4

Powers of the President

4.1 The Constitutional Convention resolved that:

> The powers of the President shall be same as those currently exercised by the Governor General.
>
> To that end, the Convention recommends that the Parliament consider:
>
> > the non-reserve powers (those exercised in accordance with ministerial advice) being spelled out so far as is practicable; and
> >
> > a statement that the reserve powers and the conventions relating to their exercise continue to exist.
>
> The Commonwealth Government and Commonwealth Parliament give consideration to:
>
> > provision for continuation of prerogative powers, privileges and immunities until otherwise provided.[1]

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1 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 39, paragraphs 26 and 27.

4.2 These recommendations give rise to a number of questions about how an amended Constitution should deal with the President's powers, particularly the reserve powers and associated conventions, and the non-reserve powers. These matters, and the questions of whether the powers proposed for the President would differ from those presently enjoyed by the Governor-General, and whether the proposed amendments would significantly alter the distribution of power effected by the present Constitution and practice, were extensively debated in the evidence before the Committee.

4.3 The main provisions of the Republic Bill which give effect to the recommendations of the Constitutional Convention are proposed s.59 (in particular the third paragraph) and proposed s.70A, which provide:

> **59 Executive power**
>
> The executive power of the Commonwealth is vested in the President, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth. The President shall be the head of state of the Commonwealth.
>
> There shall be a Federal Executive Council to advise the President in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the President and sworn as Executive Councillors, and shall hold office during the pleasure of the President.
>
> 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.
>
> **70A Continuation of prerogative**
>
> Until the Parliament otherwise provides, but subject to this Constitution, any prerogative enjoyed by the Crown in right of the Commonwealth immediately before the office of Governor-General ceased to exist shall be enjoyed in like manner by the Commonwealth and, in particular, any such prerogative enjoyed by the Governor-General shall be enjoyed by the President.

Would the President's powers be the same as the powers of the Governor-General?

4.4 As noted above, the Constitutional Convention recommended that the powers of the President should be the same as those currently exercised by the Governor-General.

4.5 In this regard, the Referendum Taskforce stated that the Republic Bill did not effect any change in terms of the President's powers compared with those of the Governor-General, and noted that:

> The Government's position is that the President should be placed in the same position with regard to these matters as the Governor-General is now.[2]

4.6 This view found support among some experts appearing before the Committee. For example, Professor Greg Craven stated that:

> This is a bill which accurately reflects our existing constitutional system with the changes necessary to place it in a republican idiom. In other words, you are taking the existing jewel of our Constitution from an 1890 setting and you are putting it into a 2000 setting. The jewel remains the same.[3]

4.7 Similarly, other constitutional law experts, including Professor Leslie Zines, Mr Dennis Rose QC, and Mr George Williams, agreed that the provisions of the Republic Bill, and in particular, the third paragraph of proposed s.59, would ensure that the powers of the President would replicate those presently exercised by the Governor-General.[4] In other words, the proposed amendments would not alter the present balance of power between the institutions of government. For example, the power of the executive would not increase at the expense of the legislature.

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2 Referendum Taskforce, *Submissions,* p. S86.

3 Professor Greg Craven, *Transcript*, p. 314. See also The Hon Michael Lavarch, *Transcript,* p. 531.

4 *Transcript*, p. 719. It was emphasised that the inclusion of the third paragraph of proposed s.59 is essential to achieve this outcome.

4.8 Indeed, many witnesses noted that the proposed amendments to the Constitution would actually enhance Parliament's role, in that they provide for a number of additional checks and balances.[5] For example, Parliament would be given a role in the appointment of a President, and the House of Representatives a role in the removal of a President. The Hon Michael Lavarch noted:

> … the net outcome of this model is that it does two essential things. Firstly, it maintains the nature of our system and the power balances between the core arms of government—between the executive and the parliament, and between the federal parliament and the states. There is no change to that, it is maintained. Secondly, it improves the operation of the system by diminishing to some extent the practical operation of executive power and enhancing the circumstances and powers of the parliament.[6]

4.9 The weight of expert evidence before the Committee supports the view that the President would have the same powers as those which the Governor-General has at present.

The reserve powers and associated conventions

4.10 Under the Constitution in its present form, the Governor-General's powers are, for the most part, exercisable only upon ministerial advice. There are, however, a small number of powers which vest in the Governor-General and which can be exercised other than in accordance with advice. These are known as the reserve powers. It is generally accepted that there are probably only four such powers, namely:

- the power to appoint a Prime Minister;
- the power to dismiss a Prime Minister;
- the power to refuse to dissolve Parliament; and
- the power to force a dissolution of Parliament.[7]

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5 For example, Professor Cheryl Saunders, *Transcript*, p. 709.

6 The Hon Michael Lavarch, *Transcript*, p. 535.

7 Republic Advisory Commission, *An Australian Republic: The Options*, vol. 2, p. 245.

4.11 Furthermore, it is generally accepted that, when exercising a reserve power, the Governor-General acts in accordance with rules of practice known as constitutional conventions. These conventions are not written rules of law, and have developed through a process of evolution.

4.12 At present, the Constitution makes no reference to either the reserve powers or the conventions associated with the reserve powers. However, as noted above, the Constitutional Convention recommended that the President should have the same powers as the Governor-General presently has, and that the Constitution should be amended to contain a statement that the reserve powers and the conventions relating to their exercise would continue to exist.[8]

4.13 Hence, the third paragraph of proposed s.59 relevantly provides:

> … 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.

4.14 This proposed provision was the subject of considerable discussion in the evidence before the Committee. In the context of the reserve powers, the main areas of discussion were:

- whether, in the event of Australia moving to a republican system, it is necessary, as a matter of law, to make express reference in the Constitution to the reserve powers and the associated conventions;
- what effect the specific mention of the conventions and the reserve powers might have upon the question of whether either the content of the conventions or the exercise of a reserve power is a matter that is actionable before a court (ie 'justiciable');
- whether this provision would change the existing situation in these respects, and if so how; and
- whether proposed s.59 would have the effect of preventing further evolution of the conventions.

8 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 39, paragraph 27.

Whether it is necessary to mention the conventions

4.15 As noted above, the Constitutional Convention resolved that the Constitution should contain 'a statement that the reserve powers and the conventions relating to their exercise continue to exist'. In providing that the President may exercise a power that was a reserve power of the Governor-General in accordance with the relevant constitutional conventions (see third paragraph, proposed s.59), the draft legislation is faithful to the Convention Model.

4.16 There is some difference of opinion on the question of whether it is necessary or desirable as a matter of law to specifically mention the constitutional conventions associated with the reserve powers in an amended Constitution.

4.17 Mr David Jackson QC felt it was 'quite unnecessary' to expressly mention the conventions.[9] Dr Gavan Griffith QC concurred, on the basis that:

> If one substitutes 'a President' for 'the Governor-General exercising powers on behalf of the Queen', it seems … self-evident and incapable of contrary argument that, whatever reserve powers that person may have exercised, those powers must devolve in equal form upon the new presidential head of state. … [I]f there is a concern which can be articulated, I would seek to balance against it the problems which can be seen to arise by attempting to spell it out.[10]

4.18 Against this, it was argued that it is necessary to mention the conventions in order to ensure that these powers, and the conventions, would survive the abolition of the Crown's role in Australian constitutional arrangements which any move to a republican system would entail.

9 Mr David Jackson QC, *Submissions*, p. S592. See also *Transcript*, p. 46.

10 Dr Gavan Griffith QC, *Transcript*, p. 180.

4.19 Professor George Winterton "totally and fundamentally" disagreed with the view that such a provision is unnecessary.[11] He expressed the view that:

> It is essential that the final four lines of clause 59 paragraph 3 be retained. In the absence of such a provision for an Australian Republic to inherit the conventions governing exercise of the reserve powers, there would be a risk (with potentially serious consequences) that such powers would be interpreted as conferring unfettered discretion on the President, thereby altering our system of government. The conventions presently governing the exercise of the reserve powers apply in Australia because the Governor-General and State Governors represent the Crown. As they are conventions of the monarchy there is an arguable case for saying that they would cease to apply (in the absence of express provision) if the monarchy were abolished. …It is of course possible that these conventions would be regarded as conventions of Australian government (though they are not unique to Australia) and would thus be inherited by an Australian republic, even without express provision to that effect. However, one cannot be certain that they would be, and the issue is too important to be left uncertain.[12]

4.20 The Rt Hon Sir Zelman Cowen and Sir Anthony Mason have expressly agreed with this view.[13] Other constitutional law experts have expressed similar views. For example, Sir Harry Gibbs has said:

> The existing conventions which govern the exercise of the reserve powers arise because they are exercised by the representative of a monarch. They would not necessarily apply under a republic. Therefore, if you want them to apply, you have to say so in the Constitution.[14]

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11 Professor George Winterton, *Transcript*, p. 99.

12 Professor George Winterton, *Submissions*, pp. S702–S703; See also Professor George Winterton, *Transcript*, p. 99; Professor George Winterton, 'Presidential reserve powers in an Australian republic,' 8(2) 1994 *Legislative Studies* 47, 49ff.

13 Professor George Winterton, *Submissions*, p. S702.

14 Comments by Sir Harry Gibbs in a radio interview on *The Law Report*, ABC Radio National, Tuesday, 17 February 1998. See also Sir Harry Gibbs, 'Some Thoughts on the Constitutional Convention' 21(3) *University of NSW Law Journal*, 882, 884.

4.21 Similarly, the Rt Hon Malcolm Fraser stated that the conventions and the reserve powers should be explicitly translated to the President.[15] Professor Greg Craven stated that as a matter of caution, it would be wise to include the third paragraph of proposed s.59.[16]

4.22 The Committee takes the view that there are persuasive legal reasons for the Republic Bill including the third paragraph of proposed s.59. It notes that the balance of expert opinion appears to favour expressly mentioning the conventions. In addition, retaining this paragraph gives effect to the recommendations of the Constitutional Convention.

Justiciability of the reserve powers and associated conventions

4.23 In evidence before the Committee, a range of views was presented regarding the justiciability of matters concerning the reserve powers—that is, whether these matters are actionable before a court. There was much debate about:

- whether an exercise of a reserve power, or the content of the conventions associated with the reserve powers, are *presently* justiciable;
- whether the proposed legislation would affect the justiciability of these matters; and
- whether these matters *should* be justiciable.

Current situation

4.24 There is much uncertainty as to the present law regarding the justiciability of matters concerning the reserve powers. The traditional view has been that courts will not review the exercise of the reserve powers, and that the conventions applicable to the exercise of those powers are not justiciable.

15 The Rt Hon Malcolm Fraser, *Transcript*, p. 222.

16 Professor Greg Craven, *Transcript*, pp. 308, 310.

4.25 However, in recent years, there has been a general erosion of executive immunity from judicial supervision which has led some eminent academic lawyers to question this traditional view. A number of constitutional law experts take the view that the reserve powers and the conventions, to the extent they exist for the purpose of furthering representative government, are subject to judicial review.[17] Professor Leslie Zines expressed the view that the conventions 'may already have [the] status [of rules of law] as a result of High Court decisions which declare that representative government is an object of the Constitution'.[18]

Effect of proposed s.59 on justiciability

4.26 Moreover, widely differing views were expressed about the effect that proposed s.59 might have upon these matters.

4.27 The Referendum Taskforce indicated that, in drafting the Republic Bill, no attempt had been made to resolve this existing uncertainty[19], and that, in the light of the Convention's recommendation that the President should be in the same position as the Governor-General, proposed s.59 'is designed to leave things as much as possible as they are'.[20]

4.28 Many witnesses did not agree that proposed s.59 would leave the present position unaltered, and stated that the third paragraph of proposed s.59 would bring about some change to the present position. However, there was no unanimity of opinion about the precise nature of the change, or the desirability of any change.

17 Professor Leslie Zines, *The High Court and the Constitution*, 4th ed., p. 250. See also Professor Zines , *Transcript*, p. 700; Professor Cheryl Saunders, *Transcript*, p. 701; Professor George Winterton, *Transcript*, p. 96.

18 Professor Leslie Zines, *Submissions*, p. S700.

19 Referendum Taskforce, *Submissions*, p. S87.

20 Referendum Taskforce, *Submissions*, p. S714.

4.29 Various experts considered that neither an exercise of the reserve powers nor the content of the conventions is presently justiciable. They felt that proposed s.59 would render both these matters justiciable, and would therefore effect an undesirable change to the present position.[21] Others stated unequivocally that these matters would not be rendered justiciable by proposed s.59.[22] Some experts who consider that these matters are already justiciable to some degree felt that proposed s.59 would either not alter the present position, or would slightly increase the possibility of justiciability.[23] Other witnesses considered that the words of the explanatory memorandum to the Republic Bill[24] may have the effect of ensuring that these matters remained non-justiciable where that is presently the case.[25]

4.30 Dr Gavan Griffith QC was one person who expressed the view that proposed s.59 would not render the conventions justiciable, in the sense of transforming them into binding rules of law, although it would confer 'legal force to the body of conventions that defines the reserve powers'.[26] As to whether an exercise of the reserve powers would become justiciable, Dr Griffith stated:

> The elevation of the conventions to the status of constitutional requirements would not of itself make the purported exercise of a reserve power by the President a justiciable issue. The High Court might well take the view that as the content of the relevant conventions (which must necessarily be established if a breach of the requirement is to be established), are indeterminate and essentially political, and hence incapable of judicial determination, it should follow that this limb of section 59 does not give rise to judicially enforceable obligations. However, given the complexity which attends the notion of justiciability generally … and the

21 For example, The Hon Justice Ken Handley, *Submissions*, p. S53; The Hon Malcolm McLelland QC, *Submissions*, p. S630; comments by Sir Harry Gibbs in a radio interview on *The Law Report*, ABC Radio National, Tuesday, 17 February 1998; Mr Richard McGarvie, *Submissions*, p. S323ff; Senator Andrew Murray, *Submissions*, pp. S519–S520.

22 Professor Greg Craven, *Transcript*, p. 307.

23 Professor Cheryl Saunders, *Transcript*, p. 701; Professor George Winterton, *Transcript*, p. 96. Mr David Jackson QC suggested that proposed s.59 is likely to make these matters 'more justiciable', *Transcript*, p. 45.

24 The explanatory memorandum to the Republic Bill, p. 10, paragraph 5.17, states 'Proposed s.59 is intended to preserve the existing status of the constitutional conventions as rules of practice rather than rules of law. It is not intended to make justiciable decisions of the President in relation to the exercise of the reserve [power] that would not have been justiciable if made by the Governor-General'.

25 Mr Dennis Rose AM QC, *Transcript*, p. 701.

26 Dr Gavan Griffith QC, *Submissions*, p. S391.

> willingness of the High Court to inquire into, for example, whether the requirements of section 57 have been complied with … it may or may not be found that the Court would take that view of the proposed provision. It is a matter of assumption rather than expressed certainty.[27]

4.31 Mr David Jackson QC considered it a 'contradiction to require constitutionally that a power be exercised in accordance with (non-binding) conventions'.[28] By contrast, Professor George Winterton argued that "conventions are generally considered binding …—although not legally binding—[but] as a matter of public ethics … I do not see any inconsistency".[29]

Merits of justiciability

4.32 It was suggested that it would not be a bad thing for these matters to be reviewable by a court. Professor George Winterton commented that

> it is always advisable for power to be subject to review … Nobody should have unreviewable power…review of the exercise of public power ultimately by the High Court is desirable unless there is some other more appropriate mechanism. But here it is either review by the High Court or review by nobody.[30]

4.33 This view found support among other judicial and academic authorities.[31] For example, Sir Anthony Mason expressed the view that any amendments to the Constitution to give effect to the Constitutional Convention's recommendations should not attempt to make an exercise of a reserve power non-justiciable, as 'the possibility of judicial review should operate as a strong incentive to cautious and responsible action on the part of the President. The possibility of review would deter the President from ill-considered action.'[32]

4.34 The Constitutional Convention Communique did not expressly address the question of whether the content of the constitutional conventions or an exercise of the reserve powers should be justiciable.

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27 Dr Gavan Griffith QC, *Submissions*, p. S391.

28 Mr David Jackson QC, *Submissions*, p. S592.

29 Professor George Winterton, *Transcript*, p. 99.

30 Professor George Winterton, *Transcript*, pp. 96–97. See also Professor Leslie Zines, *Transcript*, p. 701.

31 For example, Dr Ralph Chapman, *Transcript*, p. 397.

32 Sir Anthony Mason, 'The Convention Model for the Republic' 10 (2) *Public Law Review* June 1999.

Conclusion

4.35 Various witnesses urged that an express 'non-justiciability' provision should be included in the Republic Bill, to ensure that questions concerning the reserve powers and the associated conventions could not be brought before the courts. However, the Committee shares the concern expressed by the Referendum Taskforce that the inclusion of an express provision that these matters are not to be justiciable could then give rise to an implication that other similar matters are justiciable.[33] Furthermore, in light of the uncertainty as to whether or not these matters are presently justiciable, such a provision would arguably not simply preserve the status quo—rather, it would positively resolve this uncertainty on the side of non-justiciability.

4.36 It was suggested that a better solution would be the insertion of a provision to indicate that there is no intention to determine the issue of justiciability. Professor George Winterton put forward the following provision:

> This paragraph shall not affect the question whether the exercise of a reserve power is justiciable (or "examinable in a court of law").[34]

4.37 In view of the lack of unanimity in relation to these questions, and given the lack of clear guidance from the Constitutional Convention, the Committee considers that the Republic Bill should not be prescriptive about whether or not an exercise of a reserve power, or matters concerning the conventions associated with the reserve powers, are justiciable matters. However, the Committee considers it appropriate that the Republic Bill be amended so that the intention to preserve the status quo in respect of these questions of justiciability is express.

Recommendation 7

4.38 **The Committee recommends that consideration be given to including in the Republic Bill a provision which makes it clear that the amendments made by the Republic Bill to the Constitution do not affect the justiciability or otherwise of anything concerning the reserve powers or the associated conventions.**

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33 Referendum Taskforce, *Submissions,* p. S715.

34 Professor George Winterton, *Submissions,* p. S703.

Powers other than the reserve powers

4.39 As noted above, it is a fundamental tenet of responsible government, upon which the Constitution rests, that the Governor-General, except when exercising the reserve powers, should act on the advice of Ministers, who are in turn responsible to Parliament. At present, the Constitution does not expressly mention this. Rather, it provides for some powers to be exercised by 'the Governor-General' and others to be exercised by 'the Governor-General in Council' and provides, in s.63, that this means 'the Governor-General acting with the advice of the Federal Executive Council'. In practice, and by convention, the Governor-General acts on advice when exercising all powers, other than the reserve powers, whether the power is expressed to be exercisable by the Governor-General alone or by the Governor-General in Council.

4.40 In addition to recommending that the President's powers replicate those of the Governor-General, the Constitutional Convention indicated that consideration should be given to 'the non-reserve powers (those exercised in accordance with ministerial advice) being spelled out so far as practicable'.[35]

4.41 The third paragraph of proposed s.59, by providing that 'The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State', would make these principles and conventions express, and thus gives effect to these recommendations of the Constitutional Convention.

Should the President be constitutionally required to act on advice?

4.42 Proposed s.59 would impose a constitutional obligation upon the President to act in accordance with advice. This paragraph was the source of some controversy among the expert witnesses before the Committee.

35 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 39, paragraphs 26 and 27.

4.43 The express reference to this principle was welcomed by many witnesses, who felt there would be considerable merit in making the Constitution more accurately reflect the actual processes of the Australian system of government. Dr John Hirst stated that the third paragraph of proposed s.59 would make the Constitution "a much better document … because at least the executive power of the head of state is defined more exactly as being exercised on the advice of ministers, which was not there before. I think that is a great plus."[36] Similarly, Mr Michael Stokes commented, in relation to this aspect of proposed s.59:

> I really think it is good that it has been put in, because the more you can make these rules public—in the sense of their being in the Constitution so that the Constitution reflects what happens in reality—the more ordinary people are going to understand what goes on, particularly with respect to the Constitution. It will lose that mysticism that it has a bit at the moment … in Australia, you would think the Governor-General was some sort of potentate … [T]he fundamental document setting out what are supposed to be the ground rules of government really should reflect reality.[37]

4.44 However, some witnesses expressed the view that this provision would elevate the convention that the head of state acts on the basis of advice from mere convention to rule of law, hence rendering it justiciable.[38] Other witnesses emphatically rejected the suggestion that the effect of proposed s.59 would be to make this particular convention a justiciable matter.[39]

4.45 The Committee notes that it may already be the case that this rule is no longer simply a matter of convention, but is a constitutional implication resulting from the principle of responsible government upon which the Constitution rests.[40]

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36 Dr John Hirst, *Transcript,* p. 145.

37 Mr Michael Stokes, *Transcript*, p. 418. See also Mr John Pyke, *Submissions,* p. S548, *Transcript*, p. 536; The Hon Michael Lavarch, *Transcript,* p. 531.

38 Professor Leslie Zines, *Transcript*, p. 28; Dr Gavan Griffith QC, *Submissions,* p. S389.

39 Professor Greg Craven, *Transcript,* p. 308; The Hon Michael Lavarch, *Transcript,* p. 531.

40 Professor Leslie Zines *The High Court and the Constitution* 4th ed. p. 250.

4.46 The main objection to the first sentence of the third paragraph of proposed s.59 was that it has the potential to lead to confusion and difficulty, as it fails to specify the circumstances in which each of the three specified sources of advice would be the appropriate source.[41] At present, the appropriate source of advice to the Governor-General (that is, the Federal Executive Council, the Prime Minister or another Minister) is determined by reference to convention, and to statutory requirements such as those contained in the *Acts Interpretation Act 1901*.

4.47 Dr Gavan Griffith QC argued that

> …[i]t may be that there are matters of constitutional significance which will arise if the Constitution comes specifically to recognise the concept of advice, not merely from the Federal Executive Council, but also any of the Prime Minister or another Minister of State. There is constitutional significance in the establishment of disjunctive (and apparently equal) sources of advice of the Prime Minister or a single Minister… The proposed last paragraph of section 59 raises the possibility that there may be conflicting sources of advice. A President may be put in a position of constitutional uncertainty as to whose advice he should act on.[42]

4.48 It was argued that it may also be significant that the proposed provision contains no reference to Cabinet as a source of advice.[43]

4.49 Other witnesses did not agree. For example, Professor Greg Craven described the provision as "harmless" and one that "might well do some good."[44] The Hon Michael Lavarch suggested a middle course of referring only to the advice of Federal Executive Council, and thus reflecting the formal arrangements which exist at present for the provision of advice to the Governor-General, as opposed to the total picture.[45]

41 Mr David Jackson QC, *Submissions,* pp. S591–S592.
42 Dr Gavan Griffith QC, *Submissions*, p. S390.
43 Dr Gavan Griffith QC, *Submissions*, p. S390.
44 Professor Greg Craven, *Transcript,* p. 308.
45 The Hon Michael Lavarch, *Transcript,* p. 531.

4.50 In its submission, the Referendum Taskforce stated:

> In relation to determining the appropriate source of advice on a particular issue, it is implicit that the requirement to act on advice is to be exercised according to law or convention. Within the current convention that the Governor-General or the Crown acts on ministerial advice, there are conventions and practices as to which ministers give advice on particular matters. These are in addition to statutory requirements arising from the Constitution and Commonwealth Acts, including the *Acts Interpretation Act 1901*. Neither the statutory requirements nor the conventions would be displaced.[46]

4.51 The Committee considers that there is considerable merit in explicitly describing in the Constitution this fundamental principle of responsible government. The third paragraph of proposed s.59 would make the Constitution a far more comprehensible document, as it would describe more accurately the way Australia is governed. Further, this aspect of the third paragraph of proposed s.59 clearly accords with, and gives effect to, a significant element of the Model recommended by the Constitutional Convention, that is, that the President's powers be spelled out.

4.52 The Committee considers that any potential for confusion could be adequately addressed by the insertion of a provision in the Republic Bill which saved and perpetuated the relevant conventions which presently assist the Governor-General in determining the appropriate source of advice. The Committee noted that, if the Republic Bill is approved at the referendum, the Government would introduce further legislation to make necessary consequential amendments to existing legislation.[47] The Committee understands that this would include appropriate amendments to the *Acts Interpretation Act 1901* so that the provisions dealing with giving advice to the Governor-General apply to advising the President.

Recommendation 8

4.53 **The Committee recommends that consideration be given to amending the Republic Bill to state that the conventions which currently determine the appropriate source of advice for the Governor-General apply in respect of the President.**

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46 Referendum Taskforce, *Submissions*, p. S84.

47 Referendum Taskforce, *Submissions*, p. S714.

4.54 If this recommendation is accepted, the Committee considers that appropriate provision should also be made in the Republic Bill to ensure that these conventions are not 'frozen' at the date of enactment of the Republic Bill, and that they retain their inherent capacity to evolve over time. The amendment suggested below would achieve this outcome.

Recommendation 9

4.55 **The Committee recommends that, if Recommendation 8 is accepted, consideration be given to making specific provision in the Republic Bill to maintain the capacity of the conventions which currently determine the appropriate source of advice to evolve.**

Other suggestion

4.56 The Committee notes the alternative to the third paragraph of proposed s.59 suggested by the former Chief Justice of the High Court, Sir Gerard Brennan, which was attached to the Hon Justice Ken Handley's submission, and which reads:

> The powers of the President, other than the reserve powers, shall be exercised on the advice of the Federal Executive Council, the Prime Minister, or, in a matter relating to a Department of State, the Minister administering that Department.[48]

4.57 This proposed provision might have the advantage of specifying more particularly the circumstances in which the President should seek advice from a Minister of State as opposed to, for example, the Prime Minister or the Federal Executive Council—that is, 'in a matter relating to a Department of State'. However, the Committee was concerned that the meaning of the concept of 'a matter relating to a Department of State' is not clear, and could lead to confusion. This was noted by Mr Dennis Rose AM QC, who also pointed out that this proposed provision has

> …overlooked the fact that there are several Departments each of which is administered by more than one Minister. The Commonwealth has taken the view that the present Constitution allows the appointment of more than one Minister to administer a Department. The Brennan draft, with its reference to 'the' Minister administering a Department, would give substantial support to the view that this could not be done under the altered

48 The Hon Justice Ken Handley, *Submissions*, p. S55.

> Constitution. …It is difficult to construe the expression 'the Minister administering the Department' as 'any Minister administering the Department'.[49]

Evolutionary capacity of conventions

4.58 It is the Government's stated intention that 'the conventions [associated with the reserve powers] should retain their inherent capacity to evolve over time.'[50] Hence, cl.8 in proposed Schedule 2 provides:

> **8 Constitutional conventions**
>
> The enactment of the *Constitution Alteration (Establishment of Republic) 1999* does not prevent the evolution of the constitutional conventions relating to the exercise of the reserve powers referred to in section 59 of this Constitution.

4.59 Generally there was agreement that this provision would ensure that the conventions relating to the reserve powers would survive a move to a republican system of government, and would continue to evolve.[51] It was noted, however, that this provision is confined to the conventions surrounding the reserve powers only, and would not similarly protect the ability of any other conventions, such as those relating to the principle that the Governor-General acts on advice, to evolve. The Committee considers provision should be made to ensure that all constitutional conventions are not deprived of the capacity to evolve as a result of the amendments to the Constitution proposed in the Republic Bill.

Recommendation 10

4.60 **The Committee recommends that cl.8 of proposed Schedule 2 of the Republic Bill be amended to provide for the continuing evolution of all constitutional conventions, including those not associated with the reserve powers.**

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49 Mr Dennis Rose AM QC, *Submissions*, p. S760.

50 Referendum Taskforce, *Submissions*, p. S86.

51 The Hon Malcolm McLelland QC, *Submissions*, p. S630; Mr David Jackson QC, *Transcript*, p. 51; Dr Gavan Griffith QC, *Transcript*, p. 170; Mr Michael Stokes, *Transcript*, p. 420; The Hon Michael Lavarch, *Transcript*, p. 532.

Command-in-chief of the services

4.61 Presently, s.68 of the Constitution provides:

> **68** The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

4.62 The Republic Bill would amend this provision simply by substituting 'the President' for 'the Governor-General as the Queen's representative'.[52] A number of submissions and witness before the Committee raised concerns that this amendment would not dispel the confusion which presently surrounds the nature of the Governor-General's role pursuant to s.68. For example, Mr Stephen Brown stated:

> There are occasional misconceptions about the scope of the present section 68—eg. that it confers actual executive authority on the Governor-General in relation to the Defence Force, and that the Governor-General's authority is required for deployment of the Defence Force.
>
> The proposed amendment may add to these misconceptions by leaving the section to state baldly that 'command in chief is vested in the President'. On its face, this suggests extensive executive authority and ultimate control of the Defence Force. Clearly, any such view would be at odds with established practice and the reality that Ministers control the Defence Force.[53]

4.63 Dr Baden Teague suggested that the term 'President in Council' should be substituted for the reference to the Governor-General in s.68. He explained:

> I believe there was a specific omission of these words 'in Council' in 1901 because I believe it was the intention of the UK parliament … that the Governor-General would be able to be uniquely advised by the Queen—who would be advised by the UK government—to declare war or not to declare war and that there was to be a unitary defence system for the Empire … I believe that we should make explicit that the President is Commander in Chief of our defence forces on the advice only of … Ministers.[54]

52 See Item 28, Schedule 2 of the Republic Bill.

53 Mr Stephen Brown, *Submissions*, p. S409.

54 Dr Baden Teague, *Transcript*, p. 280.

4.64 The Committee notes that the third paragraph of proposed s.59 would apply according to its tenor to the power which the President would have under s.68 of the Constitution, as amended by the Republic Bill. Hence, the President would be expressly required to act on ministerial advice when exercising the power of command-in-chief of the defence forces. The Committee does not therefore consider that any further amendment of s.68 is warranted.

Prerogative powers

4.65 The Constitutional Convention recommended that the Government and Parliament give consideration to making provision 'for continuation of prerogative powers, privileges and immunities until otherwise provided'.[55]

4.66 The prerogatives of the Crown are certain powers, rights, immunities and preferences enjoyed pursuant to the common law by the Crown. These were inherited by the various Australian bodies politic at their inception. As Mr David Jackson QC explained, 'they do not depend on legislation for their existence, but they will be affected by legislation which either abolishes a prerogative, or regulates the manner of its exercise , or substitutes statutory rights for those otherwise existing'.[56] In *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd,* Evatt J categorised the prerogatives as follows:

- executive prerogatives (eg. the power to do certain things such as enter contracts, declare war, make treaties or extend mercy);
- privileges and immunities (eg. priority in the payment of a debt and immunity from court process); and
- proprietary rights (eg. ownership of royal metals and treasure).[57]

55 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 41, paragraph 45.

56 Mr David Jackson QC, *Submissions,* p. S593.

57 (1940) 63 CLR 278, 320-321.

4.67 It is arguably necessary to preserve the existing powers and immunities of the Commonwealth executive government as there is a risk that the severing of links with the monarchy, which will occur if the referendum is passed, would also remove the common law basis for the prerogative. In this regard, the Republic Advisory Committee concluded that:

> Although there might be scope for an implication to be drawn from the continuation of the 'executive power of the Commonwealth' and the creation of a new head of state, that equivalent powers were to be vested in the new head of state, it would not be safe to rely on such an implication. It would be very doubtful, for example, whether the concept of 'executive power' could be made to extend to the immunities presently enjoyed by the Crown and its agents.[58]

4.68 Proposed s.70A of the Republic Bill provides:

> **70A Continuation of prerogative**
>
> Until the Parliament otherwise provides, but subject to this Constitution, any prerogative enjoyed by the Crown in right of the Commonwealth immediately before the office of Governor-General ceased to exist shall be enjoyed in like manner by the Commonwealth and, in particular, any such prerogative enjoyed by the Governor-General shall be enjoyed by the President.

4.69 Two submissions raised concerns about proposed s. 70A. Mr Nick Seddon suggested that the provision is open to an interpretation which confines its operation to the 'positive' prerogatives, and omits the various Crown immunities and privileges which are presently also enjoyed by the Commonwealth. In particular, proposed s.70A in its present form could

> … generate an argument that the previous Crown immunity from statute no longer applies because the notion of the Crown has been dispensed with (through the transformation to a republic) and s.70A makes no mention of the traditional immunities which do not come under the description of 'prerogatives'. One consequence of this could be that legislation does not bind the government unless there is express provision to the contrary ….[59]

58 Republic Advisory Committee '*An Australian Republic: The Options*' Vol 1, 1993, p. 146.

59 Mr Nick Seddon, *Submissions*, p. S291.

4.70 The Committee takes the view that the Crown's immunity from statute is merely a principle of statutory interpretation which probably applies generally to bodies politic performing a legislative function, be it the Crown or some other polity—that is, that when a body politic enacts a statute, it is assumed that it does not intend to bind itself. Thus, this immunity is likely to continue to apply to the Commonwealth in any republican manifestation, so that it is not necessary to make specific constitutional provision to continue the immunity. The Committee notes that, should this not be the case, provision could be made in ordinary legislation to provide for an appropriate degree of immunity from statute for the Commonwealth.

4.71 Mr David Jackson QC raised a different concern. Proposed s. 70A passes to the President a prerogative enjoyed immediately before the office of Governor-General ceased to exist. Thus, if, at the commencement of the Republic Bill, legislation has abrogated a prerogative in any way, and then if that legislation is subsequently repealed, the prerogative would not then revive (as it would otherwise).[60]

4.72 This may well be the case. However, the Committee considers that the question of whether a particular prerogative power should re-vest in the President if legislation which had encroached upon that prerogative prior to the enactment of the Republic Bill were repealed after the enactment of the Republic Bill was one best left to be addressed by ordinary legislation in each particular case. Any particular power or immunity could be re-vested in the President by ordinary legislation, such as appropriate amendments to the *Acts Interpretation Act 1901*, or by subsequent amendment of the Constitution itself.

60 Mr David Jackson QC, *Submissions*, p. S593.