the appointment of political figures to the office of Governor-General.

This needs to be seen in the context of the fact that the President does not, in isolation, exercise any political powers which would impinge upon partisan politics, and that the President must resign from a political party before taking office. This makes the position less attractive to aspiring politicians seeking political power. It should be acknowledged, though, that a nominee could seek to use his or her position to make public statements critical of the Government. This free expression of opinion is characteristic of a thriving and robust democracy, and not something to be stifled.

Having said this, I personally feel that it is preferable for the President not to be associated with a political party. The Parliament would be entitled to legislate to restrict political parties from assisting and campaigning on behalf of nominees (subject to interpretation by the High Court of the extent to which this restriction is permitted). However, I would advise that any move to do so be delayed at least for one election to allow the people to express, through their vote, what sort of candidates they would like to occupy this office.

*If assistance is to be given, should this be administered by the Australian Electoral Commission or some other body?*

Yes. It is essential that this be administered by a non-partisan agency.

*If the Australian head of state is to be directly elected, what method of voting should be used?*

This is described in detail in later chapters. Briefly, the Constitutional Council would be directly elected by the nation voting as a single electorate (voting by proportional representation by means of the single transferrable vote), and the President would be one of the elected members of the Constitutional Council, either (a) chosen by vote of the members

of the Constitutional Council or (b) being the member who received the highest vote at the election. Whether (a) or (b) applies depends on the method prescribed by Parliament. Option (a) would be a form of indirect popular election, whereas option (b) would be a form of direct popular election.

*If direct election is the preferred method for the election of a non-executive president, will this lead to a situation where the president becomes a rival centre of power to the Government? If so, is this acceptable or not? If not, can the office of head of state be designed so that this situation does not arise?*

It would not be acceptable for the President to become a rival centre of power. The good news is that this cannot happen under the Constitutional Council model, even though the President would be popularly elected (either directly or indirectly), as the President does not exercise the reserve powers and therefore cannot effectively threaten the Executive Government with any sort of constitutional power play. The only way in which the President could be said to rival the Executive Government of the day would be in terms of popular support – but this is a healthy aspect of our democracy. It is entirely a matter for the Executive Government of the day whether it takes any notice at all of opinions expressed publicly by the President, in exactly the same way as it is entirely a matter for the Executive Government of the day whether it takes any notice of opinions expressed by the Opposition, or, for that matter, by anyone. Ultimately, the people will be the judge of that at the next general election.

*Who should be eligible to put forward nominations for an appointed head of state?*

Anyone, as long as the nomination is supported by a petition of at least one thousand signatures.

*Should there be any barriers to nomination, such as nominations from political parties, or candidates being current or former members of parliament?*

No – there is no reason why politicians cannot perform the job admirably, even though I would personally prefer that the office be held by a non-politician. However, if elected, a President-elect (or a member-elect of the Constitutional Council) would be required to resign their membership of a political party or their seat in Parliament.

*Should there be a maximum and/or minimum number of candidates?*

Providing for a minimum number ensures that reasonable choice would be offered to voters. The Constitutional Council model provides for “topping up” (by vote of the Senate) to fifteen candidates if less than fifteen candidates have been nominated.

Providing for a maximum number ensures that voters are not frustrated and overwhelmed by “tablecloth” ballot papers. This model also provides for a reduction in the number of candidates (by vote of the Senate) to fifty should the number initially exceed fifty.

The Senate would also be empowered to exclude certain candidates by a two-thirds vote of the total number of senators as it sees fit. This is intended to enable the Senate to exclude candidates whom it deems to be undesirable or inappropriate for the office of President, and given that a two-thirds special majority vote is required, this would probably reflect the opinion of a large majority of voters.

*Should there be a minimum number of nominators required for a nominee to become a candidate?*

Yes – I have suggested 1000. This is an arbitrary number, but the intention is to ensure that frivolous nominations are avoided whilst genuine nominations not be frustrated. The number could possibly be raised to something like 2500, but it would be prudent to conduct some sort of statistical analysis to determine what number would be most appropriate.

*What should the head of state be called, Governor-General, President of the Commonwealth of Australia or some other name?*

The head of state should be called the President of the Commonwealth of Australia, with a “short name” of President. The President will not be a simple transplant into the office of Governor-General; although the role is similar, there are important differences in terms of the nature of the role (the President would be head of state, whereas the Governor-General is the representative of the Queen), the powers of the office and the relationship of the office with other Constitutional organs (such as the Constitutional Council).

Quite apart from this, the term “President” is internationally recognised as referring to a head of state, whereas “Governor-General” is recognised as a term applying to a vice-regal officer.

*What should be the length of a term of office for head of state?*

Six years. This is the same as the term of a senator and one year more than the term proposed for the Speaker (five years). A term of anything greater than six years is uncommon in democracies around the world (except France), and would probably be regarded by most Australians as being too long.

*Should a head of state be eligible for re-appointment/re-election?*

*Should there be a limit on the number of terms an individual may serve as head of state?*

Yes, but the cumulative term of office should be no more than twelve years and six months, effectively limiting a President to two terms whilst providing some leeway in the event of there being early or late Constitutional Council elections, or early initial appointment to the office (e.g., if filling a casual vacancy).

*Who or what body should have the authority to remove the head of state?*

*On what grounds should the removal of the head of state be justified? Should those grounds be spelt out?*

The Constitutional Council model provides that the President would be removed from office by a resolution to that effect in both Houses of the Parliament in the same session affirmed by two thirds of the total number of the members of each of those Houses. The grounds should be the same as that which applies to judges; i.e., proved misbehaviour or incapacity. This is a non-justiciable judgement made by the Parliament, and each member would need to search their conscience – much as a juror would – in judging whether conduct can be characterised as “proved misbehaviour or incapacity”. If other grounds are favoured, it would be inappropriate to apply these grounds to removal of the President without amending similar provisions applying to removal of judges.

*How should a casual vacancy be filled?*

The Constitutional Council model provides that casual vacancies in the office of President be filled by the Vice-President, or if there is no Vice-President, the Constitutional Council would elect one of its full members to be President.

*What should the eligibility requirements be for the head of state?*

*On what grounds should a person be disqualified from becoming head of state?*

The Constitutional Council model does not specifically provide for eligibility or disqualification for the office of President, as a prerequisite to becoming President would be to be a member of the Constitutional Council. Qualifications (i.e., eligibility requirements and grounds for disqualification) for members of the Constitutional Council would be the same as for members of the House of Representatives; however, if elected, a Constitutional Councillor can't be inducted or continue to hold office if an MP or a member of a political party.

*Should the head of state have power to appoint and remove federal judges?*

A significant weakness in current constitutional arrangements is that judges are effectively appointed by the Executive Government, a serious compromise of the principal of the separation of powers. The appointment of judges should be free from partisanship, and a partisan Executive Government is probably the last place to look for this.

The Constitutional Council model provides that federal judges shall be appointed by the President in accordance with the advice of the Constitutional Council after considering submissions made by any Justice of the High Court, by the Prime Minister, by the Leader of the Opposition, or by any five members of the Commonwealth Parliament.

*In Restoring the True Republic (G. Walker, S. Ratnapala and W. Kasper, Centre for Independent Studies, 1993), the authors say:*

If there is a need to be an elected head of state, the true republicans could propose that that office be provided with sufficient independence, perhaps by popular election, to provide a balance to an otherwise autocratic prime minister. The extremely wide powers of the executive could be reformed. In the absence of the monarchy, there is no justification for the executive government possessing such monarchical prerogatives as the powers to prorogue Parliament, to dissolve the House of Representatives at any time, and to make treaties and appoint judges without legislative sanction.

The final point in respect of appointment of judges is pertinent here. In addition to the President's role, one may also cite the Constitutional Council's role in this respect as being a further justification for the body's existence as a standing body, this would tend to dispel the criticism that the Constitutional Council has too few duties, or that its duties are too mundane.

*Should the head of state have the prerogative of mercy?*

Yes. This prerogative has been exercisable by the head of state until now and should continue. This prerogative is set down under s74 in my draft Constitution as the power to "grant reprieves, pardons and commutation of sentences". The question should extend not just to whether the prerogative should remain with the head of state, but to how it should be exercised. The Constitutional Council model provides that the President may exercise this prerogative (as his absolute discretion), but only with the unanimous consent of the Constitutional Council.

*Should the head of state be free to seek constitutional advice from the judiciary, and if so, under what circumstances?*

There is currently no constitutional impediment to this. It is not possible to predict with certainty that there would never be a justification for the President to seek advice from the judiciary. Accordingly I would recommend that the President be free to seek advice from the judiciary, but that the judiciary be free to refuse to provide advice.

*What is the best way to deal with the position of the states in a federal Australian republic?*

I agree that it would be grossly anomalous and untenable for a State to retain the Queen as its head of state once the Commonwealth adopts a republican system of government. Whilst the Constitutional Council model retains the Governors, the Governors are not designated "head of state", and they are sworn in by the President. Governors are nominated, designated and removed in like manner as the Speaker, with input from the State to the Constitutional Council, and in this sense the President and the Constitutional Council take the place of the Queen in the constitutional order of the States.



## **Rationale of the Constitutional Council model**

The Constitutional Council model reconciles the two main republican camps – the “minimalists” and the “direct electionists”. Whilst there is still strong evidence that public opinion is clearly and consistently in favour of popular election of the Head of State, one of the major problems with popular election models has been the almost universal inference that a popularly elected head of state would also exercise the reserve powers.

Conversely, although most politicians tend to oppose popular election and to support an impartial appointee exercising the reserve powers, one of the major problems with models providing for a head of state appointed by the Parliament, or by an electoral college (appointment committee) or by the Prime Minister alone, is that it will be difficult if not impossible to build sufficient popular support at a referendum – and this was clearly borne out by the failed republic referendum of 1999.

Before proceeding, to avoid confusion, it is necessary to provide a definition of “head of state” in the context of this submission. The head of state is the formal head of the nation positioned at the apex of the constitutional hierarchy. There have been attempts to rebrand the Governor-General as the head of state whilst referring to the Queen as the sovereign, and whilst the Queen is undoubtedly the sovereign, she is also clearly at the apex of the constitutional hierarchy, whilst the Governor-General is expressly her representative vice-regal officer, appointed by her. Thus, the Queen will be referred to as the head of state under current arrangements.

It is worth observing that under present arrangements, the head of state under current arrangements does not exercise the reserve powers, and that the person who does exercise the reserve powers is an appointed officer. In other words, under current arrangements, the head of state and the person exercising the reserve powers are two quite separate individuals. Despite this, most republicans seem to be blinkered by a misconception that a republican head of state is the only officer fit to exercise the reserve powers. Most republicans inadvertently limit their options by failing to realise that under a republican model the symbolic and umpire roles need not be coupled; on the contrary, the President can be a symbolic head of state without being vested with the reserve powers, whilst the role of umpire (exercising the reserve powers) can be played by another officer or body.

The Constitutional Council model moves beyond the “minimalists” and the “direct electionists” paradigms, reconciling the two camps. The prospect of this reconciliation is the driving motivation behind this model.

The model neatly combines the best elements of the existing constitutional arrangements and those of the most popular republican models, including the ultra-minimalist, minimalist (i.e., election by special parliamentary majority), electoral college and directly elected non-executive President models. It is conceptually clean and simple, workable and tightly constructed (i.e., introducing no possibility of constitutional deadlock or vacuum).

## **Moving beyond the paradigm – decoupling the symbolic role and the umpire role**

Under current arrangements:

- The head of state (the Queen) plays only a symbolic role.
- The Governor-General plays a symbolic role and, in exercising the reserve powers, also acts as a constitutional umpire.

It's clearly possible, therefore, for the head of state to play only a symbolic role whilst another official acts as a constitutional umpire; that is, the symbolic role and the umpire role can be **decoupled**. These days, since the Governor-General performs practically all of the symbolic functions normally attributed to a Head of State, many Australians now regard the Governor-General as a *de facto* head of state. This is one of the reasons latter day republicans mistakenly infer that the head of state is the only official fit to exercise the reserve powers.

Setting aside consideration of the Queen for the time being, if we look at the office of Governor-General in isolation, the symbolic and umpire roles are quite distinct, and it becomes clearer how these roles can be decoupled. (Later I will explain why this is desirable.) Professor George Williams explained this well in an article in the *Sydney Morning Herald*, with my highlighting:

**First**, he must be a person who can undertake the **symbolic aspects of the office**. He should strive to unite the nation at times of national crisis or grief and must be able to represent us overseas. ... For this, he requires the broad confidence of the Australian people.

... **Second**, the governor-general may act as **umpire in times of constitutional crisis**. His broad and undefined reserve powers mean he could be called upon to dismiss a prime minister or to determine who should form government after a close election. To exercise such powers, he must be above politics.

The Governor-General must not only be impartial, but must be seen to be so.

If the symbolic and umpire roles are to be decoupled, it is clearly the symbolic role which the head of state must play. The umpire role, involving the exercise of the reserve powers, need not be vested in the head of state. The Constitutional Council model, described below, shows how the symbolic role and the umpire role can be decoupled.

## The President, the Speaker and the Constitutional Council

This model provides for popular election of a Head of State – the President – who, like the Queen, does not exercise the reserve powers. Instead, the reserve powers are exercised by the **Speaker**, with the office of Speaker reformed so as to be as independent and impartial as the Governor-General currently is, or at least **should** be.

It is instructive to take Professor Williams' quote above and to modify it to describe the essence of the Constitutional Council model:

**First, the President** must be a person who can undertake the **symbolic aspects of the office**. He should strive to unite the nation at times of national crisis or grief and must be able to represent us overseas. ... For this, he requires the broad confidence of the Australian people.

**Second, the Speaker** acts as **umpire whilst presiding over the House of Representatives** and may act as **umpire in times of constitutional crisis**. His broad and undefined reserve powers mean he could be called upon to dismiss a prime minister or to determine who should form government after a close election, and his powers whilst presiding over the House of Representatives mean that he must constantly use fairness, not political loyalties, as his guide. To exercise such powers, he must be above politics. He must not only be impartial, but must be seen to be so.

With the President performing a symbolic role, it is most appropriate for the President to be popularly elected; whilst with the Speaker performing the umpire role (both in Parliament and whenever exercising the reserve powers), it is most appropriate for the Speaker to be appointed in a manner likely to produce an incumbent who is above politics.

A Constitutional Council would consist of five directly elected “full” members (these members have a vote on the Constitutional Council) and four *ex officio* “associate” members (the Speaker, the immediate past Speaker, the immediate past President and the the immediate past Vice-President) (these members do not have a vote on the Constitutional Council). One of the full members is chosen to be the President. The model provides for two options regarding how the President is chosen from amongst these full members – either the Constitutional Council elects one of its full members to be President, or the full member receiving the highest popular vote would automatically become President. One member would also be similarly chosen to be the Vice-President.

The President and the Constitutional Council (severally or jointly) would perform a mainly ceremonial and symbolic role. The President, with the consent of the Constitutional Council, may send bills back to the Parliament for reconsideration **once**, (a power also enjoyed but never exercised by the Governor-General), but he has no power to veto bills (a power, incidentally, which the Queen currently enjoys but has never exercised). The President retains none of the reserve powers – these are exercised by the Speaker. The President and the Constitutional Council are entitled to be advised, to encourage and to warn, and one of their key roles would be to defend (within the bounds of their constitutional powers) the democratic constitutional order of the nation.

The Speaker – not the President – would assume the reserve powers now exercisable by the Governor-General whilst continuing to be the presiding officer of the House of Representatives. A number of the remaining non-reserve but nominally discretionary powers (i.e., powers which in theory might allow for the exercise of some discretion but which in practice, by convention, are exercised in accordance with the advice of the Prime Minister or of the Federal Executive Council) and explicitly non-discretionary powers currently exercisable by the Governor-General or the Governor-General in Council (all of which were exercised in accordance with the advice of the Prime Minister or of the Federal Executive Council) would, under this model, be exercisable directly by the Prime Minister or the Federal Executive Council.

The office of Speaker would be reformed to be a more independent, non-partisan office, with the Speaker nominated by the present or any past Speaker, by any past or present Prime Minister, by the Leader of the Opposition, or by any five M.P.s. The Constitutional Council would then elect a Speaker from amongst these candidates. The method of nomination and appointment would enable candidates of similar calibre, aptitude and respectability to that of the Governor-General to be selected for the office of Speaker. The Speaker could be dismissed by the Constitutional Council at its discretion, but only upon a resolution requesting the same by the House of Representatives. A full list of powers of the President, the Constitutional Council, the Speaker and the Federal Executive Council appears below.

The bonus of this model is that not only does the question of codification or exercise of reserve powers by an elected President not present a problem (as the reserve powers would not be exercisable by a popularly elected President who could claim to have a competing mandate against the Prime Minister), but that the office of Speaker is depoliticised (as all reasonable people would agree it should be), restoring some dignity to, and respect for, the House of Representatives and its members. Note that:

- in the UK House of Commons the office of Speaker has been substantially depoliticised.

- the Speaker of the Canadian Senate is not elected by the Senate, but is appointed by the Governor-General on the advice of the Prime Minister.
- in the Irish Dáil Éireann (lower house) the Chairman (equivalent to a Speaker) continues in office after a general election without needing to contest the election nor to be re-elected.
- in the Maltese House of Representatives the Speaker may be selected from outside the Parliament.
- the Speaker of the US House of Representatives is elected by the House, but the office is an overtly political one.

## The main players

Implementation of the new model would bring about changes in terms of who the main constitutional players are. This would involve abolition of certain offices/bodies, replacement of certain offices/ bodies, changes to existing offices/ bodies and creation of new offices/ bodies. These comprise:

- **The monarch:** This office is abolished.
- **The Governor-General:** This office is abolished.
- **The President:** This is a new office which replaces the monarch and, to some extent, the Governor-General.
- **The Constitutional Council:** This is a new body which replaces, in some respects, the monarch and the Governor-General.
- **The Speaker:** This office is changed, retaining all powers and functions of the Speaker under current arrangements but also assuming some of the powers and functions of the Governor-General.
- **The Chairman (or Chancellor) of the House of Representatives:** This is a new office, assuming (at times) the powers of an Acting Speaker, but limited to presiding over the House of Representatives. The Chairman of the House of Representatives never exercises the reserve powers.

Other offices and institutions would generally remain unchanged.

## Table showing main features of the Constitutional Council model

	President	Constitutional Council	Speaker
<b>Eligibility</b>	Same as for House of Representatives. If elected, can't be inducted or hold office if an MP or a member of a political party.	Same as for House of Representatives. If elected, can't be inducted or hold office if an MP or a member of a political party.	Same as for House of Representatives. If elected, can't be inducted or hold office if an MP, full member of Constitutional Council or a member of a political party.
<b>Nomination</b>	[Nomination is as a candidate for the Constitutional Council.]	By 1000 nominators. Nominators may be anyone eligible to vote for the House of Representatives.	By incumbent or past Speaker, incumbent or past Prime Minister, incumbent Leader of the Opposition, any five MPs.
<b>Shortlisting</b>	Not applicable.	Senate may reject any nomination by a two-thirds vote. Senate may top up list of candidates to 15, and may reduce number of candidates to 50. In topping up or reducing the number of candidates, it votes by secret ballot.	None.
<b>Election/ appointment</b>	The Parliament decides on one of two options: (i) Indirect popular election: the Constitutional Council chooses one of its number to be President; or (ii) Direct popular election: the Constitutional Councillor achieving the highest vote at the election becomes the President. Option (i) applies by default.	Constitutional Council is directly elected by the nation voting as a single electorate, and voting is by proportional representation by means of the single transferrable vote.	Constitutional Council chooses the Speaker from the list of candidates.
<b>Tenure</b>	6 years.	6 years.	5 years.
<b>Removal</b>	2/3 resolution of both Houses.	2/3 resolution of both Houses.	By Constitutional Council following 2/3 resolution of the House of Representatives.
<b>Casual vacancy</b>	Vice-President, or if there is no Vice-President, the Constitutional Council elects one of its full members to be President.	Counting back method used to fill vacancy. If there have been four or more vacancies of full members during the term of a Constitutional Council, the Constitutional Council is dissolved.	Deputy Speaker.

## One model, two ways of electing the President

Two types of popular election are set out for the President and Vice-President: indirect and direct popular election (see section 2 of the draft Constitution). The Parliament may decide from time to time, as it sees fit, between indirect or direct popular election. This provides for constitutional flexibility without the need for intervening referendums, allowing the Parliament to change from one method to the other should it deem one option preferable to another, or should popular opinion demand one option over another. By default, indirect popular election applies; however, it could be expected that popular opinion would be more in favour of direct popular election. By having indirect popular election apply by default, this option can be tried out for, say, one or two Presidential terms, but if public opinion remains strongly in favour of direct popular election, the Parliament can prescribe this without the need for another referendum.

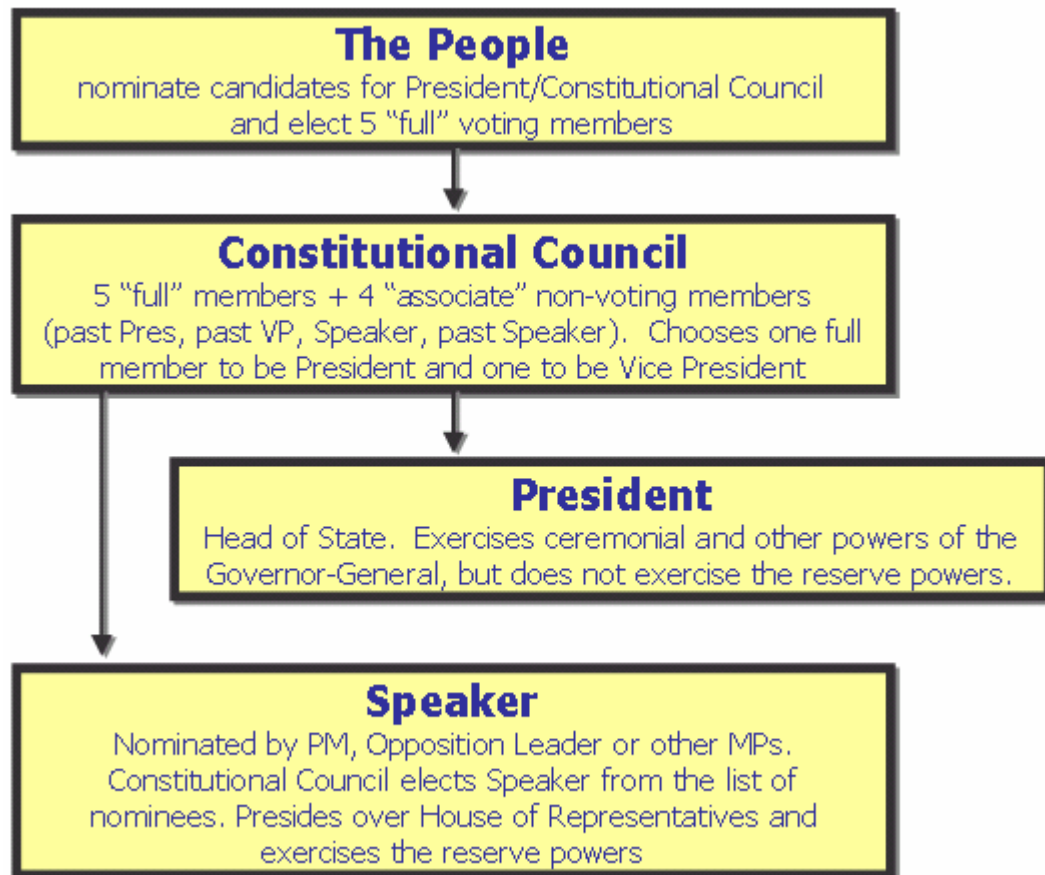
The indirect popular election option provides that after the Constitutional Council is elected, the Council meets to choose one of its number to be President and one to be Vice-President. The Constitutional Council member chosen as President need not be the member

who obtained the highest vote at the election of the Constitutional Council, though the President will of course have been directly elected as a Constitutional Council member.

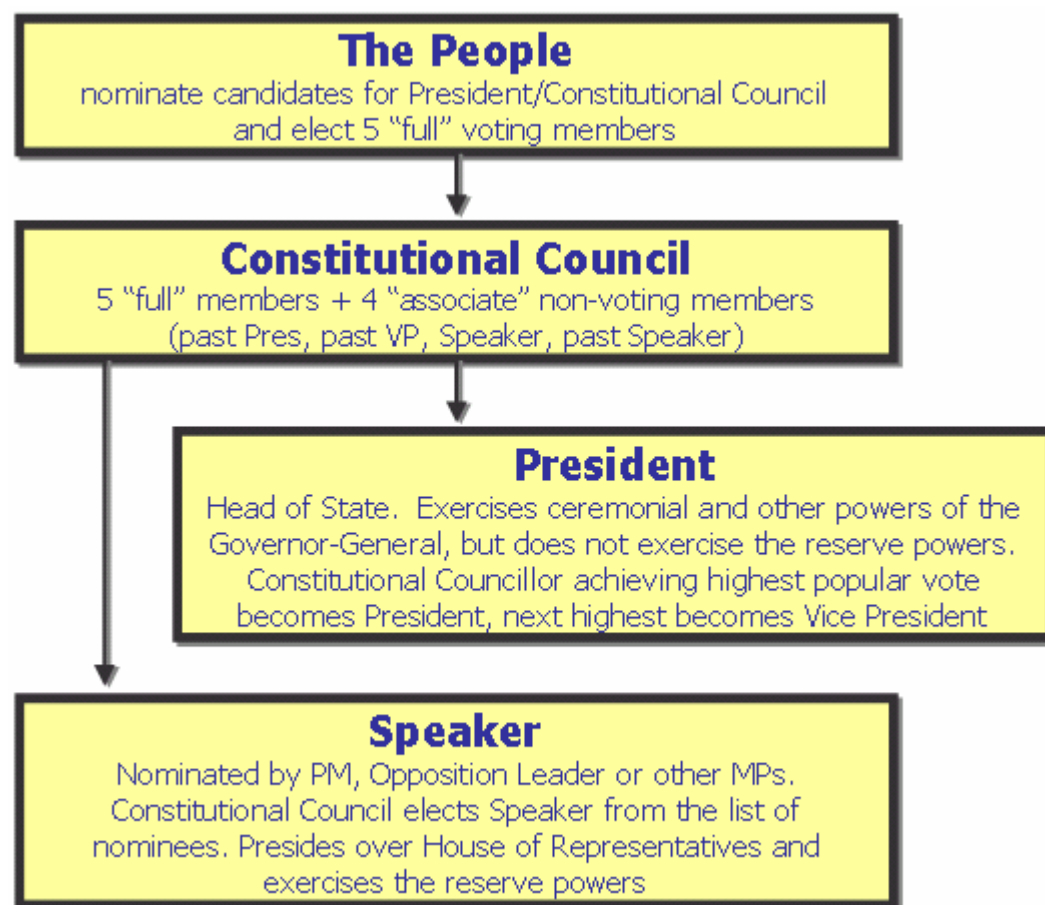
The direct popular election option provides that when the Constitutional Council is elected, the candidate with the highest vote becomes the President and the candidate with the second highest vote becomes the Vice-President.

These two options are illustrated below.

**Figure 1: Indirect Popular Election of the President**



**Figure 2: Direct Popular Election of the President**



## **The Chairman (or Chancellor) of the House of Representatives**

Recognising that the Speaker may at times be attending to other matters (e.g., Constitutional Council meetings or the exercise of reserve powers), a new office of Chairman of the House of Representatives is created. The Chairman is like a Speaker *pro tempore* who presides over the House of Representatives when the Speaker (or a deputy of the Speaker) is not available to preside, much like a Deputy Speaker under current arrangements. This is comparable to:

- the US Senate: the Vice-President, according to the US Constitution, is also, *ex officio*, the President of the US Senate, but in his absence the President *pro tempore* (who is a Senator chosen by the Senate) presides over the Senate.
- the UK House of Lords: the Lord Chancellor is, *ex officio*, the Speaker of the House of Lords, but in his absence (and in the absence of a Deputy Speaker) the House may choose a Deputy Chairman or an alternate Speaker.

The Chairman is elected in the same way as the Speaker is elected under current constitutional arrangements. The Chairman does not exercise any powers or functions of the Speaker apart from presiding over the House in the Speaker's absence, and in particular, the Chairman does not exercise the reserve powers.

The term "Chancellor" could be used here instead of "Chairman" as this title is applied to a similar office in the UK Parliament; namely, the Lord Chancellor. Although the title is of no consequence in respect of the constitutional machinery, public perception needs to be

considered. The term “Chancellor” is less familiar to the public than “Chairman”, but “Chairman” (rightly or wrongly) might be seen as a sexist term, whereas “Chancellor” is gender-neutral. “Chair” is seen by some as a “politically correct” mutation of “Chairman”. The term “Chancellor” would not be confused with the term “Chairman of Committees”, whereas the term “Chairman” would be so confused. Alternatively, the titles “Speaker” and “Chancellor” could be swapped such that it is the *Chancellor* who is appointed by the Constitutional Council and who exercises the reserve powers, and the *Speaker* who is elected by the House of Representatives to chair the House in the *Chancellor’s* absence. The latter suggestion is perhaps a closer parallel to the use of the titles “Lord Chancellor” and “alternate Speaker” in respect of the UK House of Lords.

## Classification of powers and functions

Under current arrangements, certain powers and functions (mainly of the Queen and the Governor-General) may be described as follows. These are my terms which I have used for the sake of comparison with the Constitutional Council model; the terms are not used in the Constitution.

- **Discretionary powers and functions** are powers and functions which may be exercised with, without or contrary to any advice. These powers and functions include the reserve powers and the prerogative powers, but might also include powers which, though not universally agreed to be reserve powers, are clearly granted to the Governor-General.
- **Nominally discretionary powers and functions** are powers and functions of the Queen or the Governor-General under current arrangements which, according to a literal interpretation of the Constitution, are discretionary. By convention, however, these powers and functions are only exercised in accordance with the advice of the Federal Executive Council or the Prime Minister (so in effect are non-discretionary), or are not exercised at all.
- **Other powers and functions** are powers and functions which cannot be easily classified, and which may simply define a role rather than assign powers. These must be read on a case by case basis.

Under the Constitutional Council model, I have classified certain powers and functions (mainly of the President and the Speaker) as follows:

- **Discretionary powers and functions** are powers and functions which may be exercised with, without or contrary to any advice. This is defined and explained in s126B of the Constitutional Council model draft Constitution. These powers and functions include the reserve powers (listed below under the heading “The reserve powers”) and the prerogative powers. This is broadly equivalent to the “discretionary powers and functions” under current arrangements.
- **Qualified discretionary powers and functions** refers only to powers and functions of the Speaker under the Constitutional Council model. These are powers and functions which may be exercised without advice where no conflicting advice is provided, except that in the case of the Speaker, if the Speaker is advised by the Federal Executive Council to exercise such a power, the Speaker is then bound to act in accordance with that advice. This is defined and explained in s126C of the Constitutional Council model draft Constitution. This is a sort of hybrid of the “discretionary powers and functions” and “nominally discretionary powers and functions” under current arrangements.
- **Non-discretionary powers and functions** may be exercised only in accordance with the specified advice. This is defined in s126A of the Constitutional Council model



draft Constitution. This is broadly equivalent to the “nominally discretionary powers and functions” under current arrangements.

- **Other powers and functions** include passive, symbolic, ceremonial, advisory and consultative roles (i.e., they may simply define a role rather than assign powers or functions), ongoing functions (e.g., the role of the Speaker in presiding over the House of Representatives) and *ex officio* memberships of bodies.

## The reserve powers

The **reserve powers** are a set of discretionary powers which, under current arrangements, may be exercised by the Governor-General. The reserve powers of the Governor-General under current arrangements are generally agreed to comprise the following:

- *Reserve power no. 1:* The **Governor-General appoints and dismisses a Prime Minister**. As the Prime Minister is not mentioned in the Constitution, the sections which apply to the appointment of ministers also apply to the Prime Minister. (s62 and s64)
- *Reserve power no. 2:* The **Governor-General may dissolve the House of Representatives**. (s5 and s28)
- *Reserve power no. 3:* The **Governor-General may refuse to dissolve the House of Representatives** when so advised by the Prime Minister if the Prime Minister has lost the confidence of the House of Representatives or has not yet obtained it. (s5 and s28)
- *Reserve power no. 4:* The **Governor-General may refuse to simultaneously dissolve the House of Representatives and the Senate** (i.e., to call a double dissolution) when so advised. (s57)

Reserve powers under the Constitutional Council model are essentially the same as under current arrangements, albeit with minimal codification so as to clarify the circumstances under which they may be exercised (and reviewed), but not so as to restrict the exercise of discretion. The fundamental difference is that they are all exercised by the Speaker, subject to the review of the Constitutional Council:

- *Reserve power no. 1a:* The **Speaker appoints as Prime Minister** the person whom he believes would be most likely to command the confidence of the House of Representatives, unless the House of Representatives declares confidence in another person, in which case the **Speaker** must appoint that person. (s63, paragraph 2)
- *Reserve power no. 1b:* The **Speaker may remove the Prime Minister from office** if he has lost the confidence of the House of Representatives and has failed to resign, unless the Prime Minister has advised the **Speaker** to dissolve the House of Representatives and the **Speaker** has accepted the advice. (s63A)
- *Reserve power no. 2:* If the executive government is behaving unlawfully, the **Speaker may dissolve the House of Representatives**, and he may also remove the Prime Minister from office and appoint a caretaker Prime Minister. (s63B)
- *Reserve power no. 3:* The **Speaker may refuse to dissolve the House of Representatives** if the Prime Minister has lost the confidence of the House of Representatives or has not yet obtained it. (s28)
- *Reserve power no. 4:* The **Speaker may refuse to simultaneously dissolve the House of Representatives and the Senate** (i.e., to call a double dissolution) when so advised. (s57)

There is one situation in which the reserve powers would be exercisable by the President, though the probability of this situation occurring would be small. Namely, whilst an action

to dismiss the Speaker is pending, s35E allows the President to exercise the reserve powers of the Speaker, but then only with the consent of the Constitutional Council.

## **Power of the Constitutional Council to review the exercise of the reserve powers**

The Constitutional Council model provides for the exercise of the reserve powers by the Speaker subject to review (and veto) by the Constitutional Council. Under current arrangements, in practice, the exercise of these reserve powers by the Governor-General is not subject to veto or review (although monarchists would disingenuously suggest that the Queen plays some role as a “backstop” by checking, reviewing or limiting the powers of the Governor-General). This was tested in 1975 when the Speaker requested intervention from the Queen following the sacking of Gough Whitlam as Prime Minister, and the Queen replied that it was improper for her to intervene, and again in 2003 when the Queen refused to become involved in the controversy surrounding then Governor-General Dr. Peter Hollingworth.

In order to discourage frivolous use of the review power, the following restrictions apply:

- the period of review is limited to 1 day following the exercise of a reserve power (any longer would make it difficult to “unscramble the constitutional egg” - imagine if a dismissal of a Government and the appointment of a caretaker Government was annulled more than one day thereafter!);
- four out of the five full members of the Constitutional Council would be required to vote in favour of a veto (i.e., the Constitutional Council would have to be strongly in favour of a veto); and
- one of those four full members of the Constitutional Council voting in favour of a veto would need to be the President (i.e., the President would have to be in favour of a veto).

The review power and process is defined in s126D:

**126D. When a provision of this Constitution provides that an act of the Speaker is subject to the review of the Constitutional Council, the Speaker may act (or omit to act) according to his discretion, except that no more than four days before so acting he shall inform the Constitutional Council of his intention to act, and within one day of the Speaker having so acted, the Constitutional Council may, by a resolution affirmed by four full members (one of whom shall be the President), disallow the act of the Speaker, and such disallowance shall annul the act from the time the act was performed.**

Note that the Speaker would have to inform the Constitutional Council of his intention to act so that it could be prepared to convene to consider review and veto should it see fit to do so. Note also that this does not allow the Constitutional Council to itself assume the reserve powers of the Speaker, but only to veto the exercise thereof in specific instances. Note also that in the one instance in which the reserve powers would be exercisable by the President (i.e., whilst an action to dismiss the Speaker is pending – see s35E) the exercise of the reserve powers requires the consent of the Constitutional Council, so a simple majority vote of the Constitutional Council in this case (rather than a four fifths vote) could prevent (and therefore, effectively veto) the exercise thereof in these instances.

Section 126D is based on the original section 59, which, though never invoked, empowers the Queen to veto laws:

The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the House of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is made known.

## Tables comparing powers and functions

The following tables comprehensively set out the powers, functions and roles of the President, the Speaker, the Constitutional Council, the Federal Executive Council and the Prime Minister under the Constitutional Council model and compare these with powers and functions under current arrangements.

### ***Powers and functions of the President***

The President is the head of state, and performs a mainly ceremonial and symbolic role. All powers and functions of the President are, like the Governor-General, subject to due regard being had to constitutional conventions, and with the exception of powers or functions expressly vested in the President by the Constitution (see the table below), powers or functions vested in the President (e.g., by legislation) can (unless otherwise provided) only be exercised or performed in accordance with the advice of the Federal Executive Council.

### **Discretionary (including prerogative and reserve) powers and functions**

Provisions under the Constitutional Council model	Equivalent/similar provisions under the current arrangements
s3A: The <b>President</b> may declare that an Acting President cease to act as <b>President</b> .	There is no equivalent to this power under current arrangements.
s35E: The <b>President</b> exercises (with the consent of the Constitutional Council) the powers and functions of the Speaker whilst an action to dismiss the Speaker is pending, except that the Acting Speaker presides during this time over the House of Representatives.	Under current arrangements there is no provision for an action being taken to dismiss the <b>Governor-General</b> , but note that whereas the President would be able to exercise reserve powers only at this time, the GG can exercise the reserve powers at all times.
ss57,58: The <b>President</b> may assent to bills presented for assent. He may withhold assent and (with the consent of the Constitutional Council) return bills to the Parliament with recommendations, but if the Parliament again passes the bill he may not again return it.	ss57,58: The <b>Governor-General</b> may assent to bills presented for assent. He may withhold assent and return bills to Parliament with recommendations. He may reserve the bill "for the Queen's pleasure". s59. The Queen may veto any law within a year of its having been assented to. These are nominally discretionary powers which are generally not exercised.
s69: The <b>President</b> , acting only in accordance with the advice of the Constitutional Council, confers honours and titles.	Not specified in the Constitution.
s70I: The <b>President</b> presides over the Constitutional Council, convenes meetings of the Constitutional Council and has a casting vote when votes on the Constitutional Council are tied.	There is no equivalent to this power under current arrangements.
s72: The <b>President</b> appoints the Justices of the High Court in accordance with the advice of the Constitutional Council.	s72: The <b>Governor-General</b> appoints the Justices of the High Court in accordance with the advice of the Federal Executive Council.
s72: The <b>President</b> removes Justices of the High Court in accordance with the advice of the Constitutional Council (under certain conditions).	s72: The <b>Governor-General</b> removes Justices of the High Court in accordance with the advice of the Federal Executive Council (under certain conditions).
s74: The <b>President</b> may grant reprieves, pardons and commutation of sentences, and may grant special leave to appeal to the High Court or any other court.	s74: Before appeals to the Privy Council were abolished, the High Court could certify that a question could be appealed to the Privy Council, and the Queen could grant special leave to appeal to the Privy Council. Other powers regarding reprieves, pardons and commutation of sentences deriving from the royal prerogative, while they may well be exercisable, are not spelt out in the Constitution.

## Non-discretionary powers and functions

Provisions under the Constitutional Council model	Equivalent/similar provisions under the current arrangements
s21: In the absence of the President of the Senate the <b>President</b> notifies a Governor of a vacancy in the Senate.	Same, but exercised by Governor-General.
s35D: The <b>President</b> administers oath/affirmation of office to the Speaker.	There is no equivalent to this under current arrangements.
s42: The <b>President</b> administers the oath/affirmation of allegiance to MPs.	Same, but exercised by Governor-General.
s68: The <b>President</b> is Commander in Chief of the military, but any powers/functions he exercises/performs must be in accordance with the advice of the Federal Executive Council.	s68: The <b>Governor-General</b> is Commander in Chief of the military.
s69: The <b>President</b> , acting only in accordance with the advice of the Federal Executive Council, declares war and appoints diplomatic representatives.	Not specified in the Constitution.
s70I: The <b>President</b> presides over the Constitutional Council, convenes meetings of the Constitutional Council and has a casting vote when votes on the Constitutional Council are tied.	There is no equivalent to this under current arrangements.
s103: The <b>President</b> appoints the members of the Inter-State Commission in accordance with the advice of the Federal Executive Council.	Same, but exercised by Governor-General.
s103: The <b>President</b> removes members of the Inter-State Commission in accordance with the advice of the Federal Executive Council (under certain conditions).	Same, but exercised by Governor-General.
s128: The <b>President</b> assents to bills amending the Constitution if passed at a referendum.	Same, but exercised by Governor-General.

## Passive, symbolic and ceremonial roles (including *ex officio* memberships)

Provisions under the Constitutional Council model	Equivalent/similar provisions under the current arrangements
s7: Names of senators chosen for each State are certified by the Governor to the <b>President</b> .	Same, but exercised by Governor-General.
s19: A senator may resign his seat by writing to the <b>President</b> in the absence of the President of the Senate.	Same, but exercised by Governor-General.
s35E: The Speaker may resign his office or seat by writing to the <b>President</b> .	There is no equivalent to this under current arrangements.
s37: A member of the H of R may resign his seat by writing to the <b>President</b> in the absence of the Speaker.	Same, but exercised by Governor-General.
s70A: The <b>immediate past President</b> and the immediate past Vice-President are associate (non-voting) members of the Constitutional Council.	There is no equivalent to this under current arrangements.
s70F: A member of the Constitutional Council may resign his seat by writing to the <b>President</b> .	There is no equivalent to this under current arrangements.
s72: A Justice or a judge may resign his office by writing to the <b>President</b> .	Same, but exercised by Governor-General.
s127: References to the Crown are deemed to refer in a symbolic and ceremonial sense to the <b>President</b> .	s2: The <b>Governor-General</b> is the Queen's representative.

## Powers and functions of the Constitutional Council

The Constitutional Council appoints the President, the Vice-President and the Speaker. Otherwise it performs a mainly ceremonial and symbolic role.

## Discretionary (including prerogative and reserve) powers and functions

Provisions under the Constitutional Council model	Equivalent/similar provisions under the current arrangements
s2: The <b>Constitutional Council</b> elects one of its members to be President and one to be Vice-President.	There is no equivalent to this under current arrangements.
s3: The Speaker and the <b>Constitutional Council</b> may declare the President temporarily incapacitated.	There is no equivalent to this under current arrangements.
s35A: In the absence of nomination of candidates for the office of Speaker, the <b>Constitutional Council</b> may nominate candidates for the office.	There is no equivalent to this under current arrangements.
s35B: The <b>Constitutional Council</b> chooses one of the candidates for the office of Speaker to be the Speaker. The	The nearest equivalent to this is the following: s2. The <b>Queen</b> appoints the Governor-General [on the advice

candidates are nominated by the House of Representatives.	of the Prime Minister]. s35. The <b>House of Representatives</b> chooses one of its members to be Speaker.
s35E: The <b>Constitutional Council</b> may remove the Speaker from office on an address from the House of Representatives praying for removal on the ground of proved misbehaviour or incapacity.	The nearest equivalent to this is s2, which implies that the <b>Queen</b> removes the Governor-General on the advice of the Prime Minister.
s35E: The <b>Constitutional Council</b> may consent to the exercise by the President of powers or functions of the Speaker whilst an action to dismiss the Speaker is pending. (During this time the Acting Speaker presides over the House of Representatives.)	There is no provision for an action being taken to dismiss the <b>Governor-General</b> , but note that whereas the President would be able to exercise reserve powers only at this time, the GG can exercise the reserve powers at all times.
s35F: The <b>Constitutional Council</b> may consent to an appointment by the Speaker of a deputy to the Speaker.	s126. The <b>Queen</b> may authorise the Governor-General to appoint a deputy to the Governor-General.
s35G: The <b>Constitutional Council</b> may prescribe officers, and the precedence of those officers, to act as Speaker in the absence of deputies of the Speaker.	There is no equivalent to this under current arrangements.
s35G: The <b>Constitutional Council</b> may declare the Speaker temporarily incapacitated.	There is no equivalent to this under current arrangements.
s70: The <b>Constitutional Council</b> may seek advice, encourage or warn.	This is implied; e.g., in the first sentence of the Preamble.
s72: The <b>Constitutional Council</b> advises the President in respect of the appointment of Justices of the High Court.	s72: The <b>Federal Executive Council</b> advises the President in respect of the appointment of Justices of the High Court.
s72: The <b>Constitutional Council</b> advises the President in respect of the removal of Justices of the High Court (under certain conditions).	s72: The <b>Federal Executive Council</b> advises the President in respect of the removal of Justices of the High Court (under certain conditions).
s110A: The <b>Constitutional Council</b> may, if authorised by the laws of a State, and if it agrees to do so, play a role in the nomination, designation and dismissal of the Governors of the States.	In State Constitutions and the Australia Act(s), the <b>Queen</b> appoints and dismisses the Governors of the States.
s126A. The <b>Constitutional Council</b> may set a date that an act which is required by the Constitution to be performed, but which the relevant officer refuses to perform or fails to perform, is nevertheless deemed to be performed. (The Federal Executive Council may exercise the same power.)	There is no equivalent to this under current arrangements.

## Passive, symbolic and ceremonial roles

Provisions under the Constitutional Council model	Equivalent/similar provisions under the current arrangements
s70. The <b>Constitutional Council</b> may engage in any symbolic or ceremonial functions.	This is implied; e.g., in the first sentence of the Preamble.

## Powers and functions of the Speaker

The Speaker is the presiding officer of the House of Representatives and is a non-voting member of the Constitutional Council. He can appoint and dismiss the Prime Minister, dissolve the House of Representatives, dismiss the Chairman of the House of Representatives, issue writs for elections for the House of Representatives, summon the Parliament and convene joint sittings, and recommend appropriation bills to Parliament.

## Discretionary (including reserve) powers and functions

Provisions under the Constitutional Council model	Equivalent/similar provisions under the current arrangements
s2A: The <b>Speaker</b> appoints officers to administer the oath/affirmation of office to the President and Vice-President where those otherwise provided for are unavailable and where no other provision has been made.	There is no equivalent to this under current arrangements.
s3: The <b>Speaker</b> appoints officers to act as President where those otherwise provided for are unavailable and where no other provision has been made.	s4: The <b>Queen</b> may appoint a person to administer the Government of the Commonwealth in place of the Governor-General.
s3: The <b>Speaker</b> and the Constitutional Council may declare the President temporarily incapacitated.	There is no equivalent to this under current arrangements.
s5: The <b>Speaker</b> may (subject to other provisions) dissolve the House of Representatives. Note that this power is not purely discretionary as it is defined and constrained by other powers listed here.	s5: The <b>Governor-General</b> may dissolve the House of Representatives.
s28: The <b>Speaker</b> may refuse to dissolve the House of Representatives if the Prime Minister has lost the confidence	s57: Implies that the <b>Governor-General</b> may refuse to dissolve the House of Representatives before the expiration of

of the House of Representatives or has not yet obtained it.	its term.
s35A: The <b>Speaker</b> may nominate candidates for the office of Speaker.	s35: The <b>House of Representatives</b> chooses the Speaker.
s35F: The <b>Speaker</b> may (with the consent of the Constitutional Council) appoint a deputy and may assign powers and functions to the deputy.	There is no equivalent to this under current arrangements, but c.f. s126. The <b>Queen</b> may authorise the Governor-General to appoint deputies.
s35G: The <b>Speaker</b> appoints officers to act as Speaker where those otherwise provided for are unavailable and where no other provision has been made.	There is no equivalent to this under current arrangements.
s35H: The <b>Speaker</b> may declare that an Acting Speaker cease to act as Speaker.	There is no equivalent to this under current arrangements.
s36: The <b>Speaker</b> may remove the Chairman of the House of Representatives from office.	There is no equivalent to this under current arrangements.
s57: The <b>Speaker</b> may dissolve the House of Representatives and the Senate (a double dissolution) when so advised by the Federal Executive Council and when the conditions for a double dissolution (involving disagreement between the Houses) have been met. The <b>Speaker</b> may refuse to dissolve the House of Representatives and the Senate (a double dissolution).	s57: The <b>Governor-General</b> may dissolve the House of Representatives and the Senate (a double dissolution) when the conditions for a double dissolution (involving disagreement between the Houses) have been met. [Implies that the <b>Governor-General</b> may refuse to dissolve the House of Representatives and the Senate (a double dissolution).]
s63: The <b>Speaker</b> appoints as Prime Minister the person whom he believes would be most likely to command the confidence of the House of Representatives, unless the House of Representatives declares confidence in another person, in which case the <b>Speaker</b> must appoint that person.	Not explicitly stated in the Constitution, but see s62 ( <b>Governor-General</b> appoints Federal Executive Council) and s64 ( <b>Governor-General</b> appoints Ministers).
s63A: The <b>Speaker</b> may remove the Prime Minister from office if he has lost the confidence of the House of Representatives and has failed to resign, unless the Prime Minister has advised the <b>Speaker</b> to dissolve the House of Representatives and the <b>Speaker</b> has accepted the advice.	Not explicitly stated in the Constitution, but see s62 ( <b>Governor-General</b> appoints Federal Executive Council) and s64 ( <b>Governor-General</b> appoints Ministers).
s63B: If the executive government is behaving unlawfully, the <b>Speaker</b> may dissolve the House of Representatives, and he may also remove the Prime Minister from office and appoint a caretaker Prime Minister.	Not explicitly stated in the Constitution, but see s62 ( <b>Governor-General</b> appoints Federal Executive Council), s64 ( <b>Governor-General</b> appoints Ministers) s5 and s28 ( <b>Governor-General</b> may dissolve House of Representatives).

## Qualified discretionary powers and functions

Provisions under the Constitutional Council model	Equivalent/similar provisions under the current arrangements
s5: The <b>Speaker</b> may appoint times for the holding of sessions of Parliament (including joint sittings), and may prorogue the Parliament.	s5: The <b>Governor-General</b> may appoint times for the holding of sessions of Parliament, and may prorogue the Parliament.
s56: The <b>Speaker</b> recommends appropriation bills.	s56: The <b>Governor-General</b> recommends appropriation bills.
s57 (3rd paragraph): The <b>Speaker</b> may convene a joint sitting after a double dissolution.	s57: The <b>Governor-General</b> may convene a joint sitting after a double dissolution.

## Non-discretionary powers and functions

Provisions under the Constitutional Council model	Equivalent/similar provisions under the current arrangements
s28: The <b>Speaker</b> must dissolve the House of Representatives when so advised by the Prime Minister (except that he may refuse to do so if the Prime Minister has lost the confidence of the House of Representatives or has not yet obtained it).	s28: The <b>Governor-General</b> may dissolve the House of Representatives before the expiration of its term.
s32: The <b>Speaker</b> issues writs for general elections of members of the House of Representatives.	s32: The <b>Governor-General in Council</b> issues writs for general elections of members of the House of Representatives.
s33: The <b>Speaker</b> issues writs for the election of a new member to a vacancy in the House of Representatives.	s33: Same.
s70C: The <b>Speaker</b> issues writs for Constitutional Council elections.	There is no equivalent to this under current arrangements.

## Other powers and functions, and passive, symbolic and ceremonial roles (including *ex officio* memberships)

Provisions under the Constitutional Council model	Equivalent/similar provisions under the current arrangements
s35: The <b>Speaker</b> presides over the House of Representatives.	s35: Same.
s36: The Chairman of the House of Representatives may resign his office by writing to the <b>Speaker</b> .	C.f. s35: The Speaker may resign his office by writing to the <b>Governor-General</b> .
s37: A member of the House of Representatives may resign his seat by writing to the <b>Speaker</b> .	s37: Same.
s70A: The <b>Speaker</b> (and the immediate past <b>Speaker</b> ) are <i>ex-officio</i> non-voting members of the Constitutional Council.	There is no equivalent to this under current arrangements.

## Powers and functions of the Federal Executive Council

The Federal Executive Council, which is headed by the Prime Minister, is the principal organ of the executive government. It advises the Speaker in respect of the exercise of certain powers (calling a double dissolution, summoning the Parliament and convening joint sittings, recommending appropriation bills to Parliament), establishes departments, appoints public servants and other officers, and advises the President in respect of the exercise of certain powers. All powers and functions of the Federal Executive Council are **discretionary**.

### Discretionary powers and functions

Provisions under the Constitutional Council model	Equivalent/similar provisions under the current arrangements
s5: The <b>Federal Executive Council</b> may advise the Speaker to appoint times for the holding of sessions of Parliament, and to prorogue the Parliament.	s5. The <b>Governor-General</b> may appoint times for the holding of sessions of Parliament, and may prorogue the Parliament.
s56: The <b>Federal Executive Council</b> may advise the Speaker to recommend appropriation bills.	s56. The <b>Governor-General</b> recommends appropriation bills.
s57: The <b>Federal Executive Council</b> may advise the Speaker to call a double dissolution when the conditions for a double dissolution (involving disagreement between the Houses) have been met.	s57. The <b>Governor-General</b> may dissolve the House of Representatives and the Senate (a double dissolution) when the conditions for a double dissolution (involving disagreement between the Houses) have been met.
s57: The <b>Federal Executive Council</b> may advise the Speaker to convene a joint sitting after a double dissolution. (The Speaker may also exercise this power independently.)	s57. The <b>Governor-General</b> may convene a joint sitting after a double dissolution.
s60: The <b>Federal Executive Council</b> administers the Government of the Commonwealth, and the executive power of the Commonwealth is vested in and exercisable by it. It exercises the powers and functions of, and enjoys the rights, privileges and immunities of, the Crown in right of the Commonwealth.	s61. The executive power of the Commonwealth is vested in the <b>Queen</b> and executable by the <b>Governor-General</b> .
s64: The <b>Federal Executive Council</b> may establish departments.	s64. The <b>Governor-General in Council</b> may establish departments.
s67: The <b>Federal Executive Council</b> may appoint all other officers of the executive government.	s67. The <b>Governor-General in Council</b> may appoint all other officers of the executive government.
ss68, 69, 72, 103: The <b>Federal Executive Council</b> advises the President in respect of the exercise/performance of certain powers/functions (see the powers of the President).	There is no explicit provision for this under current arrangements.
s126A: The <b>Federal Executive Council</b> may set a date that an act which is required by the Constitution to be performed, but which the relevant officer refuses to perform or fails to perform, is nevertheless deemed to be performed. (The Constitutional Council may exercise the same power.)	There is no explicit provision for this under current arrangements.

## Powers and functions of the Prime Minister

The Prime Minister is the Head of Government. He/she can advise the Speaker to dissolve the House of Representatives, submit nominations (along with others) for the office of Speaker to the Constitutional Council, is President of the Federal Executive Council and decides on the composition of the Cabinet/Ministry. All powers and functions of the Prime Minister are **discretionary**.



## Discretionary powers and functions

Provisions under the Constitutional Council model	Equivalent/similar provisions under the current arrangements
s28. The <b>Prime Minister</b> may advise the Speaker to dissolve the House of Representatives.	There is no explicit provision for this under current arrangements.
s35A. The <b>Prime Minister</b> may nominate the Speaker (but note that others also may nominate the Speaker).	s35. The <b>House of Representatives</b> chooses the Speaker.
s63. The <b>Prime Minister</b> is President of the Federal Executive Council and convenes meetings of the Federal Executive Council.	There is no explicit provision or clear equivalent for this under current arrangements. C.f. s62. The Federal Executive Council is summoned by the <b>Governor-General</b> .
s63. The <b>Prime Minister</b> appoints and dismisses Ministers and assigns portfolios to them.	s62 and s64. The <b>Governor-General</b> appoints and dismisses Ministers and assigns portfolios to them.

## The position of the States

It would be grossly anomalous and untenable for a State to retain the Queen as its head of state once the Commonwealth adopts a republican system of government. Under current arrangements the States and the Commonwealth retain the same individual as head of state, despite the divisibility of the Crown, where and even though that head of state may act in a legally independent manner in right of the Commonwealth or of the States. This affords a real sense of integration, unity and consistency in all jurisdictions of the federation. This was not always the case – at federation, and prior to 1926, it could be said that the Australia and the Australian States had one single legal and physical head of state.

To dispense with this unity would, in a sense, loosen the federation. One might even question whether the states need to designate the Governor as a “head of state” – the Governors currently do not have to be heads of state in order to effectively carry out their roles, and some territories and all local governments exist without heads of state, with other officers performing head of state type roles. In other words, Governors could continue to exist, but the head of state – even if in name only – should be the President. This can be achieved by replacing the Queen by the President in all jurisdictions, with some modifications. It is unlikely that the establishment of a separate Constitutional Council type structure in each State would be received well by the public, as the public is rightly skeptical of unnecessary duplication of function at federal and State levels. It should be noted that in Canada, the equivalents of State Governors in each of the provinces (known as “Lieutenant Governors”) are appointed by the Governor-General of Canada, yet this does not impinge upon the sovereignty of the provinces.

It must also be recognised that it is up to each State to determine its system of government, and it is not inconceivable that a state may establish a system of directly electing the Governor with the Governor also being the head of government, either dispensing with or subordinating the Premier. This fact needs to be carefully considered as there are numerous references to State Governors throughout the Constitution which could be abused by an executive Governor. These references to Governors could be easily excised without any practical change occurring to the functioning of the federal or State governments or to the balance of federal and State powers.

The provisions of the Constitutional Council model’s draft Constitution affecting the States are sections 110A, 110B, and clause 5 of Schedule II. Section 110A provides for the induction of a State Governor by the President, and includes the Constitutional Council in the process of nomination, designation and removal of a Governor in like manner as the nomination, designation and removal of the Speaker with the involvement of the State. The Constitutional Council may decline this involvement; if it does, the State is free to prescribe any other process as it sees fit. This obviates the need for State-based Constitutional Councils in each State.



Section 110B vests the executive power of the State in the Governor and vests the powers, functions, rights, privileges, immunities and prerogatives of the Crown in right of the State in the Governor and/or the State.

Clause 5 of Schedule II enables the Queen to continue as head of state of the State only if the State Parliament so resolves before the establishment of the republic, and only if the Queen does not decline to continue as head of state. At any time after the establishment of a republic, the State Parliament may resolve that the Queen ceases to be head of state, and this resolution shall be irrevocable.

## **Possible longer term reforms**

The Constitutional Council model allows for a range of further constitutional reforms, should these be desired, at or after the establishment of a republic. These include empowering the Constitutional Council to:

- appoint a Judicial Commission to advise on the appointment of judges.
- appoint non-voting members of the Senate for the remainder of the term of the Senate. This would be similar to the appointment of peers to the UK House of Lords, and would, for example, facilitate the appointment of indigenous members.
- appoint certain independent officers and agencies which should be completely free from political interference or manipulation by the executive government of the day, and which are necessary in protecting and maintaining good constitutional government, such as the Auditor-General, the Ombudsman, the Human Rights Commission, the Electoral Commission, and an Anti-corruption Commission.
- introduce legislation into Parliament in respect of powers and functions of the President and the Constitutional Council, and the independent officers and agencies mentioned above.
- initiate, review or reject any rule or order of the House of Representatives or of the Senate (pertaining to the conduct of that House's affairs).
- appoint and dismiss the President of the Senate in like manner as the Speaker.