Dissenting Report—
Senator the Hon Eric Abetz and
Mr David Hawker MP

"The angel Gabriel could not have made a workable system from the model that emerged from the Constitutional Convention".

Richard McGarvie 28/7/99 at RF 745

(former Judge of the Supreme Court of Victoria and former Governor of Victoria)

1.0 INTRODUCTION

1.1 The Australian Constitution has served the people well for nigh on a century.

1.2 That of itself does not mitigate against the understandable desire held by some, that Australia should become a republic.

1.3 However, it does set a very high standard against which any proposed republican model must be judged.

1.4 The fundamental issue to be decided at the proposed referendum to be held on Saturday, the 6th November, 1999 is not only whether Australia becomes a republic, but the type of republic.

2.0 THE QUESTION

2.1 Therefore, the question to be put before the Australian people, whilst of necessity short, needs to be sufficiently explicit as to detail the type of republic.

2.2 The proposed question is biased:

"A Bill for an Act to alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by an Australian President."

2.3 The reference to an "Australian" President, whilst failing to refer to the Queen of Australia and the Australian Governor-General, would unconscionably load the question. The insertion of the word "Australian" before President is otiose and a cheap call to jingoistic sentiment.

2.4 A report of this nature needs to contain recommendations which are fair and balanced. The use of the description "Australian" for the President has only one purpose and effect - to favourably predispose the public to the question. To fail to use the term "Australian" for describing the Queen, and in particular the Governor-General, is disingenuous. Are we truly to believe that we do not currently have an Australian Governor-General?

2.5 Further, the question fails to inform the people of the type of republic on which they need to cast their judgment. For every republic in the world there is a different model. There are also many theoretical republics which have never been put into practice. The proposed republic is such a theoretical model. It is therefore imperative that the Australian people be informed as to the type of republic on which they will cast judgment.

2.6 The question, as proposed by the Committee, is so bland as to be potentially deceptive in its simplicity. It's innocuous nature cries out for an affirmative vote.

2.7 The Bill's proposed long title however, is a more accurate reflection of the proposition on which our fellow Australians will need to cast a judgment.

3.0 DISMISSAL OF THE PRESIDENT

3.1 Under the proposal, it would be easier for the Prime Minister to sack the President than his driver. This is a substantial and material difference to the current workable system which has the safety valve of the monarch being able to delay, warn or counsel a Prime Minister against a precipitous dismissal.

3.2 Mr McGarvie put it eloquently in evidence before the Committee at RF 746 where he is quoted as saying:

> "One of the saddest things that occurred in recent history was Sir John Kerr's honest, but totally mistaken view, that if he had warned Gough Whitlam that reserve authority may have to be exercised, he would instantly have been dismissed and not have had the opportunity of bringing about the election, which was the only feasible way of resolving that intractable issue if it remained intractable. He was wrong. Almost everyone who has looked at it since, has recognised – and here I again appeal to Members' knowledge of the Constitution and politics, not any knowledge of law – that there is a very sophisticated delay factor at present. There would be that delay factor in the McGarvie model. That means that, while the Governor-General can instantly dismiss a Prime Minister – no-one suggests that should change – the Prime Minister can not bring about the immediate dismissal of the Governor-General."

3.3 To therefore assert that the proposed dismissal procedure would not bring about significant change to the present arrangements, is simply unsustainable.

3.4 Further, the dismissal of a President is a purely political act and should be kept from the Courts. If any redress is required, the Parliament would be the appropriate forum.

4.0 APPOINTING THE PRESIDENT

4.1 The proposal, whilst reflecting the Constitutional Convention's wishes is unwieldy and too prescriptive. The Nominations Committee was an afterthought by the Convention and a political sweetener designed for those supporting a directly elected president.

4.2 The procedures whilst workable, can be completely circumvented. The Prime Minister can ignore the outcome of this exhaustive and unwieldy process.

4.3 Whilst there may be political implications, ultimately the say on whom the President will be, lies with the Prime Minister and the Leader of the Opposition as their support by way of nomination and seconding respectively, is essential for a name to go forward to the Parliament.

4.4 The suggestion that the short list of selected nominees could be made public in any circumstance, undermines the position of President, will invite controversy, and therefore act as a disincentive to potential high calibre nominees from allowing their names to go forward. The list should not be disclosed. Unsuccessful candidates from the short list could be unwittingly diminished in their other offices and positions from which it may be difficult to recover.

5.0 THE FIVE FUNDAMENTAL FLAWS

5.1 Mr Richard McGarvie (former Supreme Court Judge of Victoria and former Governor of Victoria), outlined his reservations to the current proposal when asked by the Chairman on RF 745 ff. The following lengthy extract from the Hansard sets out the fundamental flaws which comprehensively articulate the overwhelming reasons why the Australian people need to reject this proposal.

> **CHAIRMAN** – Thank you for that. If I could completely change tack and ask about something you did not put in your submission: as the author of the so-called McGarvie model, which was not successful at the Constitutional Convention, do you support the legislation which is in front of this committee?
>
> **Mr McGARVIE** – No, certainly not. I am very strongly against it without being against a republic. I think I am the only one in Australia who has consistently taken that view in that I have not said a word in favour of the republicans or a word in favour of the monarchists as to whether we change. I side totally with democracy and regard federation as an essential part of democracy. For that reason, I am, very sadly, basically opposed to the model that is going to the referendum in November.

CHAIRMAN – Could you tell me the specific issues, the dot points if you will, as to how this bill alters our current Constitutional arrangements to our detriment?

Mr McGARVIE – Certainly. There are five fundamental flaws. I say this: none of my criticism is directed at the Public Service who prepared this legislation. Having regard to the foundation they started from, they have done a marvellous job. The angel Gabriel could not have made a workable system from the model that emerged from the Constitutional Convention.

The five fundamental flaws that I see are these, and I am not to be taken as implying that I could not refer to others, but I will confine myself to five. The first is the instant dismissal provision which undercuts one of the most vital sets of conventions that give us our democracy. The fact is that, as we all know, when a government loses an election or loses a vote of no-confidence, shows that it has lost the support of the lower house or does not get supply from the lower house, the Prime Minister resigns. The Prime Minister does not resign because he or she is a good fellow, and no doubt they are. The Prime Minister resigns knowing full well that if that course were not taken the Governor-General has reserve authority which would undoubtedly be used to dismiss the Prime Minister in circumstances of great embarrassment.

That reserve authority has to be workable, and it is workable at present. One of the saddest things that occurred in recent history was Sir John Kerr's honest, but totally mistaken view, that if he had warned Gough Whitlam that reserve authority may have to be exercised, he would instantly have been dismissed and not have had the opportunity of bringing about the election, which was the only feasible way of resolving that intractable issue if it remained intractable. He was wrong. Almost everyone who has looked at it since, has recognised – and here I again appeal to Members' knowledge of the Constitution and politics, not any knowledge of law – that there is a very sophisticated delay factor at present. There would be that delay factor in the McGarvie model. That means that, while the Governor-General can instantly dismiss a Prime Minister – no-one suggests that should change – the Prime Minister can not bring about the immediate dismissal of the Governor-General.

That is because the Queen is not bound to act within a time limit. The Queen is bound to act within a reasonable time,

and a responsible queen –as the present Queen is and no doubt other queens would be – would make sure that she investigated the position and gave the Governor-General the opportunity of putting his case, because she has an undoubted right to counsel the Prime Minister against that course. So it is a matter of timing and John Kerr was quite wrong on that, and what we have learnt since has taught us that. What this model does – and one can hardly believe this – is to reinject John Kerr's unfounded, erroneous fear as a matter of constitutional law. That undercuts the backing of the convention that gives the people their sovereignty, that means that a government cannot stay in office without the support of the lower house.

The second fundamental flaw is the following: our system has a head of state – an operative head of state as we can refer to the Governor-General, the Queen being the formal head of state – who is a nominal chief executive, who has enormous powers, which, at law, can be exercised at will. Only the Governor-General can dismiss parliament, call elections, summon it afterwards, appoint ministers, turn bills that have passed both houses of parliament into acts and so forth.

But what gives us our democracy is that we have two mechanisms that prevent the Governor-General from using those powers except as advised by the Prime Minister of the elected government. The first one is that basic constitutional convention which depends on prompt dismissal of the Governor-General being available but the other is that there is no mandate, there is no temptation. When one is a Governor-General – and it is exactly the same when one is a governor, as I know myself – one knows that one has been selected by one person, the Prime Minister or former Prime Minister. There is no possible excuse for any imagined mandate to represent the people and stand against the government – and lack of friction is quite essential to our system of government.

Let us look at the mandate that the model that is going to referendum will give. Firstly, the person who gets up will, more often than not, have been nominated by a very powerful community group – a peak council of an occupational organisation, a geographical organisation or a community ethnic organisation. That nomination will get the numbers on the short list committee and then, of course, it will have to go to the parties on both sides of parliament. How do you get a two-

thirds majority of both houses when no government has had a two-thirds majority of both houses for 50 years?

I do not need to tell you, ladies and gentlemen, your politics but the way you get the numbers is that you bind people by a decision in the party room. So it goes to the party room on both sides and it is only someone who gets support in the party room on both sides of parliament, as a result of a political deal, who gets up. Then when they get up they get virtually 100 per cent of the whole parliament voting for them, because you have the government bound by a party decision, and the opposition too. You might have a few Independents, but that is all. So that is the second point.

The third one is as to calibre. At present the Prime Minister can pick anyone from Australia, and I have not heard anyone suggest that our prime ministers on both sides of politics have not done very well. There is no public process of selection involved before the person is announced. I go to my own experience – there was no-one except my wife and one other who suspected that I had been approached to be governor until the Premier announced it. That is very different from this. What will happen here is that some of the most ridiculous people in the country will make sure they are nominated. The London tabloids will have a field day as to who is now being considered to be the President of Australia.

When it gets to the short list committee, this system has diversity built into it. The essence of a head of state is someone who surmounts diversity and who has an empathy with everyone. Someone who has been put on the short list committee from one of the diversity sectors will feel obliged to try to get someone from that sector up. You have only to look at the history of the electoral colleges in America. Even the perceptive Alexander Hamilton said if it was not perfect at least it was excellent, and of course, as we all know, the last thing that the electoral colleges ever do in America is sit down and think about who should be President. They all vote for the candidate that they are obliged by their party to vote for. So you will not find the people who have made our governors-general being prepared to go into that process. We all know the allegations that will be made. It will be suggested of the candidates that someone has sexually harassed someone in a broom cupboard or has been guilty of financial fraud, the sorts

of things that people who love getting themselves on television do say these days.

....

MR McGARVIE – Of the governors-general we have had, four of them came from the top ranks of politics. This model, as Malcolm Turnbull told the Constitutional Convention, is designed to keep politicians out: it will keep top ranked politicians out; no party room on either side will allow the starters from the other side to get up.

We will be the great losers from that. I might say that when I was governor two of those who were constant examples that I sought to follow were Sir Paul Hasluck, who came from one side of politics, and Sir William McKell, who came from the other. We have had three High Court judges as governors-general. How could a High Court judge allow their name to go into this? Quite apart from these bizarre allegations, how could a High Court judge sit on a case involving the federal government, as almost every High Court case does, without announcing that he or she is a candidate for President requiring, of course, the government's support to get there? So the word gets out. People like High Court judges or others would have no confidence that it would be their quality or their qualifications that would count in the diversity politics of the short list committee, nor that they would appeal to both sides of politics. So they are out, and the others would be out because of it not involving them in this ridiculous thing.

Let me move on to the next point, which is that it makes the mistake that I have already addressed the committee on: it brings the High Court into the reserve power area. What I did not say then but I do say now is this: in my view, the conventions that are supposed to control the exercise of the reserve power do not exist; they are chimeras. One of our best political scientists, who had been a sergeant-at-arms in this parliament, is a professor of political science, was deputy vice-chancellor of a university and then Governor of Western Australia – Gordon Reid – described them as chimeras, and they are. This is a contradictory model. Anyone who was alive in 1975 knows how each side had their sets of conventions all without any foundation, just as in religious conflicts each side believes in their doctrine but has nothing to found it on, and we would bring that muddle into the constitutional law. The poor

old President and the poor old High Court would have to make something of nonsense. We cannot do that.

This process of going only under section 128 on a referendum and only for the Commonwealth completely overlooks the state position and the value of our Federation. We have a strong Federation, but we should not be foolish and think that things cannot go wrong in a federation. Those who have followed Canadian affairs since the late 1970s have seen how continuous disputation over basic constitutional issues is tearing that federation apart. Members will remember that, in 1934 in a referendum in Western Australia, Western Australia voted nearly two to one to secede. What does this do? This model could never get more than 73 votes amongst the 152 members at the Constitutional Convention. If it gets through, the chances of its getting through by a majority only are high. It needs only four states to get through. Say Tasmania and Queensland vote no – then, for only the second time in the history of the Federation, states are going to be forced into something they did not vote for.

We have had eight referendums. In seven of those, the states were unanimous. In the referendum on state debts in 1910, New South Wales dissented. But dissenting on the Commonwealth taking over state debts is very different from dissenting and finding yourself hoist into a Commonwealth republic which you do not trust with your federation and then finding yourself forced to change to a republic because it is quite impractical for a state to remain a monarchy. A Dead Sea fruit is being suggested – that the states could remain monarchies. If one reads the report – as no doubt members have – of the South Australian Constitutional Advisory Council, one sees that they recognise that.

Those are the five fatal flaws. I have been in the world for a long time. I have been watching Australian politics for a long time. Over my life, I have been more often on the losing side in elections and referendums but, as I look back, I think the Australian people have been pretty right. Much of my career has been spent with juries – as a defence counsel and then as a judge. Juries nearly always get it right, and the Australian electorate will get it right. It is for that reason that I am confident that, as long as Australians get to understand what the real issues are, this risk to one of the most stable democracies in the world will not eventuate in November.

6.0 CONCLUSION

6.1 In considering these matters, it is vital to recall that the proposal that emerged from the Constitutional Convention did not enjoy majority support of the Convention.

6.2 The current Constitutional arrangements have worked very effectively. There is no need for change for change's sake.

6.3 Any proposal needs to be as good as, or better than our current system. The current proposal fails that fundamental test.

6.4 Finally, thanks are extended to the hardworking Secretariat for their expertise, support, understanding and patience.

Senator the Hon Eric Abetz BA LLB
Parliamentary Secretary to the Minister for Defence
& Liberal Senator for Tasmania

Mr David Hawker MHR
Member for Wannon

Dissenting Report—Senator Ron Boswell

1. INTRODUCTION

1.1 Several of the Committee's recommendations enjoy unanimous agreement. This Dissenting Report is confined to key areas of disagreement. In reaching a decision to support or otherwise, the test must be whether the recommended changes are true to the spirit and the letter of the model agreed to by delegates at the Constitutional Convention. Such a test has been the guiding influence on the compilation of this Report. At time of writing, the majority report's recommendations had not been numbered, so paragraph references are used.

2. LONG TITLE OF THE CONSTITUTION ALTERATION (ESTABLISHMENT OF REPUBLIC) 1999

2.1 The Committee proposes to change the long title and hence the wording of the referendum question to be put to Australian voters on November 6, 1999.

Majority Recommendation at 2.13: Disagreed

The recommendation reads:

'The Committee recommends that the long title of the Republic Bill be as follows:

A Bill for an Act to alter the Constitution to establish the Comonwealth of Australia as a republic, with the Queen and Governor-General being replaced by an Australian President.'

2.2 Reasons for Disagreement

- The Referendum Taskforce is correct in stating that the present long title 'gives sufficient indication of the purpose of the Bill and its content without being unnecessarily long' [Referendum Taskforce, Submissions, p.S76].
- A referendum question which fails to mention the method of selection of a president fails also to accurately represent the true nature of the constitutional change being put to voters.
- The Constitutional Convention expressly voted on a variety of models chiefly distinguished by their method of selection of a president. The final model agreed to be put to the people was one where a president would be chosen by a two third majority vote of Members and Senators. To omit the method of selection is to ignore the most fundamental characteristic of the republican model agreed to by delegates at the Constitutional Convention.
- Many Australians hold strong views about the method of electing a president and they have the democratic right to know exactly what they are voting for or against.
- As legislators, it is our responsibility to ensure that the question faithfully represents the nature of the proposed constitutional changes.
- The proposed long title makes no reference to the particular kind of republic on which voters would be asked to decide. Implying that name changes at the top are all that's involved is highly misleading and says nothing about the substance of the content of the legislation.
- **Describing the Constitutional Convention model as a republic where the Queen and Governor-General are replaced with an Australian President is like describing a car model as having four wheels. It tells you very little about the car.** The Committee's majority recommendation on the wording of the referendum tells very little about the nature of the republic proposed.
- Constitutional change is of immense importance because of its potential to affect the distribution of political power and the sanctions, checks and balances which protect the sovereignty of the people. In this instance, the changes to the distribution of power hinge on and are derived from the method of selection of a president. The method of selection is a defining feature of the model agreed to by the Constitutional Convention and this must be faithfully put to the Australian people as in the existing long title which reads:-

A Bill for an Act to alter the Constitution to establish the Commonwealth of Australia as a republic with a President chosen by a two thirds majority of the members of the Commonwealth Parliament.

3. APPOINTMENT OF THE PRESIDENT

3.1 Matters Concerning the Short List of Nominees

Majority Recommendation at 3.44 Disagreed

The recommendation reads:

'The Committee recommends that the draft legislation be appropriately amended to provide that where the Prime Minister nominates as President a person other than a candidate mentioned in the short list from the Nominations Committee, the Prime Minister be required to table a statement in Parliament giving his or her reasons for deciding that such exceptional circumstances existed for failing to comply with the Nomination Committee's recommendations.'

3.2 Reasons for Disagreement:-

- Unnecessary.
- The need for the Opposition Leader to second the Prime Minister's nomination will act as a political sanction against proposing a person without bipartisan support.
- A Prime Ministerial nomination would automatically be accompanied by a statement of reasons, whether the nominee was on the short list or not.
- Highlights the fact that the nomination process is simply window dressing since the ultimate decision is in the hands of the Prime Minister.

3.3 Reference to the Leader of the Opposition

Recommendation 3.69 Disagreed

The recommendation reads:

'The Committee recommends that the Republic Bill be amended by inserting the words, 'if any' in proposed s.60 following the words 'the leader of the Opposition'.

3.4 Reasons for Disagreement:-

- The Constitutional Convention expressly provided that there be a bipartisan nomination to Parliament. The call for a bipartisan approach was integral to the motivation of delegates at the Convention. Inserting the words 'if any' has the effect, at the minimum, of downgrading the delegates' intent that a person enjoy widespread and popular support to be nominated as president.
- It is a dismissive way of referring in our Constitution to a very powerful position within our Parliamentary system.
- The Referendum Taskforce was of the view that the words 'if any' are unnecessary and that the appointment of a President would not be frustrated in the event that no Leader of the Opposition existed. That view is endorsed by this Report. No encouragement should be given to an already extra-powerful Prime Minister in the proposed republican system, to thwart the nomination process by taking advantage of the questionable existence of an Opposition Leader – questionable by virtue of inserting 'if any'.
- Conceptually, this recommendation introduces the dangerous notion of a one Party state or Parliament in which there may be no Opposition - if no Opposition Leader. Why not also insert the words 'if any' after the Prime Minister?
- If the question arises (by including 'if any') whether an Opposition Leader exists, would it not be possible for the government to amend Standing Orders and determine the answer – or perhaps sway the Speaker to recognise a different Leader.
- Once again, the Prime Minister and Leader of the Opposition owe their positions to conventions developed within the existing constitutional monarchic framework. No Committee member is in a position to indemnify the Australian people against the future development of new protocols, procedures and precedents under the new constitutional framework of a republic and the new legal construct of a 'president'.

4. POWERS OF THE PRESIDENT

4.1 Comments:-

- Majority Recommendations at 4.38, 4.53, 4.55 and 4.60 are all attempts to 'get around' the difficulties of maintaining the existing dynamic and evolving constitutional conventions under a republican framework.
- While admirable in intent, these recommendations illustrate just how difficult it is to make what works now, work under a completely different system of government.
- It is easy to say that conventions should evolve, it is far more difficult to implement or draft appropriate and meaningful legislation to give it effect.
- Neither will the 'evolution' that does occur be that of a tame and familiar set of conventions, but will involve new precedents and directions because of the different constitutional framework and the new legal construct of the position of president.

5. MISCELLANEOUS

5.1 Membership of the Commonwealth of Nations

7.21 in the Majority Report implies that Australia will enjoy a seamless membership of the Commonwealth in a change from constitutional monarchy to republic. That is not the case. Upon advising the Secretary-General of the change of status, Australia must wait for the concurrence of every single one of the other 53 nations constituting the Commonwealth, before Australia is re-admitted to the Commonwealth, with all the benefits that carries - including right of participation in the Commonwealth Games. While normally it is a formality, countries have been denied readmittance, eg, Fiji. One country could veto Australia's readmittance. While remote, the possibility exists for an unhappy trading partner to block Australia renewing membership of the Commonwealth of Nations. The process is not automatic.

5.2 The Australian Flag

At 7.26 in the Majority Committee's Report, reference is made to the Australian flag. The Committee is correct in saying that a national plebiscite would have to be held before any change to the flag could be made. However, should the republican referendum be supported on November 6, then the flag would certainly be the next target for change by pro-republicans. Republicans argue that the Crown is a British symbol which must be eradicated. How impatient they must be to remove that most British symbol, the Union Jack.

Senator the Hon Ron Boswell

Parliamentary Secretary to the Minister for Transport and Regional Services

Leader of the National Party in the Senate

Senator for Queensland

August 1999

Dissenting Report—The Hon Ian Causley MP

The Committee was asked to report on two fundamental issues related to Bills before the Parliament to allow a Referendum of the people as to whether Australian should become a Republic.

The first question was whether the Bills were appropriate in the context of implementing the Republic model developed by the Constitutional Convention.

The overwhelming evidence presented to the Committee supported the fact that the Bills faithfully reflected the conclusions of the Constitutional Convention.

In fact, many witnesses went so far as to congratulate the Attorney General and the drafters of the Bills on the language and the drafting of the legislation.

The second question the Committee was asked was to identify weaknesses in the legislation that might prevent the legislation operating as intended.

In other words, if the Republic Bill became Australia's Constitution, would it work the same as our present Constitution?

The answer to this question is clearly NO.

Almost all witnesses before the Committee, whether staunch Republican or otherwise, declared concern about the powers of the Prime Minister in the Bill.

There was much evidence presented to argue that transferring the powers of the Governor General to a President would not change the balance presently enjoyed between the Prime Minister and the Governor General.

However, Monarchists argued there was a fundamental power shift because presently the Prime Minister must approach Her Majesty the Queen to remove a Governor General.

This would necessarily result in a delay, maybe only days, but would allow a cooling-off period.

There was no precedent as to what the Queen may do in such circumstances, however, given Her Majesty's concern for good government and protection of her subjects, it could be argued she would do everything in her power to resolve the conflict hopefully by a general election.

Under the proposed Bill the Prime Minister can summarily dismiss a President, without reason, effective immediately.

The only requirement is that the House of Representatives must ratify the action within 30 days.

This would allow the Prime Minister ample time to vilify the sacked President and gain a simple majority of the House of Representatives within 30 days.

Although there are provisions for the most senior serving State Governor to become the acting President, concern was expressed that a rogue Prime Minister could continue to sack acting Presidents.

Although in reality this is unlikely. Nevertheless, such a possibility should not be allowed to occur.

The Prime Minister should not have such sweeping powers. These smack of the powers available in the Weimar Republic in Germany during the 1930's.

There was evidence given to the Committee that these powers are the same presently existing for a Prime Minister to dismiss a Governor General.

The former Prime Minister, Malcolm Fraser, said he believed if the Prime Minister, Gough Whitlam, had indicated in 1975 he was approaching the palace to remove the Governor General, then the Governor General would have effectively been stymied.

This is incredulous given Mr Fraser was part of the group involved in denying supply in the Senate presumably to defeat the Government.

If the argument is accepted, however, then the argument of excessive power is proven.

Given that the Senate had denied supply in 1975 and a conflict arose between the House of Representatives and the Senate, the sacking of the Governor General would have thrown the country into chaos.

Who would have resolved the stalemate? Who would have called an election if necessary? And how would an election be funded?

The President should not be removed unless a clear case of insanity, gross malpractice or breach of the law occurs and then only on a motion carried by a 60% majority of the House of Representatives.

The President's term should be no longer than 2 consecutive terms.

If the powers of the Prime Minister are curtailed then the powers of the President must also be examined.

The power to dismiss a government was central to the conflict that arose during 1975.

Many of the conventions and prerogatives are not defined, and even constitutional lawyers appearing before the Committee were vague about what they were.

It seems the President could be left to decide alone what action he or she might take, or get the advice of a Constitutional lawyer which caused uproar in 1975.

Given the adversarial nature of our law, undoubtedly there would be a number of opinions.

The President's powers should be curtailed to involve chairing executive council and taking advice from the Prime Minister or Ministers.

The powers would include swearing in the Prime Minister, Ministers, Parliamentary Secretaries and High Court Judges, and calling elections on the advice of the Prime Minister.

Where constitutional crisis may occur between the two houses, the existing provisions of the Constitution would prevail.

If legislation had been presented to the Senate on two occasions, the Prime Minister would reserve the right to have a double dissolution at his pleasure.

The Senate should not have the right to deny money bills.

If the power of the President was curtailed then there is absolutely no impediment to a popular election of a President.

The nomination process recommended in the Bills could provide the nomination process.

The Hon Ian Causley MP

Member for Page

Dissenting Report—
Senator Natasha Stott Despoja

1. Introduction

1.1 While the Australian Democrats support a number of recommendations made in the Report of the Majority of the Committee, the recommendations contained in Chapter 6 relating to the Removal of the President are not supported.

1.2 It is the view of the Australian Democrats that the dismissal procedures in the legislation are insufficient to protect the President against a politically motivated or peremptory dismissal. The failure to stipulate grounds for dismissal and the exclusion of the Senate are two areas which the Australian Democrats believe must be redressed.

1.3 This report sets out the views of the Australian Democrats on these matters, and the large body of evidence presented supporting those views. It is unfortunate that the testimony on these issues has not been represented in the majority report of this Committee. This report seeks to redress this omission.

1.4 The Australian Democrats wish to emphasise the heavy onus upon the Government and organisers of the 'Yes' and 'No' campaigns to ensure that all Australians are provided with an adequate explanation of current constitutional arrangements, and how these would be altered by the Republic legislation which has been the subject of this Committee's Inquiry.

2. Removal of the President

62. **Removal of the President**

The Prime Minister may, by instrument signed by the Prime Minister, remove a president with effect immediately.

A Prime Minister who removes the president must seek the approval of the House of Representatives for the removal of the President within thirty days after the removal, unless:

(i) within that period, the House expires or is dissolved;

or

(ii) before the removal, the House had expired or been dissolved, but a general election of members of the House had not taken place.

The failure of the House of Representatives to approve the removal of the President does not operate to reinstate the President who has been removed.

2.1 Like Sir Zelman Cowen, the Australian Democrats are 'troubled root and branch by the notions expressed in the dismissal of a President'[1] in the proposed legislation.

2.2 The President of an Australian Republic will hold the dubious honour of being the only public official in this country not entitled to rely on natural justice principles in the event of a move to dismiss him or her. This has been referred to as the 'unfair dismissal' of the President by one witness.[2]

2.3 Not only will he or she not have the opportunity to hear or answer reasons for the dismissal, but half the body responsible for his or her appointment will have no say in the dismissal.

2.4 Stated grounds for removal and natural justice

The Australian Democrats believe a reliance on "political reality"[3] the majority of the Committee on to substitute for natural justice and mitigate against peremptory dismissal is unwarranted. Much evidence was received

[1] Sir Zelman Cowen, *Transcript*, p.210.

[2] Senator Andrew Murray, *Submission*.

[3] [5.20], *Majority report*, p.68.

arguing that the removal of the President should only be on stated grounds to ensure natural justice principles are served.[4]

2.5 The 'responsible Government' model of dismissal

In his evidence to the Committee, Professor George Winterton outlined two models of dismissal – the responsible government model and the quasi-judicial model. The responsible government model would be that contained in the legislation – the President can be dismissed swiftly by the Prime Minister who is then responsible to the House of Representatives and ultimately to the people.

2.6 The quasi-judicial model

However, despite his acceptance of that model, Professor Winterton preferred what he referred to as the quasi-judicial model, which would give the President – who is intended to be an impartial, non-political constitutional umpire – greater security of tenure.

2.7 Section 72(ii) of the Constitution

His preference was for a similar procedure to that used for federal judges in section 72(ii) of the Constitution; namely, removal for proven incapacity or misbehaviour upon the ratification of a joint sitting of both Houses of Federal Parliament.

Section 72(ii) of the Constitution provides that judges of federal courts:

> '[s]hall not be removed except by the Governor-general in Council, on an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity'.

2.8 Applicability of such protections to a President

The distinction between judges and the President was raised as an argument against the extension of section 72(ii) protections to the President. However, the Australian Democrats take the view that the nature and importance of the office of President require greater assurance of security of tenure than that provided for under the current model.

2.9 Status and role of the President

The position of President of the Commonwealth of Australia would be unique. This individual will perform the role of symbolic and constitutional Head of State, and of constitutional umpire. It is the view of the Australian

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[4] Harry Evans, *Transcript*, p.39; Sir Zelman Cowen, *Transcript*, p.210; Ms Linda Kirk, *Transcript*, p.253;

Democrats that the status consequently accorded this position should not be undermined through risk of peremptory dismissal.

As Professor Zines stated:

> After all, the head of state is supposed to be above us all and representing the community and a person who is neutral and not a protagonist and all that sort of thing. If you know anyone who can be dismissed instantly, and it says so in clear language – unlike the cover of the Crown where it is not so obvious – obviously it is going to affect, I think, the way people see the person.[5]

2.10 Security of tender and independence

Professor Zines' comments received strong support from Mr George Williams, who also links security of tenure to the evolution of judicial independence, something which the Australian Democrats believe should be fostered in the position of President:

> When you look at High Court judges, a lot of their status depends upon the fact that they have tenure until age 70 and are removable only upon specified criteria being accepted by both Houses of Parliament. I think that is critical as to how the community sees them and how, indeed, the independence of judges has evolved. If we have got the standard of simply instant dismissal by the Prime Minister, then I would agree with Professor Zines and that would say a lot to the community about the status of the President in the political system.[6]

2.11 If our High Court judges – who perform similar duties with regard to the Constitution, but who do not hold the immense symbolic national importance of Head of State – can have the protection of section 72(ii) of the Constitution, why should such protection not also be extended to the holder of the highest office in the land?

Recommendation 1

The Australian Democrats recommend that the Republic Bill be amended to provide that the President may only be dismissed on the grounds of proven misbehaviour or incapacity.

2.12 Parliamentary process of ratification of removal

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[5] *Transcript*, p.722.

[6] *Transcript*, p.722.

The Australian Democrats are dissatisfied with the current mechanism for Parliamentary ratification of a dismissal of the President by the Prime Minister, and the exclusion of the Senate in particular.

2.13 History of the role of the Senate in the dismissal procedure

The inclusion of the Senate in the ratification process, through the requirement that the Prime Minister obtain the support of a two-thirds majority of a joint sitting of the Federal Parliament formed part of the original models advocated by the Republic Advisory Committee, Cabinet of the Keating Government and the Australian Republican Movement.

2.14 Republic Advisory Committee

It is interesting to note the discussion of the need for a joint sitting to ratify dismissal in the report of the Republic Advisory Committee.[7] It was considered by that Committee that where the President could be removed only on stated grounds, the requirement for stringent ratification by parliament would be lessened, as the Prime Minister would have less capacity to undertake a peremptory or politically motivated dismissal. A joint sitting of Federal Parliament was considered necessary where the President could be dismissed without reference to stated grounds, to increase the degree of scrutiny of the Prime Minister's actions. The Australian Democrats believe that the current model represents the 'worst of both worlds', as it contains neither check on the power of the Prime Minister.

2.15 Whether the recommendations of the Constitutional Convention must be adhered to

At the 1998 Constitutional Convention, former Governor McGarvie was one of the strongest advocates of the removal of the Senate from the dismissal procedure and is credited for convincing the Australian Republican Movement to change its model accordingly. However, he has since stated that the Convention's recommendation went too far towards giving power to the Prime Minister over the President.[8] The Australian Democrats sought to amend the Constitutional Convention model during Convention deliberations to include the Senate, but were unsuccessful.[9]

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[7] "An Australian Republic: The Options", *The Report of the Republic Advisory Committee*, vol.1, 1993, pp.78-9.

[8] Dr John Hirst, *Transcript*, p.151: "…I guess there would not be 10 per cent of members of that Convention that would support this dismissal procedure now".

[9] Senator Stott Despoja, *Transcript of the Constitutional Convention*, p.369.

2.16 Constitutional Definition of 'Parliament'

Section 1 of the Constitution provides:

> 'The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate and a House of Representatives, and which is herein-after called "The Parliament", or "The Parliament of the Commonwealth."

2.17 The Senate as a fully representative chamber and equal part of Parliament

During the course of this Committee's inquiry, some doubts were raised as to the status of the Senate as an equally representative chamber of Federal Parliament. The Australian Democrats strongly refute any such suggestions, which tended to be employed to justify the exclusion of the Senate from ratification of the dismissal of a President.

2.18 Exclusion of Senate reinforcing these suggestions

The Senate is able to disallow executive regulations, yet the model proposed suggests that it would not be able to have any say in what is arguably the most significant executive action able to be taken.

2.19 The Australian Democrats reiterate strong support for the Senate as a chamber providing representation for millions of electors not able to secure any representation in the House of Representatives due to its domination by the larger states and which fulfils the vital role of house of review.

2.20 Consistency

The Committee received evidence emphasising the need for the Senate to be involved, even if only to ensure consistency with the appointment procedure. The Australian Democrats consider it highly desirable that the same body which appoints the President is also responsible for ratification of his or her dismissal.

2.21 Check on power of Prime Minister

It was the view of at least one witness that the ease of dismissal gives the PM greater power over the President[10], or at least the appearance that this is so.[11]

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[10] Harry Evans, *Transcript*, p.39.

[11] Ms Anne Winckel, *Transcript*, p.157.

As another witness stated:

> Surely it would be better that it be quite clear that the Prime Minister cannot act in a conflict of interest situation. If the Prime Minister can just dismiss the President for no reason, not get the approval of the House, and have no consequence, other than a political consequence which might or might not happen in his own Government, then surely that is untenable. I cannot understand that that is an appropriate way for the Prime Minister to act."[12]

2.22 Ease by which a Prime Minister could reasonably expect to obtain a ratification of a dismissal in the House of Representatives

A number of witnesses expressed the view, shared by the Australian Democrats, that the Prime Minister would have the support of his or her colleagues in Government, and the requirement that the majority support of the House of Representatives be obtained, did not go far enough in checking the Prime Minister's power.[13]

2.23 As one witness succinctly put it:

> The approval by the House of Representatives if the Prime Minister's action really provides little protection against a politically motivated dismissal by a Prime Minister of a President, as it merely requires that the Prime Minister has the confidence of his or her colleagues in the lower house.[14]

2.24 Inclusion of the Senate as a safeguard against politically motivated dismissal

Gaining the support of a two-thirds majority of a joint sitting of Parliament will be more difficult than gaining a simple majority in the House of Representatives. It is the view of the Australian Democrats that the Senate must be incorporated into the dismissal process to afford adequate protection to the President against summary or politically motivated dismissal by the Prime Minister.

2.25 Future composition of the Senate

While there is no guarantee that the future composition of the Senate will provide the same check on executive power it currently does, it is guaranteed that the House of Representatives will never provide this check,

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[12] Ms Anne Winckel, *Transcript*, p.157.

[13] Dr John Hirst, *Transcript*, p.151; Professor Galligan, Transcript, p.206;

[14] Ms Linda Kirk, *Transcript*, p.253.

as the Prime Minister must command majority support to hold Government.

2.26 Role of Senate in precipitating dismissal of President

It was argued by Professor Zines on two occasions before the Committee that the actions of the Senate may have led to the decision by the Prime Minister to dismiss the President, as was the case in 1975, and that excluding the Senate could exacerbate tensions between the Executive, House of Representatives and the Senate:

> The Senate has raised these issues; the Prime Minister in order to deal with them gets rid of the president. I believe the Senate should have a part to play.[15]

2.27 It was argued at the Constitutional Convention that this could be a strong reason for not involving the Senate in the dismissal procedure. However, the Australian Democrats are inclined to support the counter-argument of Professor Galligan, who stated:

> All the more reason [to involve the Senate], because if it is that sort of stand-off between the houses, why give the whistle to one house?[16]

2.28 Accountability of the Prime Minister for a dismissal

Evidence was received that a vote of no confidence may only be brought against the Prime Minister in the House of Representatives, and that this precluded the Senate from involvement in the process of holding the Prime Minister accountable for his or her actions.[17]

2.29 Nature of Senate involvement in the dismissal ratification

While different models of Senate involvement were proposed[18], the Australian Democrats prefer the following process, which enables the Senate to be incorporated into the process without compromising the accountability of the Prime Minister to the House:

> After dismissal of the President, the Prime Minister must seek ratification of the dismissal by a two-thirds majority of a joint sitting

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[15] *Transcript*, p.706

[16] Professor Galligan, *Transcript*, p.206.

[17] Professor Zines, *Transcript*, p.706; The Hon. Michael Lavarch, *Transcript*, p.535.

[18] Such as that advocated by Dr John Uhr whereby the Senate consider ratification of the dismissal as a separate and independent chamber of Parliament, *Transcript*, p.32.

of Federal Parliament within 30 days. Failure to obtain ratification would not amount to a vote of no confidence in the Prime Minister, but would give impetus to the House of Representatives to move a motion of no confidence in the Prime Minister.

Recommendation 2

The Australian Democrats recommend the Republic Bill be amended to require the Prime Minister to seek ratification of his or her dismissal of the President by a two-thirds majority of a joint sitting of Federal Parliament within 30 days of the dismissal having taken place.

3. Education

3.1 The Australian Democrats emphasise the comments in the majority report relating to the importance of a comprehensive education campaign for young people, those with limited English skills and those in remote localities.

3.2 Indigenous communities

The Australian Democrats also note the concerns of indigenous representatives who gave evidence to the Committee on the difficulties they faced in accessing information on the proposed constitutional changes. Carol Martin, a social worker with Nirrumbuk Aboriginal Corporation highlighted the difficulties faced by indigenous and remote communities in her evidence:

> One of my biggest concerns – and I would like to raise it here – is that the majority of the people I work with, who are predominantly Aboriginal, do not understand what this whole thing is about, yet we are asked to go and vote at a referendum that makes decisions for our future and our lives and the lives of our children. So my concern is: how are people like me who work in Aboriginal organisations with our people supposed to get all this information out to these people?[19]

3.3 Challenge of remote communities

Evidence was received of communities without access to Internet, television, radio or even postal services, whose first point of contact with the issue of constitutional change was likely to be when the mobile polling booth arrived on November 6. These communities present a challenge to the organisers of the 'Yes' and 'No' campaigns, and to the Government to

[19] *Transcript*, p.354.

ensure that every effort is made to ensure these communities are informed of the choice they will be making.

4. Other Matters

4.1 Consultation of leaders of parliamentary parties

The Australian Democrats are concerned at the lack of a requirement in the legislation that the Prime Minister consult with leaders of minor parliamentary parties in the appointment of community members of the Nominations Committee and the selection of a candidate for presentation to the joint sitting of Parliament for ratification.

4.2 The Australian Democrats do not consider the omission of any reference to consultation of such parliamentary leaders in the selection of a candidate for president appropriate. Nor do the Australian Democrats consider the reliance on the likelihood that the Prime Minister would consult with the leaders of other parties in appointing members of the Nominations Committee referred to in the majority report[20] to be satisfactory.

Recommendation 3

That the Republic Bills be altered to require the Prime Minister to consult with the leaders of all parliamentary parties in the nomination of members of the Nominations Committee, and in the approval of a presidential candidate for presentation to a joint sitting of Parliament.

4.3 Long Title

While supportive of the title in the majority report, and recognising that this is a complex issue, with the potential for the accuracy of the title to be affected by changes to the legislation the Australian Democrats believe that adoption of our recommendations would reinforce the accuracy of the title.

5. Conclusion

5.1 The Australian Democrats are the original Republican party, and support the upcoming opportunity for all Australians to have their say on a move to a republic.

5.2 In presenting the above concerns, the Australian Democrats seek to ensure that the model to be put to referendum will be as free from serious defect as possible. The current process for dismissal contains serious defects which the Party believes should be remedied to avoid future constitutional difficulties.

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[20] [3.25], *Majority Report*

5.3 On behalf of the Australian Democrats, Senator Stott Despoja will move amendments in the Senate to the Republic Bills to reflect the concerns set out above, similar to those expressed by her at the Constitutional Convention.

5.4 The Australian Democrats reiterate the findings of the majority report with regard to the holding of a second constitutional convention within 3 to five years of a republic being established, and put on notice our intention to continue to pursue the concerns we have detailed in this report, as well as other issues of constitutional reform.

Senator Natasha Stott Despoja

5 August 1999