



# **AUSTRALIAN REPUBLICAN MOVEMENT**

**Submission to Australian Senate Legal and Constitutional References  
Committee Inquiry into an Australian Republic**

## OPENING STATEMENT

The Australian Republican Movement welcomes this Inquiry.

The Australian people deserve a second Republic referendum. Five years have passed since 1999 and we believe the time is right. A recent Newspoll indicates that 57% of Australians want another Republic referendum.<sup>1</sup>

It would be unfair to Australia (and to the Queen) to go on maintaining the British monarch in office as our Head of State in the face of ever-diminishing relevance and declining support from the Australian people. Continuing with a distant monarch in our highest office is not an optimal situation for Australia. The system *is* broke. Now is the time to begin moving towards a new referendum to replace a remote, outdated institution with an Australian Head of State.

The ARM is the largest and most active republican organisation. It enjoys support from across the community and from members of all sides of politics, recognising that no constitutional change can occur without broad bipartisan agreement.

We believe that the change to a republic must engage the Australian people from all parts of the nation. Our membership is spread across every state and territory, made up of Australians from all walks of life who support the simple and self-evident proposition that we should have an Australian Head of State, a Head of State who owes allegiance to no one except the Australian people. Republicans think that Australia, like just about every other nation, deserves a Head of State who lives amongst us and who knows what it is like to be an Australian.

The ARM's National Committee is a 17 member body, consisting of eight members elected by the national membership, the convenors from the eight state and territory committees and a youth representative elected by the youth membership. We have a 12 member committee in every state and territory, as well as locally based community forums around the nation.

### The ARM after 1999

Until the defeat of the 1999 referendum, the ARM was a strong advocate of the republican model whereby an Australian president would be appointed by a two-

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<sup>1</sup> Newspoll/Sunday Telegraph, Jan 6 2004: *Would you like or not like to see a new referendum to decide whether or not Australia should become a republic in 2004?*

Would Like	57%
Not Like	36%
Uncommitted	7%

[http://www.Newspoll.com.au/image\\_uploads/cgi-lib.11730.1.1202\\_2004\\_polls.pdf](http://www.Newspoll.com.au/image_uploads/cgi-lib.11730.1.1202_2004_polls.pdf) (accessed 23/3/04)

thirds majority of the Commonwealth Parliament. ARM delegates to the 1998 Constitutional Convention supported this model, which, with some alterations, was put to the people in the 1999 referendum. The ARM was the leading republican organisation supporting a 'Yes' vote at the referendum.

After the defeat of the referendum, the key question for republicans was: if, as the polls show, a consistent majority of Australians were in favour of a republic, why then did the referendum fail? Several answers were suggested:

1. The republican movement was divided. Many republicans who support a directly elected president actively supported a 'Yes' vote. But other prominent direct electionists joined with monarchists in the 'No' campaign.
2. Although many political leaders from all sides of politics actively supported a 'Yes' vote, the Prime Minister did not. The conventional wisdom that Australians are unlikely to support a referendum if the Prime Minister of the day is advocating a 'No' vote was maintained. The 'iron law' that constitutional change requires a high level of political and community consensus held.
3. Too many Australians didn't like the model and would wait until a direct election model was on offer.
4. The process leading to the referendum was rushed and didn't consult the Australian people enough. The people were given a say just twice: in the election of half the delegates to the 1998 Constitutional Convention, and then at the referendum. It was observed that if you give the Australian people a 'take it or leave it' proposition, they'll most likely leave it.

With these considerations in mind, the ARM regrouped and agreed that the ARM should no longer be wedded to any one model, but to look at a range of different republican models and foster dialogue between republicans. This position reflects the diversity of opinion in the ARM, as well as the guiding sentiment that the ultimate decision on models should rest with the Australian people.

It was also agreed that the process that led up to the referendum was unsatisfactory and so the ARM chose to become focused on a more deliberative and democratic process to achieve a republic with an Australian Head of State.

### **Republican Models**

In 2001, the ARM's Constitutional Issues Committee produced *Six Models for an Australian Republic*<sup>2</sup>. This document carefully outlined the features of six

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<sup>2</sup> <http://www.republic.org.au/6models/index.htm> (accessed 23/3/04)

different republican models, which represented the broad range of republican opinion, from the most minimal change, through to a reworked version of the 1999 model, to an electoral college model, direct election and even a US style system.

The ARM does not advocate one model over the others, nor does it suggest that this list is exhaustive of republican models: we note that there are other sound and workable models devised by other individuals and republican groups. The ARM believes that the question of the republican model is a matter for the Australian people to decide.

The six models were intended to illustrate the range of conceivable republican options. They were put forward to initiate public discussion and test support for each approach. The ARM has not detected much support among republicans and within the community for a US style system. This would be a major departure from our parliamentary system and traditions. Therefore Model Six, the only model that establishes the Head of State as the Head of Government, has not been submitted here, as it does not appear to be a realistic option for Australia.

The remaining five models are submitted to this Committee with suggested marked-up changes to the Constitution (see Appendix A). However, the ARM believes that the drafting of a model should be the responsibility of an elected Convention, receiving advice from Australia's pre-eminent constitutional experts.

There are several contending and complementary principles and approaches that inform the five models that we submit here. Most of these centre around the key question of what we want an Australian Head of State to do for us?

Do Australians want a unifying figure? All of us agree that a non-executive Head of State should act impartially, so should we seek to create a model that would favour a non-party political figure to occupy the office?

Many of us want a figure that would symbolise popular sovereignty. Should our Head of State therefore be directly elected by the Australian people in an open democratic election?

Many would also stress the importance of continuity, believing that our constitution has underwritten more than a century of stable democratic government. Should we therefore strive to avoid any unnecessary change beyond the establishment of an Australian Head of State?

The ARM has submitted five republican models that are crafted to emphasise or balance these principles.

*Model One- Prime Minister Appoints the President:*

This model is likely to appeal to those who think the change should be as minimal as possible, thereby (it is argued) preserving as much as possible of our current successful system.

Another 'ultra-minimalist' option that has found support is the model devised by the late Richard McGarvie. Some prominent conservative republicans have spoken in support of this model. Both of these models stress the principle of continuity.

*Model Two- People Nominate, Parliament Appoints the President:*

To its proponents, the appeal of this model is that it upholds the principle of continuity (requiring less change than direct election), and is also more likely to produce a non-party political, unifying figure as Head of State. It is also more open to public input in the appointment process than the ultra-minimalist options.

*Model Three- Presidential Assembly Elects the President:*

This model enshrines a form of *indirect* election as a means of giving the Australian people a say in the appointment of the Head of State, while still avoiding imparting a strong democratic mandate to him or her. It seeks to balance the principles of democracy with continuity.

*Model Four- People Elect the President:*

Advocates of this model argue that this is the most open and democratic of the ARM's proposed models and would offer the people a direct vote for their Head of State. The list of nominees would be unmediated by parliament.

*Model Five- People Elect From Parliament's List:*

This seeks to balance the principle of direct election with a desire to have a non-party political figure as Head of State.

The ARM submits these models as a starting point for public discussion. Ultimately it is the Australian people that should decide the salient features of their republic through a measured, consultative process.

## **Republican Process**

The Corowa Conference of December 2001 was convened by the late Richard McGarvie to resolve upon the best way to resolve the Head of State issue. Many ARM members took part in the debate and spoke in support of the various options put to the conference.

In early 2003 the ARM's Constitutional Issues Committee began an extensive national consultation with our members on what they thought the best process would be to achieve an Australian republic: what would be the most democratic, fairest and most measured way to engage the Australian people to deliver the constitutional change that they seek? We received more than 50 detailed and thoughtful responses from ARM members and other republicans.

At the end of the consultation, the overwhelming opinion of the membership and the National Committee was to support a process quite similar to the one decided by the Corowa Conference.

The ARM supports a three plebiscite process to determine the people's will: an initial plebiscite to ask whether we should become a republic with an Australian Head of State, as well plebiscites to determine the preferred model of republic, and the preferred title for the Head of State. We also recommend that a fully elected Convention should draft an amendment to the constitution that reflects the will of the people as expressed in these plebiscites, before the amendment is put to the parliament and the people in a referendum.

Both our preferred process and our models document inform our responses to the questions posed by the Inquiry. These documents are attached to this submission to the Inquiry at Appendix B.

## **Key Themes**

There are four key themes that inform the whole of this submission:

- Firstly, Australia deserves a republic with an Australian Head of State: a republic that can accommodate the best of our traditions and our hopes for the future. Australians want a Head of State with real symbolic resonance. Maintaining a distant monarch in Australia's highest office can only alienate Australians from their political institutions.
- Secondly, the move to an Australian republic should be driven and owned by the Australian people. The republic should suit the temperament and traditions of our democratic, egalitarian culture and the Australian people should be consulted at every step of the way in the making of it.
- Thirdly, an Australian republic should maintain our parliamentary system, its traditions and conventions, regardless of the mode of appointment for the Head of State. These traditions, combined with the democratic temperament of the Australian people, have given us a century of stable democratic government, and the ARM does not see much support among republicans to change them.

- Finally, an Australian republic is the ARM's sole focus. We acknowledge that other organisations and individuals support a range of additional constitutional reforms that are not strictly relevant to the establishment of an Australian republic. There is a great diversity of views within the republican movement on such proposals. Without wishing to comment on the merits of them, the ARM has no position on constitutional change beyond the republic.

The contentious issues of altering the Australian flag or the national anthem are not matters for the ARM either. The ARM does not advocate any position on either of these issues.

## **INQUIRY TERMS OF REFERENCE**

**(a) The most appropriate process for moving towards the establishment of an Australian republic with an Australian Head of State; and**

**(b) Alternative models for an Australian republic, with specific reference to:**

- (i) the functions and powers 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.**



**Question 1. Should Australia consider moving towards having a head of state who is also the head of government?**

No. The ARM believes that the roles of both Head of State and Head of Government should be distinct and separate.

We have observed very little support among our membership and in the community for an executive Head of State. Such an arrangement would require either a significant revision of the Westminster system, as is practised in France, or a complete departure from it towards something like the United States, where the executive is distinctly separate from the legislature.

We find that much of the public sentiment towards direct election is based in a desire for people to have a say in who their Head of State is, not from a wish to overturn our long standing parliamentary system.

Our parliamentary system with an executive that is drawn from and accountable to the parliament has served us well in Australia and together with the democratic sentiments of the Australian people, has been instrumental in delivering stable government for more than a century. The ARM believes that the Head of State, whether directly elected or appointed by the prime minister, the parliament or an electoral college, should have a largely ceremonial and non-executive role. The office of Head of State should carry most of the conventions of the Governor-General with it. (The issue of codification of powers is addressed below in our response to Question 3.)

Constitutional lawyers, former governors-general and commentators have noted an inclination over the past 25 years for Prime Ministers to perform many of the ceremonial roles that, arguably, would usually be performed by a Head of State<sup>3</sup>. The blurring of the roles of a Head of State and a Head of Government is undesirable in a parliamentary system such as ours, where the two roles ought to remain distinct and separate. It is a weakness of our current system that these roles are becoming blurred, and another good reason to make the change to a republic.

The declining relevance of the Queen in Australia has created a vacuum that Prime Ministers have inevitably filled. Although Prime Ministers are party political figures, they do at least have a national and democratic relevance for Australians.

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<sup>3</sup> Cowen, Sir Zelman, 'The Role of the Head of State', [http://www.leadershipvictoria.org/resources/speeches/speech\\_cowen1995.htm](http://www.leadershipvictoria.org/resources/speeches/speech_cowen1995.htm) (accessed 23/3/04); Winterton, George, 'The Evolving Role of the Governor-General', <http://law.anu.edu/Cipl/Conferences&SawerLecture/PLW03Winterton.pdf> (accessed 23/3/04); Editorial, *The Age*, <http://www.theage.com.au/articles/2003/10/1065676158544.html?from=storyrhs> (accessed 23/3/04);

Former Governor-General Sir Zelman Cowen and ex-High Court Chief Justices Brennan and Mason gave forceful expression to the need for a separate 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.<sup>4</sup>*

Those in 1999 who opposed a republic in favour of the status quo may now find our constitutional balances are changing anyway, as we continue with a non-resident Head of State with an ever-diminishing relevance for Australians. A republic with an Australian Head of State, founded on distinct and separate roles for the Head of State and Head of Government, will be a change that conserves this essential distinction.

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<sup>4</sup> Cowen, Brennan, Mason, Letter to *The Australian*, 3 November 1999.

## ***Question 2. What powers should be conferred upon the Head of State?***

Read literally, the Australian Constitution confers enormous powers on our current Head of State, the Queen. These powers are in turn delegated to her representative in Australia, the Governor-General, who can appoint and dismiss Ministers, dissolve Parliament, grant or refuse consent to legislation and even call out the Army in his or her capacity as Commander in Chief.

Of course the real power of the Governor-General is much, much less than it appears. Constitutional conventions effectively limit his or her ability to act independently of advice outside of extreme circumstances.

The ARM submits that the Head of State should be conferred with and enjoy the same powers as currently delegated to the Governor-General; specifically:

- the ordinary or express powers conferred by the constitution
- the unwritten reserve powers
- and the unwritten constitutional conventions that govern the exercise of those powers.

These powers should be exercised subject to the same conventions and limitations as currently apply to the exercise of powers delegated to the Governor-General.

**Question 3. What powers (if any) should be codified beyond those currently specified in the constitution?**

This would most likely depend on the mode of appointment of the Head of State.

The ARM recognises that the scope and extent of the reserve powers are surrounded by significant uncertainty. This uncertainty and the continuing controversy surrounding the scope and use of the Governor-General's reserve powers, particularly in the case of the dismissal of the Whitlam government in 1975, has led to some people to call for the Governor-General's powers and the conventions surrounding their use, to be expressly spelled out in the constitution.

Other commentators do not support codification of the Governor-General's powers, arguing that the current arrangement gives the Governor-General more flexibility in dealing with any potential constitutional crisis that may occur.

The Republican Advisory Committee's 1993 report concluded that there should be some provision made in the constitution to the exercise of the Head of State's powers. The ARM concurs with this position; 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.

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. These include<sup>5</sup>

- Incorporating the conventions by reference;
- Formulation of written conventions;
- Parliament to make laws concerning the conventions;
- Codification of the relevant conventions.

The RAC report noted that codification can be done in two ways:

- **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

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<sup>5</sup> Republican Advisory Committee Report, pp. 94-112.

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.

In the models where the President is directly elected (Models Four and Five) we have proposed a complete codification of the constitutional conventions and have employed the code set out in the Report of the Republic Advisory Committee in 1993<sup>6</sup>.

This codification would serve both a clarifying and limiting function to ensure that an elected Head of State with a democratic mandate would not develop into a centre of power rivalling the government of the day.

In the models we have submitted where the Head of State is not directly elected (Models One, Two and Three), we have simply used the formula employed in 1999 whereby the constitutional conventions were deemed to continue in a republic. In these models, we have included a constitutional provision that:

*The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; but the President may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions relating to the exercise of that power.*

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.

But 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.

The ARM believes that the issues surrounding codification of powers, as well as other related issues such as the Senate’s power to block supply, should be considered and determined by a Convention, guided by experts, as described in our response to Question 29.

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<sup>6</sup> RAC Report, pp. 108-112.

***Question 4. Should some form of campaign assistance be available to nominees, and if so, what assistance would be reasonable?***

Public funding of election candidates is now accepted in Australia as a way to encourage political participation on an equitable basis in a democracy.

In this spirit, some form of campaign assistance should be available to nominees if an election is held.

A reasonable level of assistance should be determined by the Joint Select Committee on Electoral Reform or some other parliamentary body. A basic level of assistance should be available to all nominees prior to the election. This should be supplemented by post-election assistance, the level of which could be related to the proportion of the vote achieved by a candidate over and above a minimum of 4% of the vote (or as otherwise determined).

**Question 5. Should/Can political parties be prevented from assisting or campaigning on behalf of nominees? If so, how?**

No. Any attempt to prevent the participation of political parties would be undemocratic and likely to fail in any case. The parties would be very tempted to form 'political action groups' in support of their preferred candidates; these would be to all intents and purposes front organisations for the parties themselves.

It would be unusual, to say the least, to legally proscribe specific institutions like political parties from taking part in a democratic process, but not others.

The ARM has tended to find that objections to having political parties involved in a campaign often arise from a desire to keep the office of Head of State non-partisan and positioned above party politics.

If it is thought desirable to avoid an elected Head of State that has party political affiliations, then the best place to ensure this may be in the design of the nominations process. Model Five (*People Elect from Parliament's List*) attempts to do just that, by ensuring that each candidate must be approved by no less than a two-thirds majority vote of parliament.

***Question 6. If assistance is to be given, should this be administered by the Australian Electoral Commission or some other public body?***

Federal parliament should decide which body should administer campaign assistance, if it is to be given. The AEC is probably the most suitable body to do so.



***Question 7. If the Australian Head of State is to be directly elected, what method of voting should be used?***

A directly elected Head of State should be elected by a compulsory preferential vote. Australians have been long accustomed to this practice in federal and state elections and show no inclination to want to change it.

First past the post voting may result in the election of someone passionately supported by only (say) 30% of the vote, and - more problematically - strongly opposed by the remaining 70%.

We envisage that a ceremonial, non-executive Head of State would ideally be a unifying figure, therefore a preferential vote that would identify the most acceptable candidate to Australians would be the most appropriate form of selection.

A run-off election would also be less desirable than a preferential vote. Australians are unaccustomed to run-off elections and the extra cost of a two-round vote also counts against it.

***Question 8. If direct election is the preferred method for 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?***

A directly elected Head of State would be conferred with a degree of democratic legitimacy greater than any other elected official in the Commonwealth; it is therefore certainly possible that such a situation may lead to the presidency becoming a rival centre of political power to the government unless the powers of the Head of State are constrained and codified.

Most republicans believe that a competing centre of power would be unacceptable, as it would lead to instability and would have a corrosive effect on Australia's parliamentary system. However the office of an elected Head of State can be designed to make such a conflict very unlikely.

Such an office would be designed with the explicit understanding that the non-partisan, impartial and non-executive conventions and practices surrounding the role of the Governor-General should be maintained in the office of the Head of State (see response to Question 2).

However, even with such conventions, the temptation for an elected Head of State to overrule a prime minister may prove to be too great.

Therefore the ARM strongly recommends that the powers of a directly elected Head of State should be codified. The 1993 Republican Advisory Committee suggested how these powers might be codified.<sup>7</sup>

The direct election models in our submission (Models Four and Five) have drawn on the Republican Advisory Committee's recommendations in drafting the codifications as detailed proposed amendments to the constitution.

If we are to look at successful constitutions elsewhere that have married an elected president to a parliamentary democracy, the Republic of Ireland may be instructive, as indicated by the appendix to this Inquiry's discussion paper.

The Republic of Ireland is constituted differently from Australia: it doesn't have a federal system, and its Upper House does not have the power to block a money bill, as is the case here. Eire also has different political traditions to Australia that inform its political culture. Nonetheless the Irish constitution has succeeded in

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<sup>7</sup> RAC Report, pp. 108-112.

marrying an elected president with a parliamentary system of government. Ireland has enjoyed stable democratic government as a republic since 1937.

If the Australian people choose to establish a republic with a directly elected president, then the example of the Irish presidency should be considered, which clearly codifies the powers of that office so as to maintain the clear distinction between the roles of Head of State and Head of Government.

**Question 9. Who should be eligible to put forward nominations for an appointed head of state? For an elected head of state?**

There are several options here that might be appropriate. The ARM recommends that an elected Convention should resolve this issue after an indicative plebiscite vote to determine a preferred model.

In our attached models document we propose different methods that accord with each particular model. Again, we note that other republicans have devised sound alternative models that might find favour with the Australian people.

The models we have submitted provide for the following options:

- *Model One- Prime Minister Appoints the President.* Here the Head of State is nominated and appointed at the sole discretion of the Prime Minister of the day.
- *Model Two- People nominate, Parliament Appoints the President* recommends that nominations be made by a special nominations committee established by federal parliament. While the details of the Nominations Committee is not to be set out in the Constitution (as it will undoubtedly change with experience), it is proposed that the legislation establishing the Committee should provide that all nominations received should be made public. The shortlist should have not less than three and no more than seven names.
- *Model Three- Presidential Assembly Appoints the President* proposes that a nominee must have no less than 1000 nominators, of which at least one hundred must be from each State. The nominators should be Australian citizens eligible to vote. An elected assembly or electoral college would then choose from the nominees.
- *Model Four- People Elect the President* is an open direct election model. It has a requirement that a nominee must have no less than 3000 nominators, of which at least one hundred must be from each State. Again these nominators should be Australian citizens eligible to vote.

*Model Five- People Elect From Parliament's List* is a direct election model with a different nomination process. Here it is proposed that nominations for Head of State may be made by any Australian citizen eligible to vote. They may also be made by either House of a State or Territory Parliament or by the Council of any unit of local government. The full list of nominees would be published for public scrutiny for one month and then presented to the Federal Parliament. A joint sitting of both Houses shall by a two-thirds majority choose no fewer than seven candidates from eligible nominees.

***Question 10. Should there be any barriers to nomination, such as nominations from political parties, or candidates being current or former members of parliament?***

Again any restrictions placed upon the nominating process are relevant to the mode of appointment or election of the Head of State. We refer here to the models submitted to the Inquiry in our accompanying document. The point at which the restrictions apply depends on the mode of appointment.

Models One, Two, Three and Five all recommend that the candidate should not be a member of the Commonwealth Parliament or a State or Territory Parliament, or a member of a political party.

For Model One, this should apply at the time of assuming office. For Model Two, at the time of nomination by the parliament. For Model Three, at the time of appointment by the Presidential Assembly.

Model Four expects political parties to openly participate in the election campaign and has no barriers to members of a political party. It does however stipulate that the nominee should not be a member of the Commonwealth Parliament or a State or Territory Parliament at the time of nomination.

Model Five is crafted with the intention to promote a non-party political Head of State, and therefore would also bar anyone who is a member of the Commonwealth Parliament or a State or Territory Parliament, or a member of a political party, at the time of assuming office.

On the issues of age and citizenship restriction, we refer to our response to Question 20 below.

**Question 11: Should there be a maximum and/or minimum number of candidates?**

Different models will have different exigencies in this regard. The principle of accessibility must be balanced against the problems of an overly large slate of candidates and other practical considerations.

- *Model One- Prime Minister Appoints the President.* The list of candidates would be as long as the Prime Minister thinks appropriate to find a suitable Head of State.
- *Model Two - People nominate, Parliament appoints the President.* The shortlist of nominees from the special nominations committee should have not less than three and no more than seven names.
- *Model Three- Presidential Assembly Appoints the President* proposes that a nominee must have no less than 1000 nominators, of which at least one hundred must be from each State. The elected assembly would then choose from the nominees.
- *Model Four- People Elect the President* requires that a nominee must have no less than 3000 nominators, of which at least one hundred must be from each State. The bar is raised higher here to avoid a tablecloth sized ballot paper for the Australian people. The nominator quota may need to be adjusted over time.
- *Model Five- People Elect from Parliament's List.* Here it is proposed that a joint sitting of both Houses shall by a two-thirds majority choose no fewer than seven candidates from eligible nominees.

***Question 12: Should there be a minimum number of nominators required for a nominee to become a candidate?***

See response to Question 11, above.

***Question 13: What should the head of state be called, Governor-General, President of the Commonwealth of Australia, or some other title?***

The ARM supports a plebiscite question that allows the Australian people to choose the title of our Head of State. Such a question could be asked at the same time as a plebiscite on models to save money.

This is a cosmetic, rather than substantive issue. But some people feel strongly about it nonetheless. People sometimes feel the term 'president' is too misleading- it sounds like the American president who is also Head of Government as well as Head of State. Some support 'Governor-General' for continuity's sake; others oppose it because of its colonial implications.

The ARM recommends the following question be asked:

*Should the Head of State of the Australian Commonwealth be called:*

*A: The President*

*B: The Governor-General*

*C. The Head of State*

*D. Other?*

The ARM also suggests that indigenous groups be consulted and invited to submit some appropriate indigenous titles for consideration.



***Question 14: What should be the length of a term of office for head of state?***

Formally, the Governor-General holds office “during Her Majesty’s pleasure”, but the actual length of term is usually determined by an informal arrangement between the Prime Minister and the Governor-General. The convention is for five year appointments, although the term is often extended.

The ARM recommends that the current convention of the Governor-General enjoying a five-year term of office be continued for an Australian Head of State.

We recommend that the term of office should not be tied to the term of the parliament, as this may present the Head of State with a conflict of interest when given advice to dissolve parliament.

***Question 15: Should a head of state be eligible for re-appointment/re-election?***

In the models submitted, we have allowed for more than one term of office. However, the ARM believes it would be most appropriate for the elected Convention (see 'Republican Process') to decide whether a Head of State should be eligible for re-appointment or re-election.

We note that in the past Governors-General have had their terms of office extended by a year or so to allow the government of the day to find a suitable replacement, or for other practical reasons.

It may be appropriate to allow for a second term for a successful Head of State. However it should be noted that Heads of State that are limited to a single term cannot be improperly influenced by offers to renew their term.

***Question 16: Should there be a limit on the number of terms an individual may serve as head of state?***

As stated above in Question 15, the ARM believes these matters would be most appropriately decided by an elected Convention (see 'Republican Process').

***Question 17: Who or what body should have the authority to remove the head of state from office?***

Again this would vary according to the mode of appointment. The issue of the removal of the President was a contentious feature of the 1999 referendum model and would need to be carefully considered.

In the case of *Model One (Prime Minister Appoints the President)*, it is recommended that the Prime Minister have the authority to dismiss the Head of State, mirroring the current practice with the Governor-General (who may be dismissed by the Queen acting on the advice of the Prime Minister).

*Model Two (People nominate, Parliament appoints the President)* provides for the removal of the Head of State by an ordinary resolution of the House of Representatives.

*Models Three (Presidential Assembly Appoints the President), Four (People Elect the President) and Five (People Elect from Parliament's List)* raise the bar for removal, recognising that an elected Head of State would have a greater democratic legitimacy than one appointed by the parliament or the Prime Minister. Here we suggest that the Head of State may be removed from office by a resolution of both the House of Representatives *and* the Senate, in the same session.

***Question 18: On what grounds should the removal from office of the head of state be justified? Should those grounds be spelt out?***

Again the grounds for dismissal are adjusted according to the level of democratic mandate of the office of the Head of State.

- *Model One- (Prime Minister Appoints the President)*. Here the Head of State may be removed from office by the Prime Minister. No grounds are constitutionally required to be spelt out here.
- *Model Two (People Nominate, Parliament appoints the President)*. Here we have provided that the Head of State may be dismissed by an ordinary resolution of the House of Representatives. No grounds are constitutionally required to be spelt out here.
- *Models Three (Presidential Assembly Appoints the President), Four (People Elect the President) and Five (People Elect from Parliament's List)*. Here it is proposed that the Head of State may be removed on the grounds of proven misbehaviour or incapacity. This is the same impeachment formula which applies to the removal of federal judges.

***Question 19: How should a casual vacancy be filled?***

In the case of all the models we have submitted, we recommend that a casual vacancy be filled by the most senior republican state governor (or equivalent).

However if an elected Convention were to draft a direct election model, it may wish to consider whether an elected vice president should be provided for instead.

(See also our response to Question 25, below).

***Question 20: What should the eligibility requirements be for the head of state?***

Every Australian citizen qualified to be a member of the Commonwealth Parliament.

This is defined by the Commonwealth Electoral Act 1918 s.163, as a person who

- a. has reached the age of 18 years.
- b. Is an Australian citizen; and
- c. Is either:
  - (i) an elector entitled to vote at a House of Representatives election; or
  - (ii) a person qualified to become such an elector.

***Question 21: On what grounds should a person be disqualified from becoming head of state?***

Those disqualifications that apply to members of federal parliament should also apply to the office of Head of State, as outlined in the Commonwealth Electoral Act 1918, s.163.

Any further disqualifications would depend on the principles governing the republican model chosen by the Australian people.

All of the models we submit stipulate that the Head of State should not be a member of the Commonwealth Parliament or a State Parliament or Territory legislature at the time of assuming office.

Models One, Two, Three and Five all stipulate further that the Head of State should not be a member of a political party (variously at the time of nomination, or the time of appointment, depending on the model). Model Four envisages that political parties will openly participate in the election process and therefore does not make that stipulation.



***Question 22: Should the head of state have the power to appoint and remove federal judges?***

Currently the Governor-General may appoint federal judges on advice from ministers, and remove a federal judge following an address by both Houses of Parliament in the same session, on the grounds of proven misbehaviour or incapacity.

An Australian Head of State should be able to appoint and remove federal judges on the same basis.

***Question 23: Should the head of state have the prerogative of mercy?***

Again, the ARM believes this is a matter for an elected Convention to decide.

We note however that the Governor-General is delegated with the royal prerogative of mercy to pardon or release a criminal offender. If an Australian Head of State were to be conferred with the same powers currently delegated to the Governor-General by the Queen (as recommended in the response to Question 2), then we would expect that he or she would retain this power.

The power to grant pardons is enjoyed by many other Heads of State around the world.

***Question 24: Should the head of state be free to seek constitutional advice from the judiciary and if so, under what circumstances?***

There is no formal mechanism for the Governor-General to consult the judiciary at present. We also note that the High Court is not currently empowered to deliver advisory opinions.

In principle, the ARM supports maintaining the current conventions, whereby it is thought that political disputes are best resolved in the political arena, and that it is best to keep the Head of State's role outside partisan politics as much as possible.

Under the current system, the Governor-General rarely requires access to constitutional advice. In normal circumstances, the Governor-General does not have the power to refuse assent to a Bill or an executive order on the basis that it is illegal. Consequently there is little need for the Governor-General to seek advice for his or her usual formal functions. The legality of the executive's actions or the validity of legislation is a question for the courts.

As highlighted in our response to Question 2, the ARM proposes that a republican Head of State should have the same powers as currently conferred on the Governor-General. Therefore the Head of State would also have little need to seek such advice.

In the highly unusual situation where the Head of State may require advice on the exercise of his or her reserve powers, the situation may be different. In the use of the reserve powers the Governor-General may act independently of the executive. We note that in 1975, Sir John Kerr consulted the then High Court Chief Justice Sir Garfield Barwick, and later cited his opinion in defence of his decision to dismiss the Whitlam government. Whitlam objected to this, on the grounds that the Chief Justice should not be consulted on matters that might ultimately come before the High Court.

Nonetheless, 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.

Some have suggested that a Council of Advisors be established to tender such advice to the Head of State. This might be composed of former High Court Justices and former Heads of State. Such an arrangement may be suitable for an Australian republic as a means of providing constitutional advice to a Head of State without involving the High Court, which may have to hear a subsequent case on these matters. But such a council raises questions on how its advice

would be tendered (openly, or in secret?), and whether it might erode the principle of responsible government.

An alternative is to provide a mechanism for formal High Court involvement. This may be problematic: 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.

The ARM recommends that the powers of a directly elected Head of State should be codified. As part of this codification process, in our direct election models (Models Four and Five), 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<sup>8</sup>. 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 court to be persisting in a breach of the constitution and refuses to desist from that breach.

On the other hand, 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.

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<sup>8</sup> Australian Republican Movement, *Six Models for an Australian Republic*, p.25. Model Four, s.59E

***Question 25: What is the best way to deal with the position of the states in a federal Australian republic?***

If the commonwealth should become a republic, then the states would make the shift on an individual basis.

There is no necessity - and certainly nothing to compel - the states to become republican in structure simultaneously with the commonwealth. While this might lead to anomalies, whereby some citizens live under a republican commonwealth government and a monarchist state government, it is exceedingly unlikely that the states would continue in this manner for very long.

We note that seven of the eight referenda that have been passed by the Australian people have been carried in every state. The other successful referendum was carried by five of the six states.<sup>9</sup>

Historically referenda have only succeeded with a very high degree of community consensus, spread evenly around the states. The constitutional threshold that requires a majority of states as well as an overall commonwealth majority appears to ensure this.

It would therefore seem very likely that a successful republican referendum would similarly be supported in a great majority of the states, if not all of them. A state-wide mandate for change at the commonwealth level would certainly create great impetus for change at the state level.

The decision to shift to a republic at a state level is within the provenance of the individual states themselves, and should remain so.

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<sup>9</sup> Successful commonwealth referenda:  
1906 Senate Elections: carried every state.  
1910 State Debts: carried, with majorities in every state except NSW.  
1928 State Debts: carried every state.  
1946 Social Services: carried every state.  
1967 Aboriginals: carried every state.  
1977 Senate casual vacancies: carried every state.  
1977 Referendums: carried every state.  
1977 Retirement of Judges: carried every state.

***Question 26: Should there be an initial plebiscite to decide whether Australia should become a republic, without deciding on a model for that republic?***

Yes. The Australian people should be asked whether Australia should be a republic with an Australian Head of State, or whether we should remain as a monarchy with the Queen as our Head of State.

Opinion polls repeatedly indicate that most Australians want a republic with an Australian Head of State.<sup>10</sup> These poll results have been consistent for over a decade now.

The move to a republic is a complex business and the Australian people must be regularly consulted. Australians should have the basic proposition put to them in a non-binding plebiscite vote to test support for the issue before proceeding further. This is needed to get the people's go-ahead to the considerable time and effort that the community will be involved in.

If there is a majority vote for a republic, then there is clear justification to proceed further towards a referendum.

Opponents of a republic need not fear a simple threshold plebiscite. This plebiscite gives a clear opportunity to argue that the status quo is preferable to any change and that the process should go no further.

The proposition needs to be tested by a simple, clear indicative vote.

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<sup>10</sup> A Newspoll / Daily Telegraph poll published on 25 January 2004 recorded the responses to the following question:

Which of the following would you prefer as our Head of State?

- An Australian to be Australia's Head of State? 64%
- The Queen to remain Australia's Head of State? 30%
- Uncommitted 6%

***Question 27: Should there be more than one plebiscite to seek views on broad models? If so, should the plebiscites be concurrent or separated?***

Yes, the ARM's preferred process recommends that a plebiscite be held to seek people's views on broad models, to follow or accompany the threshold plebiscite. The ARM believes it's vitally important that the Australian people have ownership of their republic and that they have a say in its defining characteristics.

Whether the plebiscite questions are held concurrently or separately would depend on the political timetable. There are issues of practicality that should be determined by the government of the day. It may suit the government to ask the questions concurrently to save expense, or to ask them separately to allow proper focus on each of the questions.

We also recommend that a third plebiscite on the title of the Head of State be held concurrently with the plebiscite on broad models.

***Question 28: Should voting for a plebiscite be voluntary or compulsory?***

Voting should be compulsory, in accordance with the longstanding practice for federal and state elections.



***Question 29: What is the best way to formulate the details of an appropriate model for a republic? A convention? A parliamentary inquiry? A Constitutional Council of experts?***

The ARM supports a fully elected Convention that would formulate the details of the republican model. This Convention should follow the plebiscites and be guided by their results.

Federation was a great achievement that required debate, discussion and compromise over a number of years, as the movement towards a Commonwealth surged, faltered and paused to reconsider, before eventually succeeding in 1900. Conventions were an essential feature in this process and gave the movement greater democratic legitimacy.

A Convention can act as a kind of clearing house for the contending visions of our republic. It adds another layer of democratic consultation. The Constitutional Convention of 1998 was only partially democratic and, in the view of some, too rushed. But despite its flaws, it surprised many people by the level of public interest and democratic energy it aroused. If there has been a models plebiscite with a clear result, then a Convention would be guided by that result. If not, then more time may be required for it to examine the options and give the best chance for some consensus to emerge.

The ARM recommends that any new Convention should be:

- Fully elected: all the delegates, aside from the Prime Minister and Opposition Leader, should be elected. (Some may think it appropriate to reserve seats for the State & Territory leaders as well).
- Deliberative: It should be given time to assess options, consult and arrive at compromise. Once the first draft of a constitutional amendment is drafted, the Convention might adjourn to allow time for the community and the nations' various parliaments to consider it. Then it could reconvene to make any further revisions, before submitting the draft to the Commonwealth Parliament to begin the referendum process.
- Well advised: Changing the constitution is obviously a technical exercise as well as a symbolic one. The elected delegates must be able to benefit from the best legal and constitutional advice on offer, possibly through an advisory body that could sit with the Convention, but not vote. It's worth noting that the referendum process safeguards against any 'irresponsible' model that a Convention might throw up, as the Commonwealth Parliament must first pass the amendment bill before it can be put to the people in a referendum.

***Question 30: What is the preferred way for a process to move towards an Australian republic?***

As mentioned above, the ARM has conducted a lengthy consultative process with our committees, forums and our membership at large, on a preferred process. The ARM's preferred process is very similar to the one recommended by the Corowa Conference of 2001.

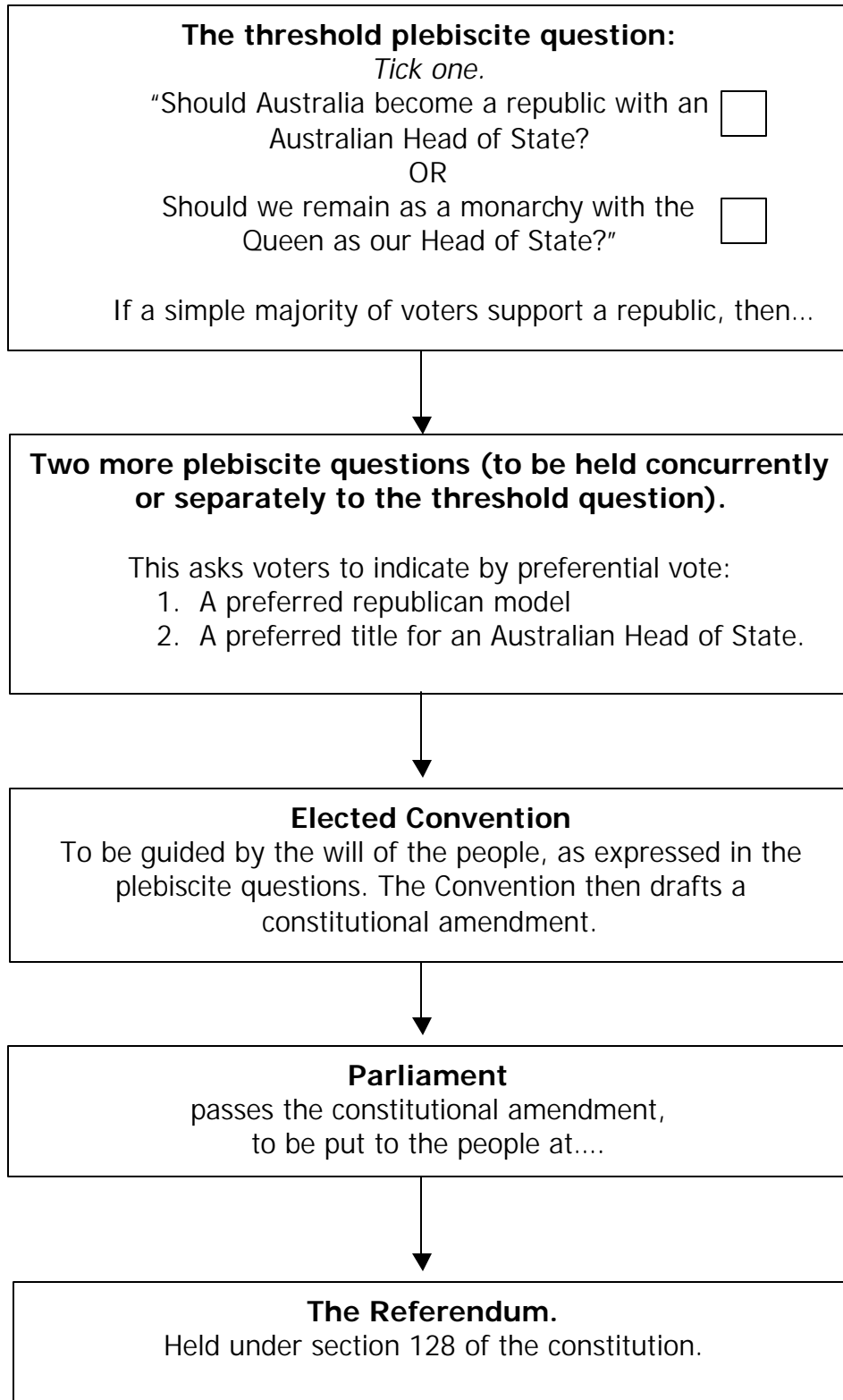
The ARM's National Committee unanimously agreed to support the following process:

1. An information campaign to be prepared by a multi-party parliamentary committee on several plebiscite questions. To assist people in making their decisions in the plebiscites, it is essential that the information campaign be extensive, balanced, fair, and well disseminated.
2. A threshold plebiscite question to be put to the Australian people asking them whether Australia should become a republic with an Australian Head of State, or remain a monarchy with the Queen as our Head of State.
3. Two other plebiscite questions should be asked together, either concurrently with the threshold question, or at a later date. One question should put a range of models to the people (i.e.: parliamentary appointment of the Head of State, direct election, and others) and ask them to indicate a preferred model through a preferential vote.

Another question should ask the people to indicate a preferred title for an Australian Head of State.

4. An elected Convention meets to draft an amendment to the constitution, guided by the will of the people as expressed by the plebiscites.
5. The bill is put to the commonwealth parliament, and, if passed, a referendum is held under section 128 of the Constitution to give effect to the amendment proposed by the Convention.

## THE ARM'S RECOMMENDED PROCESS



Thanks to all those who have assisted in the preparation of this submission, and to the members of the Australian Republican Movement for their contributions.

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