

## **SUBMISSION TO SENATE INQUIRY, MARCH 2004** **by Mike Pepperday**

### **SUMMARY**

“The republic” is going nowhere – so now we are having another high-level inquiry.

This paper proposes something quite different. It proposes that the *people* conduct an inquiry in the form of an internet research project. Unlike the last ten years of top-down failure, it would be fair, fun, democratic and cheap. And it might succeed.

To succeed means to find an model that would gain clear referendum endorsement, not one which might squeak through in anger if enough money and prominent people are used to promote it.

This paper also presents a republic plan, “popular appointment”, that should achieve this. It is quite different from those weary models set out in the Senate discussion paper. Popular appointment has no effect on the reserve powers, no effect on the relationships between the three branches of government, and no effect on the chances for other reforms including other ways of choosing the president. A table (page 14) compares its political effects to those of the present monarchy.

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This submission presents proposals addressing both terms of reference. It precedes them with some observations about the republic debate to date and offers three suggestions aimed at promoting useful discussion.

These preliminary suggestions are: **1.** that the Committee express the view that the republic model needs to be genuinely popular – 75% rather than 51%; **2.** that the Committee recommend the public’s contributions to the 1993 RAC inquiry be published; **3.** that the Committee consider the prospects of the five models in the discussion paper with a view to ruling them out as politically infeasible.

To term of reference (a), a political process toward a republic.

Let there be a “Republic Model Search” (RMS), a research project to discover all models. A rational decision requires that we have all feasible models placed before us. The five models in the discussion paper are elite products and all indications are they will not succeed. The ten-year top-down process has failed. This RMS would allow the public – the holders of the referendum veto – themselves to discover other ways. Let research grants be awarded for models, followed by an internet discussion followed by a conference and the publication of the conference proceedings. The project would be inexpensive to implement and should let us know definitively what the realistic prospects of a republic are.

To term of reference (b), the method of selection of the president.

If a republic is a place where the people are sovereign, then to convert a monarchy into a republic one would substitute “People” for “monarch” in the constitution. At least it would be the logical starting point. To (b)(ii): My suggestion is for “popular appointment” of the president, meaning that the people should take over the Queen’s job, ie approve the PM’s candidate. It may be viewed as a compromise between “popular election” and “parliamentary appointment”, the contentious components “election” and “parliament” having been omitted. To (b)(i): The conventions and reserve powers are not affected and therefore, to (b)(iii), the power relationships are not affected.

In addition it should win wide endorsement. Political feasibility is not a term of reference but, after 200 years of talking about a republic, surely it is the only thing that matters. Since the controversial aspects are absent from popular appointment, everyone who wants a republic – ie anyone who wants to sever the tie to the Queen – would presumably vote for it. It also preserves the governor-general’s dignity which should mean that at least some monarchists would have no objection.

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## 1 PRELIMINARY GENERAL REMARKS AND SUGGESTIONS

### 1.1 THE MODEL SHOULD BE POPULAR

I think it would be unfortunate if we become a republic by a narrow majority. The matter seems too important for a line-ball decision. Perhaps we should stop thinking of becoming a republic as a public relations exercise, ie we should consider it inappropriate, or even wrong, to promote a contentious republic model that has only the prospect of a narrow referendum win.

A narrow win would mean we would become a republic by celebrating the defeat of nearly half the citizenry. Judging from the bitterness of the unsuccessful “Yes” promoters in 1999 (who did not actually lose anything), the losers in a successful vote could be very angry indeed. If they lost overwhelmingly they would know that the majority of their fellow citizens were of different opinion and there was no point in arguing. If they lost narrowly, they would suspect media and political manipulation and at least some would refuse to accept it. Of course, federally they would have to wear it but we could expect – particularly if one or two states did not vote in favour, or perhaps if some political incident occurred to cast a shadow over the performance of the new republic – that there would be ongoing resistance and election campaigning with a view to showing up the new system’s faults and to retaining the monarchy for the states.

We would eventually get over it but it sounds like a poor beginning to our new republic. In East Timor the people voted 78% for their new country. At the time it was said to be important that the East Timor referendum give a clear result. Is this less important for us? Campaigning for the 1999 referendum was approached in the manner of an election. But an election is a triennial event to some extent reversible next time. The transformation to a republic is a permanent fundamental change. What I am saying is: if a model isn’t sure to get a strong majority there shouldn’t be any referendum. That means that unless a big majority is (or looks like being) in favour of a proposal, *nobody* should want it.

Probably many people would agree with the above though the matter has not had much public discussion. This may be because the idea that any model might achieve 78% is considered wildly optimistic. Perhaps this submission will show otherwise. If, for the moment, we imagine a referendum passing with that kind of majority – ie a referendum more like a celebration of national concord than a nasty polarised debate – it would mean that the outcome was a foregone conclusion long before it actually occurred which in turn would mean that any preceding constitutional convention would also have had to have been in a different spirit from the 1998 one. Instead of a fundamental quarrel over different models, it would be a conference to settle the finer points of the model that everyone knew was going to be endorsed by the people. A pipe dream? See 3.2 below.

Most proposals include a suggestion for a constitutional convention. Usually they envisage the convention deciding among models. But why wouldn’t such a convention just be a bun fight as in 1998?<sup>1</sup> The proposal has a whiff of desperation; it is an unfounded hope that the convention will magically come up with the model to answer all prayers. It is actually recognised that to repeat 1998 would be pointless, for instance on page 17 of the discussion paper where it is suggested such a con-con should have time, money and constitutional advisers. But it is wishful thinking to hope that experts will somehow find the answer. Why would they, now, after ten years? Rather than trying to make modifications around the edges, surely 1999 should simply teach us that a con-con is not the way to go?

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<sup>1</sup> Since 1999, the ARM has refused to endorse any model, saying it will let “the Australian people” decide. The ARM has a plan to (a) encourage the calling of a plebiscite; (b) get a fully elected con-con to decide on a model. But how does this equate to the people deciding? On which faction – ie popular election faction or parliamentary appointment faction – gets the most delegates? What sort of a con-con would that be? Why wouldn’t it be a reprise of 1998: PEs versus PAs with the monarchists deciding the winner?

In order to have a sensible con-con we would have to have a model that has clear popular approval. A widely popular model has to be found, however optimistic that goal may appear – and then a con-con might be superfluous.

**Suggestion 1.** If the Committee in its report were to express a view as to the desirability of a genuinely popular model, it might concentrate minds and help erode the polarisation that characterised the 1999 referendum campaign and looks set to mar debate into the future.

## **1.2 IS THIS INQUIRY REPEATING THE 1993 RAC INQUIRY?**

The republic is stalled; the Senate sees this and wants to know where to go from here. To this end it has set up an inquiry and invited the public to say how it thinks we should proceed. The Senate Committee has set out some terms of reference and written a discussion paper. It seems reasonable. I suppose if I were a Senator, I would be doing the same and any action is welcome. Still, I have some qualms and queries.

In 1993, the Republic Advisory Committee was created to inquire into how to become a republic. This Senate inquiry is asking the same question. The Committee says (p.4) that it “is keen to consult widely and to hear from all sectors of the Australian community” but the RAC inquiry was far more widely publicised and presumably would have received a wider spectrum of opinion. The RAC held, according to its report, 22 days of hearings around the country and received 400 written submissions. Instead of (or perhaps in addition to) asking the public to come forward again, wouldn’t it be a good idea to examine the public evidence given to the RAC?

It may be thought that the matter has moved on since 1993. It is precious little if it has. There seems to have been no progress to a republic. We could have notched up some progress if the model the RAC proposed and which was rejected at referendum had been thereby eliminated from consideration however this has not happened. The terms of reference for the Senate inquiry were pretty much covered by the RAC’s. The Senate intends to publish the evidence it receives (good) but why not publish the RAC submissions? Why not release transcripts of the 1993 evidence? It was given publicly by people under oath and acting in good faith. Why should this evidence and their written submissions not be made public? It could all be quite readily put on the web. If the public contribution from 1993 were available, it might be built upon. As it stands, this enquiry is starting again from scratch and, as far as I can see, it is taking the same path.

**Suggestion 2.** Could the Committee move to publish immediately the public contributions to the 1993 RAC inquiry? If not, could the Committee recommend in its report that they be published?

## **1.3 THE DISCUSSION PAPER MODELS ARE NOT POLITICALLY FEASIBLE**

If the republic inquiry isn’t starting again from scratch, then it is from a datum that the Senate Committee has defined. The discussion paper says that “many alternative models for an Australian republic have been put forward over the last decade.” Yes. And then: “This paper addresses five models...” Why these models? These ones have had quite a lot of publicity. Why not publicise some of those many alternatives? The discussion paper says the Committee “is keen to consult widely and to hear from all sectors of the Australian community” so why reproduce ideas put up by elites years ago, instead of publicising some of those many alternatives? My complaint is not sour grapes: I am just pointing out that it seems to indicate a lack of openness to new ideas.

It is actually rather worse than that because four of these five models are politically infeasible and there is doubt about the other.

Why would the people vote for the McGarvie or electoral college models (Models A and C in the paper) after they rejected parliamentary appointment? It doesn’t make sense. Nobody thinks these two models have any prospects. In no imaginable Australia could any PM dream of presenting either of them to parliament or to the people. In our context, they are monstrosities and yet here they are again, presented in all apparent seriousness. What is the

thinking behind this? Why give the Senate's imprimatur to two models which everyone knows are hopeless while ignoring many alternatives?

Parliamentary appointment (Model B), was rejected at the 1999 referendum yet it stays on the agenda. It continues to be discussed as much as, or more than, any other model.

Can parliamentary appointment rise again? Would a PM introduce a proposal that is virtually certain to lose? He did in 1999 but that was an exceptional situation. According to polls, the public has a stubborn preference for popular election so to attempt to push parliamentary appointment through again would be widely viewed as a cynical insistence on politicians' control. An angry counter campaign is easy to predict: If the people cannot vote a model down and have the rejection recognised, how are we to make progress? Which part of "No" don't the politicians understand? Was the 1999 referendum a sham? The two major parties are ganging up on the people! And so on. Evidently, pushing parliamentary appointment again would be quite a problem. On the face of it, it does not look as if any PM would give it a second thought for at least a generation.

And yet, putting it to referendum again certainly has plenty of Australian precedent. Cases in point are the repeated failed attempts to defang the Senate by breaking the nexus, or the three times (so far) that the WA public have voted the wrong way on daylight saving. This implication that the public is stupid is bound to get people's backs up, however if both sides of politics were to agree on a parliamentary appointment model, they would represent it to the people as different this time (eg by removing the PM's power to dismiss the president and other tweaking), they would persuade themselves that it lost last time because of John Howard's manipulation, and they would have the consolation of knowing that if it still didn't pass, both parties would share the opprobrium.

As discussed in 1.2.1 above, I think the whole idea of trying to squeak a model through is improper, but why is there such persistence with parliamentary appointment? Perhaps the main reason the 1999 model is not accepted as defunct is simply because those who are opposed to popular election see parliamentary appointment as the only alternative and feel they therefore must press for it. As the Senate's discussion paper asserts, it is not the only alternative. Yet unless those "many alternative models for an Australian republic" are given some air-time, how will anyone ever know?

Finally, is it possible to envisage political circumstances that would allow popular election (Models C and D), universally seen as the main alternative to parliamentary appointment, to get before parliament? One can imagine a Labor prime minister "floating" the idea. Will the Liberal Party support it? It won't, so the PM can then say, sorrowfully, that referendums without bipartisan support invariably fail and therefore there is no point in proceeding further – and he can say to republicans that he tried but the Liberals were spoilers. If the Liberal Party is somehow ahead of that game, are Bob Carr and Barry Jones going to take vows of silence? How will it get to be Labor policy? How will it get past Labor caucus? Surely, popular election is a fantasy.

Suppose by some miracle a popular election referendum bill (That would be quite something to see since, after over ten years, no one has even put together an explicit model for direct election.) passed parliament, what would the referendum be like? As a Canberra journalist<sup>2</sup> put it a year or two ago, the "No" case of the last referendum was sometimes over the top, but it would pale in comparison to the "No" case this time. Most elites are dead set against popular election and probably most media would also oppose it. It would be a "scare-mongers'" feeding frenzy. The referendum may well fail. Is any PM ever going to go out on such a limb?

**Suggestion 3.** For the Committee's final report, could it express an opinion on the political feasibility of these five models? As I see it that means rule out four of them and set out the necessary circumstances for repeating parliamentary appointment. No one is much bothered by the McGarvie and electoral college nonsense but their persistent presence does

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<sup>2</sup> Web name "Mumbles". I forget his real name. He writes, or wrote, for the *Canberra Times*.

damage the credibility of debate. The others, people do worry about. To rule out popular election would quell the fears of those who are irrationally terrified of it and release its supporters for more productive activities. A realistic assessment of parliamentary appointment would placate those who are disgusted to see the referendum outcome being ignored and who presently keep pointing to the consistent polling showing an elected president to be preferred by the people. To state these things with authority would clarify the debate and be a huge contribution toward useful discussion of a republic.

## **2. TO TERM OF REFERENCE (a), POLITICAL PROCESS**

### **2.1 THE NEED FOR REAL PUBLIC PARTICIPATION**

The *Perth Weekly* of 20-26/6/01 quoted the Governor of WA, Lt Gen John Sanderson saying about an Australian republic: "The important thing is that we actually have a debate and that we don't just silence it, because this is about how we are going to be governed in the future, though I think we have got a long way to go in the debate yet." Can this be true? Can it be true that after eight years during which there was a national inquiry, a constitutional convention and a national referendum, there was still insufficient debate? Of course he is right. There was a never a proper debate. The 1993 RAC was biased, and did not even adhere to its terms of reference (see footnote 4); the 1998 con-con was a pointless argument which yielded a result cooked up by professional politicians, and the 1999 referendum was an attempt to foist a model on a public which patently didn't want it and which apparently resolved nothing.

Whilst I appreciate the Senate's inquiring once more into "the republic" I am not typical. Who, really, will give evidence? Paddy O'Brien used to claim that only 1500 people gave evidence to the RAC inquiry in 1993. He considered that unsatisfactorily low and so it may be, but I actually think he over-estimated. (The RAC Report says only that there were 400 written submissions and 22 days of hearings.) Ordinary people don't give evidence to official inquiries. Submissions are either from people with a relevant office – ie politicians – or they are from interested citizens of whom probably most are written off as cranks. (What these people had to say to the RAC, nobody knows. As far as I can tell their evidence has never been revealed.)

Is the Senate Committee conscious of this problem of wide non-participation? Page 21 of the discussion paper discusses Corowa proposal C and the last paragraph says, "Throughout, the process was premised upon the need for thorough, open and inclusive debate on all possible options..." Yet the top of the same page it says, as step 2, "a multipartisan Committee of the Commonwealth Parliament to identify and disseminate all possible options". To me it is astounding that anyone could see a "Committee of Commonwealth Parliament" as "inclusive". What on earth would be considered "exclusive"? It also seems incredible that anyone would blithely assume that a parliamentary committee could identify all options. That approach has conspicuously failed, for ten years, to identify all options.

Consider, too, the discussion paper's emphasis on models. There are two terms of reference (a) what process and (b) how to select the head of state. There is one page of discussion on (a) with five questions followed by five pages setting out three processes from the Corowa conference. There are ten pages of discussion of (b) with 25 questions and 9 pages of appendices setting out details of models. At the moment the process continues to be elite-driven, the Senate Committee being part of it. Given the failure over the last ten years, are there not 25 questions that could be asked about process? The winning idea from Corowa (page 18) is saying in effect, "Here is a process allowing you to participate as we think you should." How much more top-down failure does there have to be before the people are let in on it, not on the terms that someone decides for them but as democratic decision makers?

The Senate Committee "is keen to consult widely and to hear from all sectors of the Australian community" but it just isn't going to happen. So my proposal to this Senate inquiry is, in effect, to start another inquiry – to set off an inquiry that really, truly, genuinely

includes the people. That is, an inquiry that doesn't unctuously claim it is including the people but one which is *by* the people. Uncontrolled public debate may sound like a venture into dangerous, unchartered territory but it actually makes political sense (apart from its propriety). Since the people have the veto over constitutional change, they might be in the best position to work out how to get past that veto. If they didn't produce a solution, we'd at least be fairly sure there wasn't one.

Not only has the controlled, top-down process failed but it has to date cost a lot of money. I estimate that a 1½ to 2 year process of the research grants, internet discussion, closing conference, and publication of proceedings, would cost less than half a million. Of course there then would be (we hope) the big expenses of a referendum and possibly a constitutional convention but for the half million we would make progress if there is any progress to be made, ie we would find out whether there was a model which was widely acceptable. If so, a con-con (which surely costs more) may not be necessary and if one was held it would be settling the details while the referendum itself would be destined to pass easily. Contrast this prospect with the present shemuzzle.

The present failure might have been expected. As everyone knows, of 44 national referendum questions since federation, all of which were designed and put by politicians, just 8 have passed. Australian politicians aren't good at this sort of thing. If this is not faced up to we are likely to go on achieving nothing. Even closer to home: Labor put 27 of the 44 referendums but of the 8 successful ones, only two were from Labor – half the Committee are Labor MPs and the republic is largely a Labor proposal. Surely the republic's chances would improve if it lost its Labor flavour. After ten expensive, fruitless years on this problem isn't it time to give ordinary people a go?

The internet seems made for such a democratic exercise. Potentially, a whole country can discuss its constitution. We got a hint of what such popular participation could be in the lead-up to the Corowa conference when people submitted their ideas to the Corowa web site, though the organisers did not actually set up an internet bulletin board or forum. Contributions were collated by someone and set out on the site (and edited to the indignation of some contributors) so you couldn't call it a discussion apart from what occurred privately by email between contributors who contacted one another. There is a lesson here that the moderator, or webmaster, must be a pretty competent individual (and what an extraordinary job it would be: official mediator of a national discussion on the shape of the republic).

George Winterton accused the Corowa organisers of arranging the program so that the McGarvie model would be the favoured, or even the inevitable, result. This was not how it turned out but it is a lesson that the arrangements should be, and be seen to be, impartial. In 1993, the RAC was criticised for being partial towards a republic. That was an irrelevant criticism but what no one seems to have noticed at the time (except Paddy O'Brien) was that it was partial to a particular model of appointment of the president. This bias, and the RAC's biased report, is arguably the major reason why subsequent debate was distorted and "the republic" is now in a blind alley.

Another lesson from Corowa, with the wisdom of hindsight, was in a mistake made in the voting structure. The plan was to get conference participants to vote to find the five most popular of the plans submitted (19 of them according to the Senate discussion paper, page 17) and then to debate those five at the conference. The trouble was that four of the five were variations on a theme. This is a logical outcome of multiple voting. People's votes for their second, third, etc choices will tend to be similar to their first preference. So the process eliminated the variety in the contributed ideas and my impression was that the debate was more or less over two options and thus along the same sort of fruitless exercise as ever. By reproducing the Corowa winning proposals, the Senate discussion paper has fallen into the same trap.

There have been other conferences. There was one at Notre Dame University on 7-8 October 2000. It is almost unknown. It was convened by Justice French and was supposed to have a legal emphasis. The participants were invited and were more or less the usual

suspects. The Notre Dame proceedings were supposed to be published though I never heard that they were. I have a set of the papers presented at the conference which, like much writing on the republic, are more or less content-free.<sup>3</sup> There was another forgettable and forgotten conference in Queensland last year. I think the *Australian* newspaper had something to do with that one.

All of these conferences seemed to have an axe to grind. My suggestion is for a research project, not a political project. I do suggest people should be able to derive some remuneration and privileged influence, but that ordinary people have a chance at this – publicly, openly, in fair competition.

## 2.2 “REPUBLIC MODEL SEARCH” (RMS) TO ADVANCE THE REPUBLIC

### 2.2.1 Specific aims

- To develop all feasible republic models, ie to gather and publish the information needed to make an informed decision on how Australia might become a republic.
- To invite public submission of models and foster public discussion of them in an internet forum and to make the web site the authoritative source for republic information.
- To conclude the web discussion with a conference and to publish the conference proceedings as a reference for subsequent political action.
- Essentially, to respond to the terms of reference the Keating government gave to the Republic Advisory Committee in 1993, namely:
 

“describe and analyse the possibilities [of becoming a republic] and the main arguments for and against them.”<sup>4</sup>

### 2.2.2 Execution

- Set up an honorary board of respected people. Perhaps incorporate RMS as a non-profit body or proprietary company. Come to an arrangement with a university to provide web facilities and set up a technical (legal-political) committee and appoint a half-time director and a half-time administrative officer.
- Invite, in national (and international?) advertisements, applications for RMS research grants, say \$10000 each, for submission of republic models. This would hopefully receive some media attention and free publicity.
- Each application to consist of an outline of a proposed republic model. The technical committee assesses applications and the board awards 10 or 20 grants which are paid in part. Possibly it also awards special merit prizes, say \$500, as an encouragement for the merit prize-winners to submit their models and to stand by to criticise others’ models.
- Grant holders submit complete models, which include all needed changes to the Constitution, by the due date and these are published on the web by RMS. They remain there for a year to attract comment and be refined by their proposers. The RMS web site should become the main source of information for journalists and politicians and anyone else interested in the republic.
- Hold a conference of grant holders, some invited presenters and commentators, and any person who pays the registration fee. Possibly award prizes.

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<sup>3</sup> At this conference which was supposed to be on legal matters pertaining to becoming a republic, I think neither of the concepts of sovereignty and legitimacy were ever mentioned.

<sup>4</sup> The Republic Advisory Committee, chaired by Malcolm Turnbull, presented its report in September 1993. It did not fulfil this term of reference in that it argued for its preferred model (parliament appointment) without giving a single argument against it and argued against the main other option (direct election) without presenting an argument in favour of it except for one oblique remark. These grossly biased discussions took up several pages and in each case were set under headings in italics saying *Arguments for and against* as if they adhered to the terms of reference. The report also developed details of its preferred design and variations upon it but did not do this for other options. The Turnbull report was the main reference for the 1998 constitutional convention.



- Publish the conference proceedings and a record of the lead-up discussion.

The answers to the Senate discussion paper's five questions are as follows: 26 - 28: the public and closing conference would decide; 29: none of these but through the process described above; 30: as described above.

### **2.2.3 Notes on RMS execution**

#### **2.2.3.1 RMS management**

The management board should include prominent private citizens. Association with a university would provide academic respectability. The idea is to achieve credibility without elitism. Perhaps none of the members should be elected politicians. Members might be prestigious rather than powerful and include: an eminent patron, a lawyer, an advertising executive, a senior political scientist, a senior journalist, a prominent artist, a prominent sportsperson.

Director and administrative officer both half time. Director, probably an academic, is moderator of the web site and is member of the board and of the technical committee. Administrative officer maintains a mailing list, and organises publicity.

#### **2.2.3.2 Grants**

Forum research grant instalments: part paid on awarding the grant; part on submission of complete model to RMS; part on submission of refined model on eve of conference; final instalment paid for conference attendance.

#### **2.2.3.3 Applications**

Hopefully, the most effective advertising for applications would be free, ie through media coverage.

An applicant could be a collective such as a community group, school, corporation, or union. Perhaps a parallel competition for schools could be held.

One criterion for grant approval would be political feasibility, ie whether parliament-friendly and referendum-friendly. Applicants who include reforms such as bill of rights, CIR, electoral reform, minority recognition, a preamble, a new flag or any other feature not obviously concerned with converting the monarchy to a republic, would be required to show that their addition would not reduce the chances of their model being approved at referendum.

Terms of reference for models might include: a schedule of constitutional changes; an outline of expected consequences of the changes and reasons for the design; possible problems with the model in practice or in getting it through the referendum.

#### **2.2.3.4 Internet forum**

Proposers should be pressed to explain and defend such things as: their model's effect on the constitutional conventions, to whom it transfers the Queen's powers, precisely who replaces the Queen and in what capacities, whether the proposal increases or decreases the authority of the governor-general/president, whether it increases or decreases the power of the politicians, whether it increases or decreases the influence of the major political parties, what the implications might be for liberty and democracy, whether it will reflect the will of the people, what the prospects of widespread acceptance are – and no doubt other things. A comparative table of features along the lines of the one in the Senate discussion paper should be drawn up. The table should include a column for the status quo (like the one on page 14 herein) and should include rows dealing with sovereignty and legitimacy.

It may be appropriate to appoint some web site contributors as official commentators. It may be appropriate to solicit comment from interest groups such as political parties, RSL, Scouts, ACOSS, unions, employer organisations and think tanks.

It might be necessary to run two forums. One constrained to model discussion and one for people who want to discuss other constitutional matters. If the tendency for blogs and forums to go off the point could be profitably channelled, it would be a fine outcome for although there is plenty of web comment about the daily political to and fro, there seems to be no bulletin, forum or blog discussing political institutions.

People other than research grant holders should be encouraged to submit novel models, at least early in the discussion period, and perhaps they should receive ad hoc (funded) invitations to the conference.

### 2.2.3.5 Conference

It might be an idea to hold the conference at a place remote from Canberra.

It might be awkward to award prizes since a model or models judged as successful would be the result of many people's efforts.

If it is possible to develop a model that could win wide endorsement, the RMS process should by now have found it and the conference would recommend it be adopted. If no model is a clear winner, then the conference may decide to present its findings and to leave further action to politics.

Copies of the proceedings should be distributed to influential people and be put on sale. This volume would then be the authoritative reference for republic models and a record of the process that enabled the models to be developed.

### 2.2.3.6 Estimated budget

Two half time salaries for two years:	\$150 000	(Tech Dir, Admin Off)
Advertising	\$20 000	
Twenty grants, each \$10000	\$200 000	
Prizes	\$20 000	
Twenty extra invitations to conference	\$20 000	
Organise conference and edit proceedings	\$20 000	
Publish and distribute proceedings	\$20 000	
<b>Total</b>	<b>\$450 000</b>	

This is probably an overestimate. Can there possibly be twenty feasible models?

There may be some income from conference fees and there may be some income from advertising on the web and sale of the proceedings.

Should this RMS be government funded? Perhaps with some publicity and some celebrity endorsement it would attract private funding. If publicly funded, it probably should be put at arm's length from the government to maximise objectivity, non-partisanship and popular ownership.

## 3. TO TERM OF REFERENCE (b), METHOD OF SELECTION OF PRESIDENT

### 3.1 THE NEED TO RESPECT SUBSTANTIAL CONCERNS

At present the Queen appoints the governor-general on the advice of the prime minister. The essential problem with becoming a republic was apparent from the early 1990s: if the Queen ceased to exist, who would then appoint the governor-general/president?<sup>5</sup> In the end that is what the 1990s debate (such as it was) was about, and it was what the 1999 referendum was about, and the problem of how the president should be chosen remains the stumbling block. It is the problem that has to be solved before progress to a republic can be made. If it is solved, becoming a republic is easy.<sup>6</sup>

Wisdom and good manners would suggest that promoters of a republic design should respect the concerns of republicans of all colours: those who want the people to have a say in the appointment, those who fear political upset, those who don't want politicians' power increased, those who have a broader reform agenda and those who do not want to see a president who is a political rival to the PM. Also they should consider the concerns of the lawyers who complain about the difficulty of codifying the so-called "reserve powers" and, finally, they should respond to those monarchists who fear that the presidential succession

<sup>5</sup> The Queen could never refuse to appoint the PM's candidate – more on this in 3.3.3 and note 18.

<sup>6</sup> There could hardly be a better indication that to solve the president problem is to solve the republic problem than the Senate discussion paper's preoccupation with it.

will be a political brawl. A good design would respect these positions, not ignore them or disparage them. "Popular appointment" tries to do this, see 3.2.2.

The plan was recently set out in the *West Australian* (29/12/03) in response to an article by prominent conservative and chairman of the WA branch of the ACM, Bill Hassell. Hassell had demanded a republic that was: introduced gradually, by clearly defined changes, which is safe, and which would achieve majority consensus. Presumably he thought those demands impossible to meet. But they are perfectly reasonable demands and popular appointment does meet them. The response from Perth's conservatives has been public silence and private admissions that no one can see a flaw.

The idea has been published a few times (once, in 1999, as a double page spread in the *Financial Review*) and the little response that there has been, was all positive. Perhaps the Committee could give it some more publicity, try it out, see if people can find anything wrong with it.

In the event of the above-suggested RMS, "popular appointment" would be my entry.

### **3.2 PRESIDENT BY POPULAR APPOINTMENT**

#### **3.2.1 Detail of constitutional changes and process of appointment**

Let the people directly take over the Queen's task of appointing the governor-general, and let nothing else – no conventions – be changed. That is, the people would appoint (or decline to appoint) the prime minister's recommended candidate.

It may be easier to become a republic in two stages: first resolve this apparently difficult problem of appointment of the governor-general, then later formally modify the Constitution to become a republic and to re-christen the governor-general as "president".

The appointment of the governor-general is set out in Sections 2 and 4 in the written constitution. For the people to take over the Queen's appointment powers would require three replacements of the word "Queen" with the word "People" in those two sections. There are no other references to appointment or dismissal of the governor-general.

Section 2 would read:

"A Governor-General appointed by the ~~Queen~~ People shall be Her Majesty's representative in the Commonwealth and shall have and may exercise in the Commonwealth during the ~~Queen's~~ People's pleasure, but subject to this constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him."

Section 4 would read:

"...the governor-general for the time being, or such person as the ~~Queen~~ People may appoint to administer the Government..."

This Section 4 change is probably not strictly necessary to solve the problem and the Queen could continue to appoint where the governor-general was not available.

Obviously this would not make us a republic since the Queen would remain and this people-appointed governor-general would still be the Queen's representative. But the later stage to become a republic would be something of a non-event since there would be no practical effect. A straightforward way to accomplish that would be to exchange "People" for "Queen" (or the equivalent according to context) throughout the Constitution. With about two dozen simple changes the Queen of Australia would cease to exist. If we wish the head of state to be known as "president", there would also be three dozen replacements of "governor-general".

Though the written Constitution is clear about appointment, it says nothing about *choosing* the governor-general. That is in Australia's unwritten constitution. Our convention is for the prime minister (who himself exists only by convention and is not mentioned in the Constitution) to write to the Queen advising her to appoint his candidate. The Queen agrees and writes appointing the person. For the Australian people to take the Queen's place, the PM would have to write to the people and the people would have to reply, ie to keep the present convention, there would have to be a postal ballot.

“Dear Citizen,” the PM might write, “It is my great pleasure to recommend that Ms Josephine Bloggs AO be appointed governor-general for five years beginning on... Ms Bloggs has had an outstanding career of public service including... I am confident she will make a splendid governor-general. I look forward to your returning the green slip to signify your approval. Your most humble and obedient servant, (signed) Prime Minister.” The green slip would state: “Yes, I am pleased to appoint Josephine Bloggs as governor-general,” and a red slip would say: “Thank you for the recommendation but I regret that I find the candidate unsuitable; please recommend another.”

The 25 questions posed through the discussion paper are answered: 1 - 12, 14 - 16, and 22 - 24 are irrelevant, which is not say some of them are not interesting questions just that they have nothing to do with becoming a republic; 13 no opinion; 17 the people; 18 - 21 continue as at present; 25 same as federally, ie let the people appoint the Premier’s candidate.

### **3.2.2 Consensus republic: popular appointment satisfies everyone (almost)**

“Popular election” republicans want the people, not the politicians, to decide on the president. Surveys after the 1999 referendum showed that just over half of those who voted “No” did actually want a republic. These people voted against what they saw as a “politicians’ republic”. Popular appointment gives the people a say in the matter and the politicians play no role.

Though the Labor Party supported the 1999 referendum and the Liberal Party tended to oppose it, many Liberal electorates showed strong “Yes” support. In my view, it was not so much that these Liberal voters were eager for a republic but rather that many were frightened of a future popular election model, and so voted strategically for what they saw as the lesser evil. Free market Liberals probably voted “No” because they are frightened of more power going to politicians. Popular appointment is not frightening to anyone and relinquishes no power to politicians.

People who seek broader political reform may be disappointed that popular appointment only yields a republic. But on referendum day, would they oppose it? Since popular appointment gives no power to politicians it does not close any doors to reform through popular agitation, so there seems no reason why they would prefer to remain with the Queen. The insistence on other reforms stems from a desire to use the momentum of change to achieve them. The trouble is there is no momentum. Indeed, it is mainly such second agendas that are killing it and stymieing progress to a republic.

Politicians would be content. They fear direct election for they know that if the governor-general were elected, then no matter what formal de-powering there was of the position and of the reserve powers, popular election provides the legitimacy – here and in all democracies – for day-to-day governing. In a competitive election there has to be some reason why people vote for one candidate and not another so there would be campaign promises which the governor-general would feel bound to honour, and the huge legitimacy of being nationally-elected would lead to conflict between the governor-general/president and the cabinet. However with popular appointment, nothing changes; the governor-general has no mandate to rule and carries on as before.

Constitutional lawyers would sleep soundly. The reserve powers are unaffected. Since the Isaac Isaacs business in the 1930s, it is out of the question for the Queen even to query, let alone reject, the PM’s recommendation, so popular appointment would tilt some power toward the people and take it from the PM since the PM could no longer take approval of his candidate for granted. But there is no power tilt toward the governor-general/president, so no change to the power relationship with the elected politicians is implied. Hence no changes are required to the reserve powers.

Constitutional monarchists argue that the monarchy gives us assured and dignified succession, that appointment by the Queen saves us from an unseemly political campaign for the position of governor-general. So it would continue with popular appointment: no election, no campaign, no election promises, no disturbance of the dignity of the position. The discreet prime ministerial selection, combined with popular appointment based solely on a

distinguished career, would see the same sort of individuals holding the post as have usually held it.

Offered a choice between popular appointment and the status quo, who would vote against it? Apart from those with an emotional attachment to the monarch, no one has anything to lose. A consensus republic, ie one satisfying all stakeholders, *is* feasible.

### 3.2.3 Comparative perspectives on popular appointment

Popular appointment is a way to become a republic and do *nothing else*. Our political system would go on as it has done for a century except in a republican way, ie the people would do what the Sovereign did. The table below summarises the political implications.

Popular appointment does not rule out later change to some other model. It just allows us to become a republic without any of their complications. Also, there is nothing wrong with wanting to reform the constitution, get a new flag, introduce CIR, eradicate the states and so forth, and these aims are not inhibited in the slightest. Popular appointment does not get in the way of other agendas; it is a means of becoming a republic without reforms yet without ruling out reforms. If we wanted to adopt some other way of choosing the president at a later date, we could do so just as easily from the position of popular appointment as from the present position of royal appointment. In this it differs considerably from other designs all of which by their nature would be very final and in practice virtually impossible to change.

Popular appointment may be compared with the only two models the wider public is aware of. Instead of a popular *election* it prescribes popular *appointment*. Instead of the *parliament* appointing, the *people* would appoint. There is, though, an important difference between parliament and the people appointing; it lies in the meaning of “appoint”. The people might refuse the PM’s recommended candidate whereas (in the 1999 model) parliament would have had no such option, the parliament’s vote being a formality which could only approve the candidate. Most Australians are/were quite unaware that under the 1999 plan the so-called people’s representatives were to vote without the opportunity of discussion, even in the party room. The net effect was that the identity of the president would have been decided behind the scenes by the machine men of the opposition party who would have exacted a quid pro quo for their consent. None of this was ever publicly discussed.

Another way to view popular appointment is to say that if a republic is where the people are sovereign (And if it is not, then what is it?) then the logical way to convert a monarchy into a republic would be to replace constitutional references to the monarch with references to the people, ie to strike out “Queen” and its synonyms and write “People” in its place.<sup>7</sup> Popular appointment does exactly this.

### 3.2.4 Popular appointment FAQs

Has popular appointment been tried anywhere else? Yes. All judges in Japan and the judges in half the states of the USA are appointed this way. It is known there as the “Missouri Plan”. We would be the first to do it for a head of state. In the USA the choice is made by the governor aided by an expert advisory committee. The committee is needed since a judge must be professionally qualified.

Would the opposition attempt to make political capital by publicly criticising the PM’s choice? No, because this would be seen to be politicising the governor-general and sully an occasion of national agreement. The candidate would anyway secure opposition endorsement before agreeing to stand, and after the identity was announced the opposition leader would be constrained to endorse the candidate.

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<sup>7</sup> Though this is obvious, at least when pointed out, in over ten years this has never even been discussed. It is one indicator of the distortions in the republic “debate”.

**Table: The status quo compared with popular appointment**

<u>Current monarchy</u>	<u>Popular appointment</u>
<ul style="list-style-type: none"> <li>• The Constitution refers to the Queen.</li> <li>• The Constitution refers to the GG.</li> <li>• The Queen represents the State.</li> <li>• The GG represents the Queen.</li> <li>• The Queen performs ceremonial duties on behalf of the State; GG performs mainly ceremonial duties on behalf of the Queen.</li> <li>• Sections 2 &amp; 4 of the Constitution provide for a GG appointed by the Queen.</li> <li>• The PM writes a letter to the Queen recommending a single nominee for GG</li> <li>• The Queen writes accepting the recommendation.</li> <li>• The Queen cannot refuse to respond.</li> <li>❖ <i>The Queen could once, but cannot now, decline to appoint the PM's nominee.</i></li> <li>• Appointment is based solely upon past service and good character, as judged by the PM.</li> <li>• Queen and GG have no mandate to rule.</li> <li>• The PM must ask the Queen to dismiss the GG. (This has never happened.)</li> <li>• Parliament plays no role in appointment or dismissal of the Queen.</li> <li>• Parliament plays no role in appointment or dismissal of the GG.</li> <li>• GG's "reserve powers" – to appoint and dismiss ministers, and to hold, or refuse to hold, an election – are authorised by the Queen for use in the name of the Queen.</li> <li>• The Queen is the Sovereign.</li> </ul>	<ul style="list-style-type: none"> <li>• The "Queen" is replaced by the "People".<sup>8</sup></li> <li>• The "GG" is renamed the "President".<sup>9</sup></li> <li>• The President represents the State.</li> <li>• The President represents the People.</li> <li>• The President performs ceremonial duties on behalf of the State and mainly ceremonial duties on behalf of the People.</li> <li>• Sections 2 &amp; 4 of the Constitution provide for a President appointed by the People.<sup>10</sup></li> <li>• The PM writes to each citizen recommending a single nominee for President.</li> <li>• The People write, via Yes/No postal vote, deciding on the recommendation.<sup>11</sup></li> <li>• Voting is compulsory.</li> <li>❖ <i>The People may decline to appoint the PM's nominee.</i><sup>12</sup></li> <li>• Appointment is based solely upon past service and good character, as judged by the PM and the People.</li> <li>• The President has no mandate to rule.</li> <li>• The PM must ask the People to dismiss the President by formal Yes/No vote.<sup>13</sup></li> <li>• Parliament plays no role in appointment or dismissal of the President.</li> <li>• Parliament plays no role in appointment or dismissal of the President.<sup>14</sup></li> <li>• All conventions are undisturbed including the "reserve powers". The President has the People's authorisation to use them in the name of the People.</li> <li>• The People are sovereign.</li> </ul>

❖ *The italicised item is the only one where there is a practical difference between the republic and the present monarchy.*

<sup>8</sup> Sometimes a slight rewording is required but mostly straightforward substitution is possible.

<sup>9</sup> The name change is not essential. "President" is used here for clarity and convenience.

<sup>10</sup> Two replacements of "People" for "Queen" in section 2 and one replacement in section 4 wholly transfer the Queen's appointment power to the people.

<sup>11</sup> A postal vote not only conforms to present convention but avoids the less dignified election ballot.

<sup>12</sup> Rejection should never happen. If it did, a new candidate would be recommended.

<sup>13</sup> Dismissal should never happen. If it did, it would not be slow or cumbersome: two to three weeks should suffice – and it would probably be to resolve a problem that had been building for months.

<sup>14</sup> The President thus has the same independence from partisan politics as the GG.

Would the candidate's past be more thoroughly examined than previous governor-generals'? We should hope so. This is quite likely, for there would be more media coverage. If anyone does genuinely object they could do so and if the matter was serious the candidature could be withdrawn before appointment (rather than after). It is more likely that such a candidate would anticipate all this and not agree to stand in the first place.

What if the people declined the PM's recommendation? That would be the people's right. Unlike the Queen's appointment power, and unlike the parliament's planned appointment power, the people's power to appoint would be real. However it won't happen. If it ever did it would be sign of extraordinary political stress. We would be glad to have avoided a president the people did not want and the PM would resign in embarrassment. The new PM would submit another name.

Would such a governor-general have sufficient authority to do the job? Yes. Sacking the elected government is a very big deal and in a republic may only be done in the name of, and with the authority of, the people. Popular appointment delivers this authority. At the same time popular appointment grants no authority to interfere in daily politics.

Would not popular appointment give a president/governor-general more legitimacy than royal appointment? Perhaps, since popular appointment is genuine in the sense that it could be refused, it would seem to give more than the *present* monarchy gives. On the other hand, it is hard to see what additional actions a popularly-appointed Kerr would have felt legitimised to undertake in 1975. Have there been occasions when a popularly appointed governor might have acted against the government? This is a very hypothetical question which historians can speculate on.

How could the president be dismissed? The change to Section 2 takes dismissal from the Queen and puts it in the hands of the people, so theoretically a ballot would have to be held. The circumstance where this would arise are unimaginable but if it did, it could be done quite readily. Unlike the years needed to impeach a US president, it would not be slow – a plebiscite could probably be organised within a few weeks. Much was made of this alleged problem prior to the 1999 referendum, however in 150 years there has not been a need to dismiss a governor or a governor-general.<sup>15</sup> The matter has no urgency and if there is a case for change, it does not have to be considered at the same time as becoming a republic.

### 3.2.5 A three-stage process?

The above suggests two stages: first resolve the head of state question by changing three words to provide for the people to replace the Queen in her role of appointment, and the second to make the mechanical changes to terminate the monarchy. If gradualism is one key to consensus, the first of these two stages could be preceded by a preliminary stage. Modest as making three, one-word changes to the constitution may appear to be, it might still be too radical for the real political world.

Instead of plunging in with a referendum to alter the constitution, a PM who was fairly sure of his position could simply hold a plebiscite seeking popular approval of his candidate. If the process was satisfactory, the PM could later hold the referendum to make the three alterations to the constitution. Or a premier could do it, the subsequent constitutional changes are much easier in the case of a state.

Even this low-key incremental process may require more courage than a sitting PM or premier can summon for it would be criticised as an irrelevant diversion from one side and a timid half-measure from the other. Progress may depend on an opposition leader making it an election promise. Even then, after his election, chances are he would set up a committee of enquiry so as to shed some of the responsibility. This republic is an elusive thing.

Of course, at this stage, such ruminating is building castles in the air.

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<sup>15</sup> If there is a new governor every 5 years then for five states we have about  $150/5 = 30$  governors each and for WA and the Commonwealth roughly  $100/5 = 20$  so we have  $30 \times 5 + 20 \times 2$ , making 190 governors. As personalities they have been a mixed bag but as far as I know none ever looked like being a candidate for dismissal.

### 3.3 LEGITIMACY & SOVEREIGNTY: A POLITICAL SCIENCE ARGUMENT

Legitimacy and sovereignty are fundamental political science concepts. Legitimacy refers to the right to exercise power. Sovereignty refers to who gets the final say. In the following they are operationalised to resolve the republic debate – as popular appointment.

#### 3.3.1 A stalled republic

A majority of Australians want a republic but no progress is being made because republican activists are divided into two camps. One favours popular election (PE) of the president; the other wants parliamentary appointment (PA).

The two sides do agree on some things. Apart from both wanting the country to sever its ties to the English crown, they generally agree on two aims:

- the future president should perform the same duties as the present governor-general, and
- the present “constitutional conventions” should be undisturbed.

Whatever their agreement, they have disagreements great enough for both sides to prefer the status quo to the other’s plan. Also, though they claim these two aims, they don’t seem to be quite sincere and each camp has a secret, possibly subconscious, second agenda.

PE supporters object that PA would give power to politicians and none to the people. PA supporters are concerned that PE would disturb the established political system because a directly elected president would be a power rival to the prime minister.

The two sides emphasise different things. In political science terms, the PEs are concerned about who has *sovereignty*; the PAs are worried about giving the president too much *legitimacy*. PE supporters want sovereignty to go to the people and complain that PA transfers sovereignty to the politicians. PA supporters object that PE would confer greater legitimacy on the president than the prime minister possesses and thus cause conflict.

The argument is at cross-purposes and stays there. Each camp is loud in its objections to the other but the objections are never answered. Neither side defends its own case; neither responds to the opposing concern. Instead of defending its own plan, each camp prefers to emphasise the defects of the rival plan.<sup>16</sup> In the first place, the criticisms pretty obviously have some validity and there exist no satisfactory answers. But there is more to it: the PEs are not *interested* in the PA concerns about legitimacy, and the PAs are not *interested* in the PE concern about sovereignty. So in the second place it is because the criticism is actually not regarded as a defect, indeed each camp quietly *welcomes* the characteristic the other sees as a criticism.

The disjointed nature of this debate and the perspective of both republican camps that the other plan is so fatally flawed that the status quo is preferable, would itself indicate that neither plan actually fulfils the agreed aims, namely a president like the governor-general with conventions preserved. As the following shows, viewing the proposals from the standpoints of sovereignty and legitimacy confirms that neither proposal confers legitimacy commensurate with maintaining the governor-general’s present powers, and that neither passes the Queen’s sovereignty to the people.

#### 3.3.2 Legitimacy

Once we regarded the monarch as legitimate, the legitimacy conferred by birth or God’s will. Over the centuries our ideas changed and nowadays many people doubt that our

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<sup>16</sup> The insistence by each side to emphasise the disadvantage of the other plan rather than promoting its own, was well illustrated by the official pamphlet for the 1999 referendum on the question of introducing PA. Most of the space allocated to the YES case was left blank. Since the people promoting PA had driven the debate through the 1990s and were among the most articulate in the land, this silence appeared to show the proposal’s lack of virtues. The YES case could have taken up their opponents’ objections but they did not, either because they could not, or because they were not interested. The space allocated to the negative, anti-PA case was, of course, filled. If a referendum on PE were held, the corresponding situation would probably arise with respect to it, ie a massive anti case and a floundering yes case.



Queen's remaining scerie of sovereignty, namely her power to appoint the governor-general, is legitimate and, indeed, since Prime Minister Scullen won an argument over the appointment in 1935, this power of the monarch has become a formality.

Legitimacy should match power. In the democratic world we think that our legislators must be elected by the people to be legitimate, whereas a police officer's legitimacy comes from merely being employed by proper process.

In our society popular election confers the legitimacy for law-making and for day-to-day rule. PE would therefore confer more legitimacy than required by a ceremonial president. On the other hand, parliamentary appointment is associated with positions such as auditor-general and ombudsman. PA would therefore confer too little legitimacy on a president who has the power to dismiss an elected government.

This reasoning holds whether the president has *formal* powers or not. The idea that the president should be directly elected while at the same time all the powers be removed, is contradictory. In politics it is the *most powerful* who must be directly elected, not the powerless. What would be the point of directly electing the powerless?<sup>17</sup> Consequently, popular election would confer power, whatever the formal, nominal powerlessness. Similarly a parliament-appointed president would not have the authority to sack the government even if (eg as under the 1999 plan) the formal power was there. In a crisis, such a president would not have any authorisation, would not feel authorised, and could not act.

So neither PE nor PA will supply the correct type or quantity of legitimacy for the president to carry on with the governor-general's duties. To retain the present power relationships, the president must:

- lack the legitimacy to participate in day-to-day rule, yet
- possess the legitimacy to exercise huge power on rare occasions.

That is what the present monarchical arrangement achieves. *To deny legitimacy for day-to-day rule, the president must not be elected by the people. At the same time to have the legitimacy to sack the elected government the president must have the people's authorisation* for whereas a governor-general disciplines the elected government in the name of the Queen, a republican president does it in the name of the people. This is only possible if the people have authorised the president.

The conclusion is inescapable: for a president to have the *same legitimacy* as the governor-general, he or she must be *appointed, but not elected*, by the people. Thus the post would be filled not on the basis of promises of future acts but, as it is at present, on the basis of past service and good character.

### 3.3.3 Sovereignty

To terminate a monarchy, something has to be done with the monarch's sovereignty. Sovereignty – final power, or who has the last say – is a slippery concept and it is fruitless to seek it in any one place in a modern society. Our nominal Sovereign, the Queen, ceased to be sovereign long ago except for one remaining power: she appoints the governor-general on the prime minister's advice.

Some would question whether she has even this much sovereignty. It is a curious situation and a revelation of the subtle nature of power. Though the Queen always accepts the PM's recommendation (and for her to reject it is quite unthinkable), somehow we do not believe that the Queen obeys the PM's instructions. Somehow we feel that the PM doesn't appoint, he only recommends, and that it is the Queen – "Her Majesty" – who appoints. Apparently, if the people insist that it is the Queen who appoints,<sup>18</sup> then it seems that it is so.

<sup>17</sup> Election of a powerless person creates logical problems. On what basis would a voter choose between candidates? Good looks? What would be the basis of the candidates' campaigns? "Elect me for I will cut ribbons with more dignity than my opponents!" Entertainment value? "Elect me for I will make more gracious speeches!"

<sup>18</sup> The Queen must have some real significance apart from the people's insistence, for it is hard to imagine John Kerr sacking the government if the Queen had not been involved in his appointment.

At any rate, for a decade it is what the republican debate has been about: who is to get this modicum of sovereignty? It could be said that the total progress of the Australian republic so far has been to identify two possible answers to the question of who controls the appointment of the president: the politicians or the people.

PA would simply pass the Queen's sovereignty to parliament.<sup>19</sup> PE is more complex; it does not just transfer sovereignty to the people. The election would give the people some sovereignty, since they would decide between the (two) candidates, however the Queen's power to refuse to accept any candidate would not pass to the people unless the election permitted voters to decline all nominations, which it would not. This power to decline to appoint would appear to be subsumed under the preselection powers which is also where the PM's power to recommend the candidate to the sovereign would go. In short PE shuffles the power around considerably with most of the sovereignty apparently going to the preselection committees of the two major parties.

Neither PA nor PE transfers the Queen's sovereignty to the people. For the Queen's sovereignty to go to the people, the people would have to take over the Queen's role and appoint the president on the PM's advice.

### 3.3.4 Resolution

Sovereignty and legitimacy – Political Science 101 but entirely omitted from the debate. In so far as the concepts have meaning, we must conclude that neither PA nor PE will give us a president with the same powers as the present governor-general. PA gives the Queen's sovereignty to politicians, not to the people; PE gives too much legitimacy to the president. If the system is not to be disturbed, there appears to be no alternative to popular appointment.

The Queen's power to appoint (and dismiss) the governor-general is assigned by the Constitution in Sections 2 and 4. To wholly transfer this power to the people would require "Queen" to be replaced by "People" at three points in these sections. Assuming the continuation of the convention of the prime minister recommending the candidate, the problem of passing sovereignty to the people while preserving the present legitimacy, would be solved.

### 3.3.5 Psychology

Over some months I pestered friends and colleagues for feedback on the above. I thought it showed academically what everyone already knew perfectly well, but it turns out the notions of legitimacy and sovereignty are not that easy to get across and in the process I inadvertently confirmed one aspect: PA supporters regard the matter of legitimacy as the important argument while PE supporters consider sovereignty as the issue. One PA man impatiently told me that the discussion of sovereignty was "blather". The same impatience was shown by a PE supporter who burst out, "But it's the *sovereignty* that it's really about" (and not that redundant academic waffle about legitimacy).

They both matter.<sup>20</sup> Unless the people have the sovereignty of a say in the appointment, the president will not have the legitimacy to carry out the duties of sacking the elected government. If the president has the legitimacy provided by a competitive election his day-to-day power will be greater, the major parties would gain sovereignty and the prime minister's power will be reduced.

At some level both camps know this. I think that those who want parliamentary appointment, and who say they want a figurehead president to preserve the present successful

<sup>19</sup> Nominally PA would pass the Queen's sovereignty to parliament but in the 1999 model it would mostly have gone to the machine men of the party in opposition – see 3.2.3 above.

<sup>20</sup> And perhaps not only legitimacy and sovereignty. Perhaps parallel arguments could be woven around the concepts of answerability and obligation. The president would be answerable to whoever has power of sanction. A president would be obliged to whoever got her the job. An appointed president would be obliged to whoever did the appointing. Who would an elected president be obliged to? The people who elected, or the party which funded and campaigned?

polity, actually do not want to see a president who can exercise the reserve powers. That is to say, they actually do *not* want the present arrangement but have reform agenda which they are not being frank about. The supporters of popular election explicitly recognise the problem of an over-legitimised elected president and say the president's reserve powers should be "codified"<sup>21</sup>. But they don't say "disempowered" for they see a president who is a counterweight to the PM and cabinet. They, too, have an unspoken reform agenda.

Popular appointment implies no reform. It severs the tie with the monarchy without affecting the power relationship between the three branches of government. The prime minister would lose a little power but not to the other branches; it would be a reversion to the situation before Isaac Isaacs when the sovereign was able to reject the nominated candidate. Correspondingly, popular appointment gives the people a little more power – which is what changing from a monarchy to a republic is supposed to do.

#### 4 CONCLUSION

We are in a rut. In ten years, we have made no progress toward Australia's becoming a republic. This Senate inquiry has the same aim as the 1993 RAC inquiry and in its discussion paper it sets out five models quite similar to the ones in the RAC report. Only one of these models has a ghost of chance of getting to referendum and it is the very same one that the RAC pushed and which the people turned down at the 1999 referendum. There are also calls for another con-con apparently doomed to repeat the failure of 1998.

We have been talking about a republic for 200 years. At the rate we're going, we are set for another 200. We need to find *new* models. We need a *new* approach.

In the first section of this paper I have offered three suggestions for the Committee to express opinions which might facilitate breaking out of the rut.

To term of reference (a)

The top-down approach has failed. I have suggested a "Republic Model Search" which would involve any interested member of the public. This RMS would be a research project, not a political campaign and if progress is possible it would make it. It would be inexpensive, probably successful and democratic beyond reproach.

To term of reference (b)

I have suggested that if a republic is a polity where the people are sovereign then it is logical, where a monarchy is to become a republic, that the sovereignty of the monarch should pass to the people. We could become a republic simply and elegantly by the people taking over the monarch's constitutional powers. The power of appointing the governor-general is our monarch's only remnant of real sovereignty and the stumbling block to becoming a republic. To resolve it requires only three substitutions of "People" for "Queen" in sections 2 and 4 of the Constitution.

Those who would campaign for another model might consider how it compares with popular appointment (see table on page 14). Unless their model has a chance of clear public endorsement they should abandon it on the grounds that we should not become a republic by a narrow victory after another angry campaign. "Popular appointment" could yield a republic which affronts no one. At the same time, its adoption would leave open the option of future campaigning for a different model or for other reforms.

Mike Pepperday

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<sup>21</sup> "Codify the powers" is easy to say but after a decade of public debate, no one has come up with a plan of the necessary changes to the constitution. Lawyers have been arguing over codifying the governor-general's reserve powers for sixty years.