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JOINT SELECT COMMITTEE ON REPUBLIC REFERENDUM

Reference: Proposed laws, Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999

TUESDAY, 29 JUNE 1999

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JOINT SELECT COMMITTEE ON THE REPUBLIC REFERENDUM

Tuesday, 29 June 1999

Members: Mr Charles *(Chairman)*, Senators Abetz, Bolkus, Boswell, Payne, Schacht and Stott Despoja and Mr Adams, Mr Baird, Ms Julie Bishop, Mr Causley, Mr Danby, Ms Hall, Mr Hawker, Mr McClelland, Mr Price, Mr Pyne and Ms Roxon

Senators and members in attendance: Senators Schacht and Stott Despoja and Mr Baird, Ms Julie Bishop, Mr Causley, Mr Charles, Mr Danby, Ms Hall, Mr Hawker, Mr McClelland, Mr Pyne, Mr Price and Ms Roxon

Terms of reference for the inquiry:

To inquire into and report on the provisions of bills introduced by the Government to give effect to a referendum on a republic.

WITNESSES

Committee met at 4.28 p.m.

CHAIRMAN—I now open the first public hearing of the Joint Select Committee on the Republic Referendum. In the first hour, the hearing will follow the usual public hearing format. Following the first hour, we will be running a session in a roundtable format. The round table has the benefit that some of the relevant participants are present to hear what others are saying about the two bills under review. The committee may then invite a participant to comment on the issues that other witnesses at the table have made.

Before I talk about procedural rules, can I just say that from the committee's viewpoint we believe we are here, firstly, to test the bills and be convinced that the bills represent faithfully and fairly the result of the Constitutional Convention and, secondly, to ensure that, if accepted by the Australian public at referendum on 6 November, the bills will work satisfactorily in moving Australia to a republic. A third issue that the committee is determined to pursue is to be certain that the Australian public feels that, by the time we report, they have had an opportunity to comment on the technical details of these two very important constitutional bills.

I must ask participants strictly to observe a number of procedural rules. First, only members of the committee can put questions to witnesses if this hearing is to constitute formal proceedings of the parliament and attract parliamentary privilege. If other participants wish to raise issues for discussion, I would ask them to direct their comments to me and the committee will decide if it wishes to pursue the matter. It will not be possible for participants directly to respond to each other. Second, given the time available, statements and comments by witnesses should be kept as brief and succinct as possible.

Third, I advise witnesses that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the Houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and will attract parliamentary privilege.

Finally, I refer any members of the press who are present to the guidelines about the broadcasting of proceedings. In particular, I draw the media's attention to the need to report fairly and accurately the proceedings of the committee. Copies of the guidelines are available from the secretariat staff.

[4.31 p.m.]

DOHERTY, Mr John, Convenor, Referendum Taskforce, Department of the Prime Minister and Cabinet

FAULKNER, Mr Jim, Assistant Secretary, Referendum Taskforce, Department of the Prime Minister and Cabinet

LEWIS, Mr David, Referendum Taskforce, Department of the Prime Minister and Cabinet

GOVEY, Mr Ian, First Assistant Secretary, Office of Legal Services Coordination, Attorney-General's Department

POWER, Ms Sandra, Assistant Secretary, Constitutional Policy Unit, Attorney-General's Department

ORR, Mr Robert, Deputy General Counsel, Australian Government Solicitor

CHAIRMAN—Welcome. Do any or all of you have a brief opening statement? We have received your submission.

Mr Doherty—Mr Chairman, I have a brief opening statement. The referendum task force was established in the Department of the Prime Minister and Cabinet at the end of last year to support the work of the ministerial steering group in developing the referendum legislation. Jim Faulkner and David Lewis have both been closely involved in that.

On the task force we have also worked closely with the Attorney-General's Department. The Attorney-General's Department has a constitutional policy unit currently headed by Sandra Power. That reports to Ian Govey. Ian and Sandra have both also been closely involved in the development of the legislation. We have also worked closely with the Australian Government Solicitor's office and legal issues have been referred there. They have been involved in discussions as the drafts have been developed. Robert Orr, Deputy General Counsel, has been closely involved in that process as well.

In addition to the submission that we have provided to the committee secretariat, I am hoping to provide this afternoon the text of a speech that the Attorney-General will make as part of an ANU public lecture series today. It tracks much the same ground as is covered in our submission—that is, an explanation of the approach which the government has adopted in giving effect to the Constitutional Convention model.

I am conscious that the committee have not had our submission for very long. In that context, it may be useful if I just give a very brief overview of the structure of the submission, the main elements of the legislation, and what we see as likely to be the key issues which will arise before the committee.

CHAIRMAN—Does the committee prefer an overview or shall we start asking questions?

Mr CAUSLEY—I would prefer an overview.

Ms JULIE BISHOP—So would I.

Mr Doherty—Thanks, Mr Chairman. As has already been identified, there are two bills which the government has introduced which are proposed to form the basis for the referendum on whether Australia should become a republic. The Constitution Alteration (Establishment of Republic) 1999 would contain the proposed constitutional changes. Because they are proposed constitutional amendments, those changes would only become law if endorsed by the people at a referendum.

The provisions of what we call the republic bill—the Constitutional Alteration (Establishment of Republic)—fall into three main sections and they are identified in three schedules to the bill. The first deals with the real structure of the proposed republic model: the provisions relating to the office and the powers of the President. The second schedule deals with a range of consequential changes to constitutional provisions which would be required as part of the change. These, in the main, relate to replacement of monarchical references in the text of the Constitution.

Our submission does not deal with those provisions in detail, but they have been explained comprehensively in the explanatory memorandum to the bill. I should say that our submission is not intended to replace or substitute for the explanatory memorandum.

To help the committee look at those provisions, we have included with our submission a copy of a marked up Constitution, which would show the changes to the Constitution as proposed in this legislation. I think that makes the effect of those amendments a lot clearer in each case. The third schedule then in the republic bill relates to a range of transitional and technical provisions and the most important of those relate to the issue of how to coordinate change at state level or how to deal with the implications for state constitutions of change to a republic.

The second bill in the package then is the Presidential Nominations Committee Bill, which sets out additional provisions relating to the Constitution and operation of the committee which would deal with the process for obtaining public nominations for the office of President. The nominations committee bill does not contain constitutional changes. Accordingly, it would not need to be put at a referendum and would not form part of the referendum question. The government's intention is that the nominations committee bill, while it has been introduced, would not be pursued through to passage unless the republic bill is passed at the referendum.

Just turning briefly to the structure of our submission, we have attempted to deal with what we see as the main issues which are likely to arise before the committee. We do not follow the provisions of the bills in sequence. Again, that is an exercise for the explanatory memorandum. Our judgment about what are the issues that are likely to arise has in part been informed by the exposure draft process and the comments that we received in the process of developing the drafts.

The bills were released as exposure drafts in March 1999 and we received somewhere over 100 submissions in response, which have been taken into account in finalising the drafts which were introduced into parliament. In addition to the public consultation process, we had detailed consultations with all states under the auspices of a COAG working group of officials. The results of those consultations have also been fed into the final drafts. To identify the changes which have been made since the exposure draft stage, we have included a marked up version of the bill showing the changes between exposure draft and introduction.

If I could turn briefly to the general approach that has been followed in preparing the drafts, we have followed three broad principles. The first is that the provisions should be an appropriate expression of the republic model that came from the Constitutional Convention. The second is that they should not go beyond what is reasonably necessary to implement the convention model. There are a range of other constitutional issues which have been raised for consideration, but the government's judgment was that this proposal should be limited to what is necessary to implement the convention model for a republic. Thirdly, the language should accord with the style and level of detail adopted in the existing provisions of the Constitution.

Turning then to what we see are likely to be main issues or the main elements of the bill, which will give rise to issues that will be considered before this committee. In terms of the qualifications of the President, the intention of the provisions is to pick up the same eligibility requirements as would apply for members of parliament. The provisions would pick up the application of sections 34 and 44 of the Constitution as they stand. I understand there are some issues relating to section 44 and the prospect that there may be proposed amendments to that provision in the future. The intention would be that any changes to section 44 would flow through to the President, as they apply to appointment of members of parliament.

The next group of issues relate to the process of appointing the President and the proposed provisions would entrench the three main elements identified in the convention's resolutions. Those are a broadly based committee to invite and consider public nominations and then report to the Prime Minister, the bringing forward of a nomination by the Prime Minister seconded by the Leader of the Opposition and, thirdly, approval by a two-thirds majority of the members of both houses of a the Commonwealth parliament at a joint sitting.

The next important group of issues relate to the powers of the President. The intention of the proposed provisions is to give the President the same powers that the Governor-General now exercises. A broad distinction is drawn in the proposed provisions between the reserve powers and other powers. Proposed provisions would make it clear that the powers other than the reserve powers are exercised in accordance with advice. In relation to the reserve powers, the proposed provisions would preserve the constitutional conventions which currently apply to their exercise without spelling them out.

The next group of provisions relate to the Acting President and deputies. These involve the use of state governors as Acting President in line with existing practice. Another important feature of that is that they would operate automatically to put an Acting President in place in the event of a vacancy.

Moving then to the removal of the President, which is clearly an important issue: the proposed provisions would provide a power in the Prime Minister to remove the President by a written instrument which takes effect immediately. They also provide a constitutional requirement for the Prime Minister to seek approval from the House of Representatives, except where an election follows the removal.

In relation to states, the provisions are intended to achieve the result that each state would make its own decisions about changes to the state Constitution. The government has expressed a strong preference that, if the Australian people vote for a republic, then change should come into effect simultaneously at both Commonwealth and state level. However, the government does not believe that the referendum should force change to state constitutions. The intention has been to allow the states to follow their own processes but to allow time for that to happen so that it maximises the chance of a coordinated commencement on 1 January 2001 if change is endorsed at the referendum.

In these opening comments, we have just attempted to provide a very broad outline of the provisions. We can elaborate on any particular area where you feel you would find more information useful. Finally, it may not need to be said but I would just like to put on the record that, in explaining the intended operation of these provisions and our understanding of the issues, we are not seeking to support either the case for or against change. Our task has been to help develop bills which are an effective expression of the convention model and our answers should be understood in that context.

CHAIRMAN—Thank you, Mr Doherty. Thank you for coming today. If I could introduce my colleagues: Nicola Roxon, from Victoria; Michael Danby, Victoria; Jill Hall, New South Wales; Natasha Stott Despoja, South Australia; Robert McClelland, New South Wales; Julie Bishop, Western Australia; David Hawker, Victoria; Roger Price, New South Wales; Ian Causley, New South Wales; and Bruce Baird, New South Wales.

First question: on the term of the President, you said, 'Although the bills place no limit on the number of terms, there is no incentive for a President to favour the government to attempt to secure reappointment because of the bipartisan nature of the appointment process.' Quite frankly, I thought that was silly.

I will point to you the only constitutional crisis we have had in 98-plus years. It seems to me that the Prime Minister's suggestion to the Queen of the appointment of the Governor-General backfired on the Prime Minister of the day when Kerr switched camps. How on earth can you say that the fact the Prime Minister appointed him in the first place and it was agreed by the Leader of the Opposition means there would never be a case for the President to become partisan? I cannot follow the logic.

Mr Doherty—I think the nub of the point we were trying to make is that, under this process, you would need both sides to approve the appointment of a President.

CHAIRMAN—The point I make is that, once he or she is approved, the individual becomes his or her own man or woman. I think each of us could point to governors-general who have changed substantially, who have allowed the office itself to change their views,

their policies and their practices. How the initial appointment relates to what they are like as an individual five, six or seven years down the track totally escapes me.

Mr Doherty—Again, they would need to go through the same process to be reappointed, so if, in four or five years, they were attempting to curry favour with a view to reappointment, they would still have to have an eye to the fact that they could not be reappointed unless both sides agreed to that reappointment. It would not be a unilateral appointment by one side or the other.

Mr CAUSLEY—Surely, if they were popular with the public, there is going to be a problem arising. I think what Bob is trying to get to is that they make their own position. They could easily become a very popular figure. Then, even though you might have the support of both sides of the parliament, it is going to be very difficult to remove them.

Ms ROXON—I have a question, Mr Chairman, about the removal. Why is it, if the drafting has required bipartisan support for the appointment, that you would not require any sort of bipartisan support for the removal, or even any public notification, or even any declaration of the reason for removal, especially as there is an election?

Mr Doherty—The basis for the removal provisions is really the Constitutional Convention model. These sorts of issues about how you affect the balance were worked through at the convention, and the end result was empowering the Prime Minister to effect the removal.

Mr DANBY—It subsequently has to come back to parliament.

Ms ROXON—Someone will correct me if I am wrong, but there was actually a process, if you were following the convention's recommendation, for there to be a later vote and potentially a vote of no confidence. That is not in the legislation, though?

Mr Doherty—Yes, the provision is there to require it to be brought to parliament for the parliament to vote on whether it approves the removal or not, except in that very limited case where an election follows immediately after.

Mr HAWKER—Could I just follow up on that point: supposing the decision is not brought to the parliament, what happens then?

Mr Doherty—The result, I guess, is that you have got a breach of a constitutional provision. Ultimately, the remedy for that may still lie in the parliament, but it would be a matter which, again, could be raised, I guess, by a majority in the parliament.

Mr HAWKER—But if the Prime Minister controls the majority, at least in the lower house, he may not wish it to be brought to the parliament. So what happens then?

Mr Orr—The Prime Minister would be acting unconstitutionally in doing that. The basic provision is that there is an obligation on the Prime Minister to bring this matter before the parliament within the second period.

Mr HAWKER—What is the sanction on the Prime Minister?

Mr Orr—The Prime Minister would be acting unconstitutionally. There are two levels of sanction that might arise there. The first level of sanction would be sanction by the parliament itself. The other level of sanction may be a level of sanction by the court.

Mr HAWKER—You say 'may be'. If the parliament does not sanction the Prime Minister, then what happens?

Mr Orr—It would be possible for someone to try to bring proceedings to compel the Prime Minister to fulfil his obligations.

Mr HAWKER—What is the High Court going to do then?

Mr Orr—The High Court is going to have to weigh up a number of factors in deciding whether it would intervene then. You cannot do more, as a matter of law making, than say in the Constitution that the Prime Minister must take certain steps. There is no higher law than the Constitution. It is a matter of having then the organs of government and our system of government to bring about compliance with that. But you cannot really do more than say that the Prime Minister must do this.

Ms ROXON—Those steps do not require the Prime Minister to explain to anybody, give any reasons, or even notify anyone, other than the President.

Mr Orr—No. Section 62 of the bill, which you have before you, says that the Prime Minister must seek the approval of the House of Representatives. So the Prime Minister has to bring the matter before the House of Representatives within 30 days, except in certain exceptional cases involving an election, where it is really a matter for the people of Australia to decide the position.

Ms JULIE BISHOP—In relation to section 62, I understand that this has been amended as a result of the exposure drafts so that there is inserted in this section an exception to the situation where the Prime Minister must seek the approval of the House, and that exception is where an election has been called—parliament is prorogued.

That could well mean, therefore, that the action of the Prime Minister in dismissing the President will never in fact be put before the House because there could be a change of government, a change of Prime Minister and the like, so that President is gone for ever more. And we cannot assume that the election is the political process that will justify or not justify the Prime Minister's action, for the election could be called in relation to an entirely different issue, and fought and decided on an entirely different issue. Are you comfortable that that situation be allowed to occur, that there be essentially a sacking by a Prime Minister of a President that is then never brought to the House for approval or disapproval?

Mr Orr—It is not that it will never be brought; there is just no constitutional obligation on the matter being brought because of the fact that an election is to be held.

Mr PRICE—It is just the ultimate umpire of decisions.

Mr Orr—Exactly.

Ms JULIE BISHOP—Except that the election may not be in relation to this issue. The election might be on a tax issue or anything other than the circumstances of the dismissal of the President.

Mr Orr—That is right. Elections are held on a range of issues. The fact of an election, however, is seen as a vote by the people with regard to this issue and is seen as determining it.

Ms JULIE BISHOP—You are happy that that covers it?

Mr Orr—Yes.

Senator STOTT DESPOJA—I was going to pursue Julie's points, rather than rehash some of the concerns of the model proposed at the Constitutional Convention. I agree with Nicola, and I was the person who moved the amendments seeking to involve the Senate in the process of dismissal. But I was going to ask you how responsive you feel you have been to that consultation process, the exposure draft process. Clearly, you have indicated one change that could be made. I am wondering how many people raised objections to the model that arose from the ConCon in relation to the dismissal provisions.

I am specifically concerned about two areas: the lack of a role for the Senate, and so for two houses to be involved in that process of dismissal; and also that issue of natural justice, the idea, which I think was not necessarily taken that seriously at the Constitutional Convention, that retrospective ratification denies a degree of natural justice to the person in that position. Did people raise these concerns in the consultative process and how cognisant of that have you been in recommending changes or considering changes?

Mr Doherty—The answer is that our considerations have been limited essentially to giving effect to the model that came from the Constitutional Convention. That was the government's commitment. We have not been looking at the proposals which would reflect a different model altogether. So a lot of the issues that you are raising which would involve changes to the convention model we have not reflected in changes since the exposure draft process.

Senator STOTT DESPOJA—Did a lot of people raise these issues? I am just genuinely concerned.

Mr Doherty—I cannot put a figure on it but, yes, there were issues raised during the consultation process which went to the model rather than to the legislation as an expression of that model.

Senator STOTT DESPOJA—Do we get an analysis—and I apologise if we have one already—of the consultative process after the exposure draft? Is that something you can provide to us, or is this essentially it?

Mr Doherty—We have not at this stage. We have provided only a brief narrative description of the consultation process. We do have a privacy concern in relation to disclosing what individuals have said in the consultation process. We understand they would have the right to bring their submissions forward to this committee.

Senator STOTT DESPOJA—To resubmit. Okay. Thank you.

Ms HALL—My question goes to section 62 and is along the same lines as have already been raised. My concern—and I am interested to know if this has been raised at the consultation—is the fact that, in the event that the Prime Minister removes the President, he has the 30 days to have it ratified, and if the House of Representatives does not ratify the Prime Minister's action, then that constitutes a no confidence vote in the Prime Minister. Given that the Prime Minister is the Prime Minister because he is the leader of the party of the government, it would appear to be a highly unlikely scenario that there would actually be a no confidence vote in the Prime Minister in the House of Representatives. I suppose it goes to what Natasha was alluding to earlier, that the involvement of both houses, or some other mechanism, would make the process a little more accountable. Has that concern been raised along the way in your consultation?

Mr Doherty—Again, it was a conscious decision at the convention to limit that approval process to the House of Representatives, which was seen as the house where governments are formed or lost. If the Prime Minister, after his action, continued to command the majority in the House, that is, the majority with his own party, and if that was the dominant party, then I guess the result of that is that he is able to pass the approval motion and there is no question of no confidence.

Ms HALL—In the consultation process, no-one raised the fact that the Prime Minister would in all likelihood retain the confidence of his own party because he was the leader of that party?

Mr Doherty—I think that was an issue that would have been well in the minds of the people at the convention as the proposal was developed. Again, as I said to Senator Stott Despoja, the approach in the consultation process was that we were looking at comments which related to the legislation as an expression of the model, not to questions which went to the basic model itself.

Ms ROXON—I cannot get my mind around why you actually do not politicise the position of President more by excusing the dismissal at the time of an election but not at any other time, or do not have a review process at the time of the election. I do not see why that does not give some impetus for a Prime Minister to determine that it is electorally useful to dismiss the President and then go to an election, if it is an unpopular President, or for whatever reason. Again, the answer might be that that is what the Constitutional Convention determined and you are stuck with that. But to me that just seems strange. I do not know if you have an answer on that.

Mr Doherty—I do not think we can point to the Constitutional Convention on that one because the exception in relation to the election process is really something that did come out in the consultation process, in particular in the consultations with the states. The scenario

of a President being removed during an election process seems unlikely, I think largely because of the huge political risk that is involved; if that was seen and presented as a bad move, the risk would be enormous. You cannot remove, I do not think, the possibility that that would need to occur.

The one extreme case that occurs to me is that you may have a President who is becoming involved in the election process, promoting one side or the other or a series of issues. There may in fact be bipartisan support that the President would need to be removed to allow the election to happen fairly. In that process I do not think you can rule it out. I think you need to allow for it, and the approach that has been adopted is to say that if the people have the say in a subsequent election occurring shortly after the removal they can decide whether or not that is a big issue to them and express any view that they feel through that vote. So you do not then need to have the whole process again, a new approval vote in the House, the possibility of a no confidence motion and a fresh election.

Ms ROXON—But it has been already raised that it is a bit of a nonsense to think that people are going to vote just on that one issue, as Julie said. In the scenario you say it might be something that both parties agree to. Then there is no difficulty going either to a joint sitting of both houses or a House of Representatives vote to say that this is what we need to do. I do not see why that creates the exception for during the election period. You may not have an answer—

Mr Doherty—I just come back to the issue that the people may not want to express a view; there may be other issues that are a higher priority to them. If that is the situation, is it really worth then going through the process again for which the end result is possibly another election, if, by their voting, they have in fact indicated that there are other issues that are more important to them?

Ms ROXON—Yes, so why not have a process that requires the Prime Minister to do that to start with, rather than wait until after the election? Why not have a standard process that they have to come back?

Mr Doherty—Again, I do not want to get too far into defending the model, but that was the model that came out.

Mr Orr—Just to add to that, there is no prohibition on the matter being raised in the parliament after the election if the parliament wants to raise the matter. All that is removed is the absolute requirement of the Prime Minister to raise it. So, if the parliament regards this as an issue—indeed if either house regards this as an issue—the matter can be raised in the parliament. It is just that there is no requirement that the Prime Minister bring this to the parliament within 30 days.

A more minor point, but nonetheless a significant point, is that the whole timing of the 30 days becomes quite problematic if you are in an election period. It would need to be a much more complicated model if that was to be accommodated.

Mr Doherty—Parliament would not be sitting.

Mr Orr—Elections generally take longer than 30 days, so it would blow out considerably the timing involved.

Mr Faulkner—I think also that it does not make it any more or less likely that the political will will be there to pursue a Prime Minister who is seen to be acting improperly in doing what they have done.

ACTING CHAIR (Mr McClelland)—On that issue, given that the act of dismissal occurs when the Prime Minister issues the instrument to the President, can you elaborate on your opinion that it is unnecessary to have the subsequent objection by the parliament or the House of Representatives to the Prime Minister's action constituting a vote of no confidence? Why does that rejection of the Prime Minister's actions not constitute a vote of no confidence in the Prime Minister?

Mr Faulkner—I think the point there is that there may well be a vote in the House which constitutes a vote of no confidence in the Prime Minister. But there is no provision in proposed section 62 which says that there shall be a vote and the vote shall be, if it is in the negative, a vote of no confidence. There has to be a very high likelihood that that will happen. The question then is: what is the consequence of a vote of no confidence? The fact is that a vote of no confidence in a particular minister, particularly in the Prime Minister, is a rather unusual event. It is not entirely clear, in the abstract, what the consequence would be. It might simply constitute a vote of no confidence in that individual, which would mean it would be necessary to find a replacement for the Prime Minister in the governing party, or it might be taken to be a vote of no confidence in the government which, essentially, would result in the end of the government.

To simply use the words that the Constitutional Convention used would have been, in our view, technically inadequate. It would have been necessary to go to the next step and say what the particular result in any particular circumstance would have been of a no-confidence vote. In order to do that, one runs into quite complex factual situations that have to be dealt with and so on. Perhaps, more fundamentally, one is moving beyond what the convention model actually prescribes. It talks simply of a vote of no confidence in the abstract. I would simply say that the likelihood is that there would be a vote of no confidence if there were political will to pursue the Prime Minister who was seen to be acting improperly.

ACTING CHAIR—At the end of the day, whatever system is proposed here, it has to be compared to what we have at present.

Mr Faulkner—Precisely.

ACTING CHAIR—And that is, effectively, that the Prime Minister could dismiss the Governor-General without any form of accountability?

Mr Faulkner—That is right. I think it is certainly fair to say that there would be an additional hurdle that is not there at the moment. One can talk about what sort of a hurdle is represented by the requirement that the Prime Minister notify the Queen to dismiss the Governor-General, but that is a different kind of issue. I think your point is a good one: there is an additional hurdle here compared to what we have at the moment.

Mr Orr—I do not think it is quite true to say that there is no accountability. Even now the Prime Minister would be accountable to the parliament, to the House of Representatives, for that action. As Jim was saying, the additional hurdle here is that the Prime Minister is obliged to raise the matter in the parliament within a set period of time. It is a higher level of accountability by providing the procedure for that.

ACTING CHAIR—Are there any other questions on the issue of dismissal of the President? I wanted to step into another side issue. You have indicated that the current long title is adequate and in enough detail to explain the nature of the bill. But would there be any downside to include reference to the fact that the person chosen must be an Australian citizen and that they must be approved by a two-thirds majority vote of a joint sitting and, also, that the British monarch is being replaced as our head of state. Do you think there would be any problems if those three facts were included in the long title?

Mr Doherty—The long title is one of those issues which is probably not solved on the basis of the technical position. It would be quite open legally to add more of the elements of the model into the long title. I guess when the government looked at the long title it was trying to achieve something which was reasonably brief and give the sense of what was the thrust of this proposal.

If you start adding more elements to it then you run into the question of balance. For some people it would be valuable to include a reference to the public nomination process because that would be seen to make the appointment process more inclusive and the whole proposal more attractive. To others, in submissions that we got, they saw it as important to include a reference to the power of the Prime Minister to remove a President because they saw that as something that could be attacked and therefore would make the whole proposal less attractive.

So once you start looking at adding provisions, the issue then comes down to being one for judgment about what is the implication of that for the overall process. As I say, I do not think that is one that we can really add much to at a technical level; I think that is essentially one for ministers or for government.

ACTING CHAIR—Are there any other questions along those lines?

Ms ROXON—Not particularly.

ACTING CHAIR—Any other questions?

Ms ROXON—Why was this not drafted through parliamentary counsel?

Mr Doherty—It was drafted through parliamentary counsel.

Ms ROXON—But you had the task force overseeing it?

Mr Doherty—The task force fulfilled the role which would normally be done by a line department, providing the drafting instructions and responding to questions. Parliamentary counsel played the normal role.

Ms ROXON—With the two separate bills, the first that will be subject to the referendum and the other that will come into effect if the referendum is successful, does that mean—and I probably should know the answer to this but I do not—that the nomination process which is in that second bill can change without there being any need to have a referendum in the future?

Mr Doherty—Do you mean can the nomination process—

Ms ROXON—I can see everyone else behind you nodding their heads.

Mr Orr—The answer to your question is yes. In so far as the provisions in the Presidential Nominations Committee Bill are concerned, they are just general legislation made by the parliament. They are not of a constitutional form, so they could be amended at a later date.

Ms ROXON—So the committee process and the nominees and all those sorts of things can all change?

Mr Orr—Some of them are in the constitutional provisions. The basic provision is in section 60 but it allows the parliament to fill in the details from time to time.

Mr Doherty—That is also something that came out of the convention, this idea that the process may need to be amended in the light of experience over time.

ACTING CHAIR—How does the reference to prerogative rights compare in the proposed bill to those which exist in our Constitution at present in terms of reserve powers and prerogative rights generally?

Mr Doherty—I am not sure that we would lump the reserve powers and prerogative powers together. Jim, perhaps you can comment on this.

Mr Faulkner—At present there is no reference to the reserve powers at all in the Constitution. So the reference in the proposed section 59 would be a new reference to those. As you are no doubt aware, the bill would insert a new section 70A into the Constitution which would continue the prerogative powers currently vested in the Commonwealth.

ACTING CHAIR—Can you explain for us what the difference between reserve powers and prerogative powers might be?

Mr Faulkner—Prerogative powers are those powers essentially which derive from the common law powers.

ACTING CHAIR—Of the Crown?

Mr Faulkner—Yes, and they encompass a range of proprietary rights, proprietary interests, certain kinds of powers to make appointments, et cetera. They involve quite a wide range of things that a person might need to do in order to fulfil an office.

When people refer to the reserve powers, it is usually understood that they are referring simply to those powers which arise under the Constitution in the Governor-General, in the Australian circumstance, which the Governor-General can exercise without or contrary to advice. There is quite some learning on the historical links between the prerogative and the reserve powers and the doctrines that have evolved which allow the exercise of the reserve powers without or contrary to advice. That is generally the distinction that we are working with.

ACTING CHAIR—Will a reserve power be, for example, a right to grant assent or not grant assent to a bill?

Mr Faulkner—There is general agreement that there are four reserve powers. There is the power to appoint the Prime Minister; the power to dismiss the Prime Minister; the power to refuse dissolution, either of the House of Representatives or of both houses; and to force a dissolution of the parliament. When we are talking about reserve powers, that is what we are talking about.

In all of those cases—and all of those powers actually are regarded as arising under of the Constitution—there is no requirement that they be exercised with advice, and they can in some cases be exercised contrary to advice. That is really the distinction between reserve powers and what you might call ordinary powers. The principle of responsible government dictates that in general the powers of the Governor-General are exercised on advice, the exception being the reserve powers which may be exercised without or contrary to advice.

ACTING CHAIR—What is the significance of having these reserve powers specifically noted in the proposed bill whereas they are not in the Constitution at present?

Mr Doherty—You are almost forced to a position where you need to do that if you are going to identify that the other powers need to be exercised on the basis of advice. This was an objective of the Constitutional Convention, to give a bit more clarity to the basis on which those powers are operated. If you are going to say these powers need to be exercised on advice but have a provision for those four reserve powers to be exercised without advice, you need to make some special provision in relation to those powers.

The question then is how much detail do you go into to identify those powers and the basis on which they can be exercised. The approach that has been adopted is basically to say that for the constitutional powers other than the reserve powers, they will be exercised on the basis of advice. For the reserve powers, they can be exercised in accordance with the constitutional conventions, and those conventions are basically the conventions that now exist and have been preserved under other provisions.

ACTING CHAIR—Is there a specific provision preserving those constitutional conventions?

Mr Faulkner—Yes, there is clause 8 of schedule 3 of the republic bill. That provision is intended to continue the capacity of the constitutional conventions to evolve. Proposed section 59 would actually continue the reserve powers and the constitutional conventions relating to their exercise. Clause 8 would put beyond doubt the existing capacity of those

conventions to evolve beyond the point at which the Commonwealth severs its links with the Crown. The concern there being that given that these conventions have evolved in a constitutional monarchy there is an argument that one needs to provide expressly for the continuation once those Crown links have been severed. We see that provision as putting that beyond doubt.

ACTING CHAIR—What schedule is proposed section 70A contained in?

Mr Faulkner—That is actually in schedule 1. It would go into the part of the Constitution dealing with the executive government. That is on page 6 of the bill. That continues the prerogative.

ACTING CHAIR—Are you able to give an example of what might be a crown prerogative that currently exists?

Mr Faulkner—It is generally regarded as including the powers to declare war and make peace, and the prerogative of mercy. They are the kinds of things that are often talked about in historical terms. They have been largely superseded by provisions of the Constitution itself, by statutory provisions, a basic point being that the prerogative is subject to legislative provision. So where the parliament provides for something, that is the end of the story, essentially. To a great extent, statutory provisions, in the form of either the Constitution or ordinary legislation, have taken over the area of the prerogative's operation.

ACTING CHAIR—A submission by Dr Nick Seddon, who is with the Australian National University, suggests including in section 70A, after the words 'until the parliament otherwise provides but subject to this Constitution', the words 'any immunity privilege or rule of statutory interpretation', to pick up that point. Do you think that is a valid suggestion?

Mr Faulkner—I might just say on that point that the exposure draft version of this provision had included something more like a list of the terms that have been used to describe various elements of the prerogative, which is what we are talking about here. We received a number of submissions going to how one ought to describe those various elements of the prerogative and we decided, on reflection, that the safest way to refer to the prerogative—in so doing, capturing all of the various elements, because there are a number of different ways they have been described over the years—was to use the very general term 'prerogative'. That was in the expectation—I think quite reasonable—that a court or any relevant person looking at this would understand that reference to be a reference to all of those prerogative powers, immunities, advantages and so on deriving from the royal prerogative. We see this as a safer mechanism for achieving the kind of thing that Dr Seddon may have had in mind.

As I say, our original version did have a rather more exhaustive list. The concern was that, no matter how many terms you put in, you might be seen to have been trying to put up an exhaustive list which missed something along the way. There is nowhere you can turn to, to find an absolutely authoritative statement of how you should describe all of the various elements of the prerogative.

Mr McCLELLAND—Do you think it is sufficiently accepted that there are conventions regarding the exercise of that crown prerogative? Would people generally accept that it would be inappropriate for the current Governor-General, or indeed the Queen of England, to go and declare war, that she would not do it or that our Governor-General would not do that without advisement?

Mr Faulkner—That is right. With regard to the powers of a particular office holder, generally the principle of responsible government dictates what action can be taken. That general principle pervades the Constitution, including things which might arise in relation to the prerogative.

Mr Doherty—But I think there is a fundamental point in the question that you are asking. The prerogative powers, to the extent that they would be exercised by the President, would be exercised on the basis of advice. They would be in that category of 'other powers'. It would only be those four reserve powers that we have identified which the President would not be able to exercise without advice. So the power to declare war would be exercised as it is now declared, on advice of the government, rather than as something the President could decide to do.

Mr McCLELLAND—Where is that non-reserve power distinction drawn?

Mr Faulkner—In 59.

Mr McCLELLAND—So, in a sense, what is proposed is to give greater protection to the exercise of the executive power, in the sense that non-reserve powers, including the exercise of what is now accepted in conventional common law to be crown prerogative, would only be exercised on advice, other than the reserve powers. Is it a fair statement that, in a sense, there are greater protections contained in the proposed bill?

Mr Orr—Yes, greater protections, in the sense that it is now expressed in a formal way in section 59. What I think generally is accepted to be the position, which is what I think John and Jim just outlined—that is, there are reserve powers which are constitutional powers which sometimes are not acted on on advice by the Governor-General. But for everything else—constitutional powers, statutory powers, prerogative powers—the Governor-General does act on advice. I think that would be generally accepted to be the position, but you are right, it is nowhere stated in the Constitution. It is an underlying assumption rather than a statement. I think you are also right, though, because section 59 now articulates that as a principle. To that extent, it entrenches it in a more formal way in the Constitution.

CHAIRMAN—I will ask a question that I understand has not been asked. One of the things that interested me was that the Constitutional Convention recommended two oaths. In fact, what we have in the bill is one. Can you explain to us why that was done?

Mr Faulkner—Briefly, what was suggested by the Constitutional Convention was forms of words in the form of 'pledges', in one case. The view was taken that it was more appropriate, in the case of the oath that the President would take, to have a statement which reflected the fact that the President was already a citizen and was taking up office, rather than pledging allegiance to the polity, which is the case with members of parliament.

CHAIRMAN—Did you receive many submissions on that issue?

Mr Faulkner—I cannot be sure, but not a particularly large number, no.

CHAIRMAN—Does anyone have anything else? We could move on and have the round table now.

Ms JULIE BISHOP—This may have been covered, so please stop me if it has. The question that I have relates to the position that could possibly occur in three instances, which can all be taken separately: firstly, if the nominating committee does not agree with a nomination; secondly, if the Prime Minister does not agree to accept the nomination of the committee; or, thirdly, if the Leader of the Opposition does not accept the Prime Minister's nomination. In each instance, what is the position, how is it left and what is the deadlock that needs to be broken? What is the resolution to the deadlock that might occur if, firstly, the committee cannot agree; secondly, the Prime Minister knocks back the nomination; or, thirdly, the Leader of the Opposition knocks the Prime Minister's nomination?

Mr Doherty—I will try to deal with those together. The provision requires the nominations committee to provide a report to the Prime Minister. That is in the Constitution and the bill itself talks of a short list going with that report. I think that the committee does not need to resolve on a single nomination, so in the event of problems resolving it, you may find that you will end up with a larger short list than you otherwise would.

Ms JULIE BISHOP—A long short list?

Mr Doherty—A long short list, definitely. There is no provision at the moment to say how long or short the short list should be. The Prime Minister cannot proceed until he has a report from the committee to put forward a nomination, but that report may include, I suspect, no short list under the constitutional provision, or a short list in the form that the committee decides after resolving it. I do not think you have got a serious problem of deadlock at the committee stage.

Ms ROXON—There is nothing in the way the bill is currently drafted, as I understand it, that requires the Prime Minister to act upon it or for it to be public or for anyone to do anything about it if he does not.

Ms JULIE BISHOP—That was the next point.

Mr Doherty—That is the next stage, yes. There is no requirement for the Prime Minister to accept someone from the short list from the committee.

Ms ROXON—Is that not contrary to the convention's recommendation?

Mr Doherty—No, that is in line with the discussion at the convention. You have to appreciate, I think, that there would be strong public pressure as well. I do not think the Prime Minister could avoid making a nomination or that he could lightly depart from what was in the short list, but legally there is no requirement on him to adopt someone from the short list or to move forward with the nomination at all, in which case the existing President

would continue in place, if they are prepared to do that. If they resign, then you would have the acting arrangements take over.

Ms JULIE BISHOP—If in the establishment of this regime there is no existing President then the Governor-General remains in place?

Mr Doherty—No.

Ms JULIE BISHOP—If this happens first off?

Mr Doherty—There is provision for an Acting President to take place if there is no President appointed at the beginning. I think the situation in relation to the Prime Minister not proceeding is much the same in relation to the Prime Minister not being able to secure the support of the Leader of the Opposition. The process does not move forward until he can secure that support. It would be possible to convene a joint sitting and to put the nomination and to use that to try to get pressure on the Leader of the Opposition to agree, but unless the Leader of the Opposition seconds the motion I do not think you could have an appointment made at that joint sitting.

Ms JULIE BISHOP—So there is no trigger to resolve those sorts of deadlocks?

Mr Doherty—That is right; there is no deadlock mechanism there. The mechanism is that you do not dismantle the arrangements you have in place until there is a substitute.

Mr Faulkner—You are right to say that there is no trigger in the sense that you are talking about, but the provisions have been designed to avoid any kind of constitutional hiatus that might occur if there is delay. There will always be someone there; the system does not fall apart because one element of it is not working as well as it should.

Ms JULIE BISHOP—Even though it would be entirely unsatisfactory, it does not fall apart.

Mr Faulkner—That is right. Indeed, I think the point ought to be made that the fact of its unsatisfactoriness is one of the things that we would see working in favour of resolution. One has to recall the obvious factor that we are dealing with a Constitution and there are limits on what kinds of prescription you build into it. It is a question of judgment but the fact that these things would appear to be improper and untenable are all very important in pushing towards their resolution through the structures that are there.

Ms JULIE BISHOP—I was just interested in section 60 where it says, 'The Prime Minister may,' which is the point Nicola made, and then 'if the Prime Minister's motion is seconded by the Leader of the Opposition in the House and affirmed'. There does not seem to be any mechanism for bypassing a seconding of it by the Leader of the Opposition.

Mr Faulkner—I agree with that.

Mr HAWKER—Supposing the Prime Minister dismisses and then serially dismisses the Acting Presidents. There is an election and the Prime Minister is returned and then the Prime Minister cannot agree on a President. What happens then?

Mr Doherty—If one Acting President is removed another one will take their place, so you will always have an Acting President stepping in.

Mr HAWKER—What if he removes the next one?

Ms JULIE BISHOP—He is a serial remover.

Mr HAWKER—He is serially removing them. It is an unusual situation.

Ms ROXON—Your Prime Minister would not do that, would he?

Ms JULIE BISHOP—This Constitution is meant to stand around for hundreds of years though.

Mr Orr—In terms of those deadlocks, it is very difficult to design a system which avoids at some point in time the possibility of a deadlock. You have a nomination process which, you are right, requires various steps to be gone through. It is possible for those things not to be gone through for a whole range of reasons—in particular, where you are looking for a consensus President, if you cannot get the Leader of the Opposition or the parliament to agree. The way it has been designed is not to try to resolve those deadlocks by some other complicated mechanism which will create more problems than they will solve, but by making sure that there is always a safety net there; having someone in place.

Mr HAWKER—What is the safety net?

Mr Orr—In terms of the first President, if there is no first President appointed, the longest serving governor available will be the President and there will be a cascading ability to work down six of those if necessary. It is similar with regard to a vacancy within the position of President until a new President is found. There is the longest serving available state governor to fill that position and there are six of those to work down as well. That is, therefore, seen as a very significant safety net to ensure the stability in the system whilst possible problems about appointing a new person are overcome.

Ms ROXON—Is there any technical reason that you could not provide in the Presidential Nominations Committee Bill for the nomination process, or the short list process, to be made public? A number of the submissions that we have received have said that—picking up on your point—there would be a lot of pressure obviously for any Prime Minister to choose or nominate a person on that short list. Are there any technical reasons why the provision that that short list be made public cannot be in the bill? I understand that it is not there now, but is there really any reason why it could not be?

Mr Doherty—Legally I cannot see any reason why you should not have a process that was more open. In policy terms, the implications of that for the process—

Ms JULIE BISHOP—Specifically ConCon required it to be confidential.

Mr Doherty—Yes.

Ms ROXON—That is not my question; my question is whether there is any reason that it cannot be there.

Mr Doherty—Legally, no. In policy terms I am not sure this is the place to track why ConCon came to that recommendation.

Ms ROXON—I was not asking you the policy question.

CHAIRMAN—I think we will move on and ask our other respondents to come. Thank you very much for assisting us. When we have done our travelling around the states and have talked to as many people as possible, before we wrap it up, write the report and make any recommendations, the committee might decide to ask you to come back again to clarify any particular issues that we have concerns about. If that would meet your approval, that is what we might do.

Mr Doherty—Thank you. We are more than prepared. If anything comes up that we can provide you advice on during the process, to assist with further explanation, we would be happy to look at that.

CHAIRMAN—Thank you for that. It is hard to anticipate exactly what concerns will arise and to what extent the committee itself will have concerns about those issues and want to address them. Thank you very much for your submission as well as your advice and the revised bills. We have no choice; we have to move very quickly.

[5.36 p.m.]

EVANS, Mr Harry, Clerk of the Senate

HOLLOWAY, Mr Ian (Private capacity)

ROSE, Mr Dennis John AM, QC (Private capacity)

UHR, Dr John Gregory (Private capacity)

WARHURST, Professor John Lewis (Private capacity)

WILLIAMS, Mr George John (Private capacity)

ZINES, Professor Leslie Ronald (Private capacity)

CHAIRMAN—We will now recommence the hearing. I apologise, on behalf of those of us from both houses: the House of Representatives is very busy with the taxation bills and some of our colleagues are on the floor at the moment; there are no senators here. All of us will be headed to the houses at some point when the bells ring for divisions. So could you please just bear with us.

The committee has three purposes: firstly, to try to ascertain that the bills that we have before us faithfully replicate the decisions made at the Constitutional Convention. Secondly, if those bills were to be enacted in law because the Australian public votes to accept a republic at the referendum on 6 November, we want to make sure that the provisions work properly. Thirdly, we want to make sure that the Australian public—and those of you here are included in that—have an opportunity to comment on these very important issues surrounding our constitutional affairs. We have a submission from Mr Evans, one from Mr Uhr and one from Mr Williams. I will be guided, colleagues. Would you like to start asking questions?

Mr HAWKER—Yes.

Ms ROXON—Could I suggest that the people who do not have submissions before us very briefly provide us with an outline as to what their position is. We have had an opportunity to read the submissions that have been received. That might be helpful before we ask questions.

CHAIRMAN—That is fine. I have to ask you to be very succinct and very brief because I guarantee that the bells will catch us.

Ms ROXON—I am happy if you want to do questions first and, if we have time, do the rest later. It does not bother me.

Mr HAWKER—I would like to start questions. Getting straight to the guts of it, if the constitutional changes were carried by a referendum, what flaws do you see in the proposed referendum legislation?

Mr Evans—The problems I see are basically problems with the model adopted by the convention, although the drawing up of the bills have added to the problems. Basically, by putting the head of state completely under the control of the Prime Minister you have ratcheted up the balance of power several notches in the direction of the already enormously powerful Prime Minister. You would shift the balance of power in favour of the Prime Minister who already has enormous powers, including controlling one half of the legislature, and sooner or later those powers will be used. You are really saying, and it was said just a little earlier, 'The Prime Minister would never behave unreasonably' and 'The Prime Minister would always do the right thing.' The whole point of having a Constitution is to guard against those occasions when you have people in office who are not going to do the right thing.

I think, for example, it is well within the bounds of possibility that a Prime Minister will at some stage say, 'The current President, who also happens to be a friend of mine, is doing a good job. I'm not going to make a nomination, and the Constitution authorises me to do that because it provides for a President to continue in office until another one is appointed. X is doing a good job; I'm not going to make a nomination.' You will have a situation—and I have referred to the situation in Tasmania—where the head of state seeks to exercise the reserve powers in what would be regarded as a proper way to make the system of cabinet government work, and a Prime Minister determined to cling to power would use the dismissal power to get rid of that head of state and appoint one more amenable to the prime ministerial will.

The bill would really undermine the system of cabinet government by undermining the independence of the head of state and shifting the power very radically in the direction of the Prime Minister. The provisions covering the dismissal power, the power to dismiss any successor and the power to keep a President in office and not to make a nomination would come back to haunt us sooner or later.

Mr Williams—I see no flaws as such in the bills and there are no overriding reasons, constitutionally speaking, why the bills could not be passed in exactly the form in which they currently are. However, I do think there are some areas in which the bills could be improved, and I think some of the areas Harry Evans is talking about are relevant. Two particular things come to mind from my perspective. The first is dealing with the dismissal procedure. I think that ought to be dealt with and ought to be redrafted. This is the only area that I am aware of where this committee should consider departing from the Constitutional Convention to get a more workable model.

The second area which I see as the major concern is dealing with the community's involvement with the selection of the President via the Presidential Nominations Committee. In particular, we have a situation where the Prime Minister can select someone from a report which is not seen by any other person and indeed may decide not to choose someone from the report at all. We deal with, for example, the possibility of a public outcry. If the public never gets the opportunity to see that report at any stage, neither does the Leader of the Opposition, and I think that that does raise quite serious concerns as to whether the convention is being faithfully implemented and whether indeed the people are being appropriately consulted at the end stage of choosing the President.

They are my two main issues, but again I do not think there are any flaws as such. The bill is passable in its current form.

Ms ROXON—Could someone comment about this question of the short title? The people who were giving evidence earlier said that that was really a political issue. But do those of you who have made submissions to us about how we could improve the public process and some of the other key factors have a view about the necessity to put a little more detail in that title so that when people are voting they are clear what it is that these bills are doing?

Mr Evans—In my submission I have said that the long title was misleading because it does not tell the electors about the most salient fact in this scheme, namely, that the head of state can be dismissed by the Prime Minister at the stroke of a pen. The electors should know that. It is positively misleading—

Ms ROXON—Do other witnesses have a view?

Prof. Warhurst—My view would be that to be even-handed you have to go two ways. One, you can include some other things in the long version in the bill. I would have thought, given the emphasis on an Australian head of state in the second reading speech, that that would have been the obvious thing to include. Clearly, that is a republican position because the long version will become part of the debate during the referendum. I would have thought that if the arguments are persuasive that once you start adding a number of things you will end up with an unwieldily long version.

Therefore, I would have thought it more even-handed to have an even shorter version. In fact, I think it better to say simply, 'To establish the Commonwealth of Australia as a republic.' I think that is quite clear. It does not include as much as I would like to include in terms of public information, but it is more even-handed than the present long version of the bill.

Ms ROXON—Do others have a comment on that?

Prof. Zines—I am inclined to agree with that. After all, the short title of the Constitution says simply, 'An Act to constitute the Commonwealth of Australia.'

CHAIRMAN—Could I return to the question that we had before. It is the situation currently that, effectively, the Prime Minister appoints the Governor-General and the Prime Minister can sack the Governor-General. How is it that the provisions of the bill make such a provision so unconscionable. If it has worked so well for over 98 years, why should we not continue it?

Prof. Warhurst—I do not think it is unconscionable, but I think it could be improved. If involvement of the Senate is not in line with the wishes of the Constitutional Convention, then I suppose that cannot be done under the present approach. My suggestion would be that I find the 30 days a very leisurely way to approach this whole matter. If we want to bring the issue of the dismissal of the President very quickly to the parliament, I cannot see why

you could not do it in a week or two. There may be practical problems with such a short time span but presumably this is a crisis and it should be done as quickly as possible.

Mr Holloway—I tend to agree with Mr Evans. I think the chief flaw of this bill is that it fails to take into account the extent to which history and tradition have become the key working ingredients of our constitutional system. It is said rhetorically at times—and Jason Li said it at the debate that we had at Old Parliament House—that the Prime Minister, if he wanted to, could appoint his mother as Governor-General. Clearly, he cannot. In principle he could, but the sobering obligations that history places upon him make it unthinkable that he would appoint his mother as Governor-General.

Similarly, the obligation to have to tender advice to the Queen in London acts as a sobering influence on the ability of the Prime Minister to act on a whim to dismiss the Governor-General. When the people from the Department of the Prime Minister and Cabinet were speaking earlier on they talked about this model providing additional safeguards. I think that the thing that this model fails to take account of is the safeguard of historical precedent. That, I think, is the chief defect of this bill.

Prof. Zines—The explanatory memorandum says that this method is similar to the present one. I think that is very deceiving. The present system does not allow the Prime Minister to get rid of the Governor-General simply by directing that that should be so in writing, and the Queen has those rights to be consulted, to warn, to encourage, and that takes time. Time could very well be of the essence if you have a situation of a constitutional high noon when you are wondering who is going to shoot first, the President getting rid of the Prime Minister or the Prime Minister getting rid of the President. I think that is rather deceiving.

There is something else I would like to say on this. It is more of a drafting matter. If you had this power in a statute that A can dismiss B, then there is no doubt the High Court would imply a duty to hear, a duty to provide natural justice, a duty to have regard to proper considerations and so forth. I do not think the High Court would do so in this situation, having regard to the fact that it is such a high political situation.

Nevertheless, if the provision remains as it is and if a Prime Minister acted in bad faith or he wrongfully accused the President of doing something the President had not done and had not given the President a right to refute that matter, the possibility would always remain, if the provision did not make clear provision to the contrary, that the High Court could intervene. I assume that is not intended. If so, it would be very advisable to indicate that it is not justiciable.

Mr Rose—I tend to agree with that last suggestion by Professor Zines. I would be rather worried about the intrusion of the High Court into the dismissal issue.

I do not really see any problem in the provision for instant dismissal by the Prime Minister by an instrument in writing. At the moment the Prime Minister can have the Governor-General dismissed by contacting the Queen. The only thing that stands in the way of immediate action by the Queen is whatever might be happening over there in the confines of Buckingham Palace or wherever else the Queen might be at the time. I would see those

delays at that end as being undesirable. I would have thought the Queen should act immediately upon the advice of the Prime Minister, just as quickly as it can be got to her. So, in practice, there would be no difference between what ought to happen now and what is provided here, that is, instant dismissal by the Prime Minister.

Mr CAUSLEY—Why didn't Gough Whitlam sack Sir John Kerr?

Mr Rose—Sir John Kerr got in first, as I understand it. One thing that did trouble me was that I heard at one stage—I may or may not be right in this—that Sir William Heseltine, the Queen's Principal Private Secretary, said that if the message had come to the Queen in the middle of the night he would not have brought it to her notice. So there you have the potential for quite some hours of delay during which time things could have happened at this end contrary to what would be appropriate, according to my notion, namely, that the Prime Minister ought to be able to get rid of the Governor-General, or the President, instantaneously.

Mr Williams—Can I mention two reasons why I think the existing bill needs to be changed. The first is the high noon situation that has already been mentioned. We do not want to set up a scenario where time is of the essence and it depends on who gets in first.

The other reason I wanted to add comes down to the perceptions of the bill and the nature of the office. To my mind it is inappropriate that a person appointed by two-thirds of the parliament can be removed solely by the Prime Minister. It comes down to the stature of the post. It comes down to the position of the post as being, hopefully, above politics. It also raises the question of whether the President will be the Prime Minister's President or the people's President. If there is removal solely according to the Prime Minister then that issue is one that will be perceived negatively by the Australian people.

To my mind, the parliament needs to be involved directly in the removal of the President, not simply as an afterthought. Ideally, both the Senate and the House of Representatives should be involved. But recognising that that is probably not likely to be an appropriate compromise, at least it should be removal on the vote of the House of Representatives requiring an absolute majority on a motion put by the Prime Minister. That would involve some degree of scrutiny, some degree of delay, and also would still enable the Prime Minister and the government to remove the President without having to deal with an opposition. That, to my mind, is perhaps a more appropriate compromise with the different parties.

CHAIRMAN—It does amaze me somewhat that we so concentrate on this removal issue. I have some difficulty in understanding what sorts of motives would cause a Prime Minister to want to destabilise the Prime Minister's own government. We seem to make a presumption that a Prime Minister wants to willy-nilly sack a President. I am at a bit of a loss on that matter.

Ms ROXON—I think we have Dr Uhr here on that point.

CHAIRMAN—Can you help me out with that, Mr Williams?

Ms ROXON—We are still waiting for a final answer from Dr Uhr on the first question.

CHAIRMAN—Okay, we will go back to that then.

Dr Uhr—I think the committee should be mindful of two sets of issues that require attention. Some of those were resolved at ConCon but in a kind of ambiguous or uncertain way, and I think the dismissal provision fits this factor. There is another set of issues that was resolved totally vaguely—and I will come to that in a minute—but I think those issues really do deserve your attention. The ones that I think deserve renewed scrutiny by the committee were resolved with a narrow majority and relate to the dismissal. I think, at the very least, the committee should be looking to see why it is not convinced that there should be a requirement for the Prime Minister, upon dismissal, to table or publicise a statement of reasons. That is the very threshold issue of publicity that the community demands in relation to this dismissal situation.

Secondly, as others have said, I think there is a requirement for parliament to be closely involved in the ratification or the approval of a dismissal, and the fact that the Senate is not there at the moment is just a crying sore in the proposal. I do not think you can use the automatic excuse that the ConCon resolution has solved this forever and that we do not have to revisit it. As I said in my submission, the Senate should be involved as an independent and separate house of the parliament with the capacity to disallow that dismissal.

The second set of issues, where I think ConCon is actually misleading us by leaving vague words in the resolution and where it would be unwise for us to seize upon those as though somehow they have settled policy forever, relate mainly to the nomination process. For example, if you look at the explanatory memorandum included at the back of the bill on page 38, there are two areas there where I think the committee has heaps of room to move and should not be locked into, or be persuaded that it is locked into, this current minimalist model. Very briefly, in consulting the community the phrase used by ConCon is that it should be a process that 'ensures that the Australian people are consulted as thoroughly as possible'. That is an altogether laudable and meritorious goal, but there are lots of different ways of giving effect to that and I think there is going to be lots of public input as you go around the country where people are saying, 'If we can't have direct election of the President, why can't we have direct election at least of the nominating committee as one way of getting thoroughly involved and committed to this whole process?'

Secondly, in relation to the Prime Minister's receipt of the report in relation to the approved set of candidates, all ConCon says is that 'the Prime Minister should take into account' the report. There are lots of different ways in which you can try and enforce a Prime Minister's close or thorough or proper account and I think the committee would be well advised to look at ways in which you recommend that the short list coming from the committee is made public so that the community, again, has an opportunity to see the degree to which a Prime Minister deviates from that set of recommendations. Now back to your questions.

Mr Evans—Mr Chairman, in my submission I have mentioned a scenario in which a Prime Minister or head of government would be very tempted to exercise the dismissal power—for example, the situation in Tasmania in 1989 where the Premier lost his majority

but nobody else had a majority. The people who did hold the majority between them wanted to form a coalition. The Premier said that that was totally undemocratic because they had not said they would form a coalition before the election. He wanted a new election and was refused it by the Governor. There would be an enormous temptation for a Prime Minister in that situation to dismiss the Governor, or a Governor-General or a President, get one amenable to his advice and go to an election in a last-ditch attempt to cling to power on this plausible ground that the other parties had not revealed that they were going to coalesce during the election campaign. That is just one scenario, a perfectly plausible scenario.

Mr Holloway—We talk often about the constitutional crisis of 1975 but let us think about the loans affairs of 1974. I think it is quite plausible to think that a President who swears that he will faithfully serve and protect the interests of the Australian people will become an irritant to the Prime Minister. It is perfectly imaginable that President Kerr in 1974 would have expressed public concern about what the government of the day was doing.

Every day in this parliament we see the extent to which the tradition of sharp partisanship in our political process operates. A President chosen this way may not have a greater political mandate but he will certainly have a greater political constituency than any politician. I think that an instance where someone like—

Ms ROXON—Can you explain how this works?

Mr Holloway—Because he or she will claim to have the support of two-thirds of the parliament, whereas the Prime Minister, at best, has 50 per cent plus one.

Ms ROXON—You are not suggesting public support; you are suggesting through the parliamentary process.

Mr Holloway—In the same way as the Prime Minister derives his power. It is quite thinkable that someone in the situation of, for example, Senator Harradine, to whom so much responsibility has been devolving in recent months, might say to himself that he is just one senator representing a small state and that maybe he will just wait and hope that the President will intervene and say something as the protector or guarantor of the interests of the Australian people.

I think the President will be driven to be—if he takes his job seriously—a political actor. That will inevitably lead him to be an irritant to the Prime Minister so the race to dismiss is unavoidable in this model.

Mr Rose—If the President did act in that way, I think he should be dismissed immediately. I am wondering, too, about George Williams's proposal for slowing things down. He slows things down on the side of the Prime Minister getting rid of the President, but does not do anything to stop the President, as soon as he thinks the machinery is in motion, from dismissing the Prime Minister—if that is a high noon situation, and that is what we are talking about.

Dr Uhr—I think we should remember that under the proposed change to the Constitution we are not looking at something that is similar to what we have now. We have the

imposition of a President, which I fully support, but it is as head of state. The current arrangements for a Governor-General are not as head of state and dismissal provisions that might now apply to the Governor-General as a substitute for the Queen are not a good model for somebody who is declared to be our head of state. I really do think it is frail at the moment.

The head of state should have much greater independence than is currently provided for in this model; hence my recommendation that the committee look at at least a declaration of reasons by the Prime Minister who has dismissed a President, and secondly, an absolute requirement that the Senate be involved in the ratification of the process.

Prof. Zines—My concern in not having the Senate involved at the stage of reporting after the President has been dismissed is that the feeling between the Prime Minister and the President, or the suspicion of the Prime Minister in relation to the President, might very well have arisen over actions of the Senate, which was the case of 1975. This could very well exacerbate the situation with the Senate and the Senate would have no part in approving or disapproving constitutionally the actions of the Prime Minister.

Mr CAUSLEY—I want to ask a very fundamental question and I hope I come to this committee with an open mind—I might be in the minority there. Taking the position of the Australian people and the fact that we have a democracy that protects our rights and our freedom at the present time, it seems to me at the core of this is the argument about the power between the President and the Prime Minister. We have raised the position of the Prime Minister. I was not here, but maybe you talked about the reserve powers of the Governor-General before. Many of those reserve powers, as I understand it, are not written; they are convention, and that is the debate that has taken place ever since 1975. Also, of course, the Governor-General is the Commander-in-Chief of the armed forces. One of the problems I have with this—and you have to convince me—is, if we are to protect our freedom and our rights, how do we get this balance right? At the present time I believe that the reason that the Governor-General has not been interventionist in the past is that the Queen or Crown has a policy of non-intervention and are seen to be removed from politics, not involved in politics. That is the removal; they stand aside from politics and are the trigger or the safety valve in our system so that, if we have a constitutional crisis, it goes back to the people. How do we get this system right so that it does go back to the people and neither of these two, the Prime Minister or the President, can take ultimate power?

Prof. Zines—The draft constitutional alteration ties the President to the conventions that the Governor-General follows at the moment and certainly in respect of advice. Indeed it is clear, despite the statements made by the Attorney-General—or whoever it was—in the second reading speech or in the explanatory memorandum, that those conventions have been converted into rules of law as far as the present text is concerned. The President would, except where the reserve powers are involved, legally be unable to act without the advice of any of the three persons mentioned in section 59—the Executive Council, the Prime Minister or another minister.

When it comes to the reserve powers, section 59 says that the President will be subject to the same conventions as the Governor-General. I am inclined to think that has also been converted into rules of law unless something is done in the bill to say that it is not

justiciable. I do not know why that was not put in. Perhaps I have not understood what Mr Causley has been saying, Mr Chairman, but what else could one do in the situation?

Mr CAUSLEY—What worries me—and history probably proves this in many instances—is that it is very difficult to stop someone if you have not got your constitutional right to take ultimate power, to become a dictator. What are the safety valves in this system at the present time that ensure that neither the Prime Minister nor the Governor-General can get to the position of having ultimate power and become a dictator? That is really the protection that we are looking for.

Ms ROXON—All the rest of the provisions of our Constitution, presumably, would assist us—like having to have elections.

Mr CAUSLEY—It is not as simple as that, I am afraid.

CHAIRMAN—Who are you asking that question of?

Mr CAUSLEY—Anyone who can answer me.

Mr Evans—Mr Chairman, the greatest danger from dictatorship in our system of government comes from the Prime Minister. The Prime Minister is an enormously powerful individual. He controls the House of Representatives. Under this proposal he would control the head of state in addition—or at least have vastly increased control over the head of state. What amuses me about the debate when talking about balance is that people say, 'We cannot have an elected President because he might go mad and do all sorts of things,' but we do not worry about—

Mr PRICE—You are not going to say that we can have a mad Prime Minister?

Mr Evans—Prime ministers have done some very strange things in the past. My answer to your question is simply that you are shifting the balance in the direction of the most powerful individual under the current system. You are giving the most powerful individual under the current system more power.

Mr CAUSLEY—What stops the Governor-General from using his position as Commander-in-Chief of the armed forces?

Mr PRICE—That is the point. A lot of people speculate about the way that that would change under the republic model.

Mr Evans—Because, as Ian Holloway said, there are all sorts of inhibitions surrounding the concept of the Crown and governors-general thinking that they cannot depart from the notion of the Crown—the political neutrality of the Crown and all that sort of thing.

Mr CAUSLEY—That is not a presidential thing. What about a President taking those powers?

Mr Evans—That is one of the things you have to look at. If you dispense with that aura of the Crown, you have to put constitutional safeguards in place of those sorts of conventions.

Mr CAUSLEY—We do not have them here.

Prof. Zines—They are there under section 59.

Mr Rose—I was going to mention section 59.

CHAIRMAN—We are not going to have a free-for-all here.

Mr Rose—In the exercise of his powers as Commander-in-Chief, for example, the President would have to exercise his powers on the advice of the federal Executive Council, the Prime Minister or another minister. That would prevent the President, in his capacity as Commander-in-Chief, getting out the Army and taking power in that way. As far as the Prime Minister's power is concerned, that only lasts for a maximum of three years. Whatever he has done has to come back before the people.

Mr CAUSLEY—But let us take that in practice.

Mr PRICE—How does it work now? What does it really mean today to say, 'He is the Commander-in-Chief?' What does that really mean?

Mr Rose—It is a titular position and that is all, really. The Defence Act regulates the armed forces, and it is clear that that must be done under the ordinary governmental provisions and constraints of responsible government. He cannot take out the Army by himself.

Prof. Warhurst—I would take issue with the notion that the present governors-general act as they do because of the aura of the Crown. My view would be that at this stage in the 20th century Australian governors-general act as they do because of their own understanding of the position. Probably, if they were looking for role models, it would be previous Australian governors-general and an understanding of how they acted. I firmly believe if we move from a Governor-General to a President the new President and subsequent presidents would look back to previous Australian governors-general as models—when they needed to—for how it was appropriate to act in any of these circumstances.

Mr Holloway—I would like to counter something that my colleague Professor Warhurst said and to explain why I think the safeguard of history and the aura of the Crown, to use Mr Evans's language, regulates the conduct of the Governor-General. I think Professor Warhurst is quite right to say that Sir William Deane probably looks to Sir Zelman Cowan as his guiding light, as his role model, rather than to Queen Elizabeth. But I think the code of conduct that developed amongst our governors-general in this country developed at a time when the governors-general did look to the English Crown. So I think we have imported the aura of the Crown and Australianised it.

The problem with this proposed model is that, in constitutional terms, it represents a formal severance of the link with history. A Governor-General who today has the same political constituency as Queen Elizabeth has in the United Kingdom—namely, a general interest to do what he or she can to represent the interests of people—will be replaced by a President who will have a constitutional mandate to be an irritant to the Prime Minister, which will induce the Prime Minister to want to get rid of him or her.

Mr Williams—Can I just refer to an earlier point. In fact, the answer is as plain as day. Section 59 states:

The President shall act on the advice of . . . the Prime Minister or another Minister of State, except as regards the reserve powers.

It has never been suggested that a reserve power involves taking out the Army or anything akin to that. I think quite clearly under the text of the Constitution, as drafted, if we had a rogue President who attempted to do that it would be nothing more than a coup d'etat. There would be no authorisation for such an action under the Constitution, as drafted, and I think it is just as clear as it could possibly be that the President must follow those conventions that the Governor-General does and that we expect that person to do today.

Mr PRICE—I would like to disagree. In relation to being Commander-in-Chief of the Defence Force, he had, to my limited knowledge, some specific tasks which we have just recently removed—that is, no officer could be appointed without a commission from the Governor-General and no officer could be dismissed without the approval of the Governor-General. My question is: are there any other current duties specifically related to the Governor-General being the Commander-in-Chief?

Mr Rose—I am not aware of any off the cuff, so to speak. Mr Chairman, those commissions—

Mr PRICE—They have now been removed?

Mr Rose—Yes, but they would have been exercisable on the advice of the Minister for Defence, wouldn't they?

Mr PRICE—Yes. All I am saying is that no-one else could sign off on them; you actually had to get his signature as Commander-in-Chief.

Mr Rose—But the point is that it is not a reserve power. It is a power that would have to be exercised, according to current conventions, on the advice of a minister or the Executive Council—more than one minister. That seems to cover it. Section 59 makes it explicit that non-reserve powers could be exercised only with the advice of the federal Executive Council or the Prime Minister or another minister.

Mr PRICE—I am sympathetic to Ian's point. When we go around the country, people will want an assurance in these bills that the role—for example, as Commander-in-Chief of the Defence Force—will be no different in a republic from what it is in our current situation.

I think we need to be able to satisfy ourselves and the people on that point. That is the reason I mention it.

Mr Rose—Mr Chairman, that assurance can be given because of the current situation in relation to the Governor-General as Commander-in-Chief. It would be no different with a President, except for the fact that the requirement for advice is specifically stated there in section 59.

Ms JULIE BISHOP—The dismissal procedure is clearly going to be a controversial issue. The two-thirds dismissal idea was in fact the original ARM model as it appeared on the ConCon scene. As it turned out, that model would never have received the support of the convention or it would not have become the majority model. Dr Uhr, particularly, could you suggest how we could entertain a model that incorporated a dismissal of two-thirds of both houses when in fact that was the model that was amended, then turned out to be the House of Representatives dismissal procedure and was voted upon to give a sufficient majority? Just help me here because I can see that it is going to be a controversial issue. It was rejected at the convention.

Dr Uhr—The suggestion I made in my submission is a little more radical than that, and it may be even more difficult to sell in Canberra. It may not be harder to sell outside. The suggestion is that the Senate should be involved in the ratification of a dismissal, not as part of a two-thirds majority but as a separate and independent house of the parliament, just as currently the Senate or either house of parliament is in a position to—

Ms JULIE BISHOP—And if it does not ratify?

Dr Uhr—You would have to get advice, because we would have to refine the policy to make sure that we have the institutions right. But a rough model is the power that the Senate or either house now has to disallow executive regulations. Here you have the most momentous executive action, and in my view the Senate should be empowered to disallow that in the same way as it is empowered to disallow minor regulations by ministerial actors.

I agree with you that it deviates from ConCon, but I think that there are paradoxes and tensions within the ConCon resolution. They are patent and obvious when you come to the nomination process; they are kind of tortuous. They are much tighter and more plausible in relation to the presidency.

Ms JULIE BISHOP—It does deviate sufficiently from the model. It was such a controversial issue at ConCon that I cannot see how we can steer our path clear to consider a different dismissal procedure from that rejected at ConCon. The model would never have got up. That is the way the numbers panned out.

Dr Uhr—Maybe. I accept that the former officers giving evidence were bound to honour the policy as coming out of ConCon. I am a deviationist; I am not bound to honour that. The Australian people are deviationists as well; they are not bound to honour it, and I suspect that parliament potentially is a deviationist.

Ms JULIE BISHOP—We have a brief.

Mr McCLELLAND—In response to concerns raised by my colleague Mr Price, isn't it arguable that the protections contained in the proposed bill are actually stronger in the sense that our current Constitution does not define reserve powers, does not define Crown prerogative and nor does it refer to conventions, whereas those things are specifically now referred to? And anything other than a reserve power has to be exercised on advisement. That is something to consider.

CHAIRMAN—Since a division has been called in the House, we will take a short break.

Proceedings suspended from 6.18 p.m. to 6.39 p.m.

Mr McCLELLAND—Perhaps I should rephrase the question. In one sense, under our current Constitution, the reserve powers are not referred to, the Crown prerogative is not referred to and the conventions are not referred to. Previous evidence was given to the effect that those things will be referred to under the proposed bill. Previous evidence was given to the effect that the reserve powers, which were described as being the appointment of a Prime Minister, the dismissal of a Prime Minister, the acceding to the dissolution of the parliament and the refusal to dissolve the parliament, were regarded by the previous witnesses as falling within the reserve powers. Other than those, they were of the opinion that all other exercise of power by the President would have to be pursuant to section 59, exercised on advisement. Is that a fair statement?

Prof. Zines—Yes, that is correct.

Prof. Warhurst—I think it is a fair statement too.

Mr McCLELLAND—Mr Holloway, you said that your concern was that in departing from the connection with the Crown we were losing a history. But aren't we retaining specific reference to the history in section 59, in section 70A retaining specific reference to the existence of the current prerogative and, indeed, in clause 8 of schedule 3 retaining specific reference to the evolution of constitutional conventions? Isn't there a specific reference to that history and bringing it over to the new system?

Mr Holloway—Yes, but I agree with my two professorial colleagues that your assessment of the way in which the President would have to act on advice is quite correct. Two things I would say, though. One is that the proposed amendment to which you just referred speaks of the conventions evolving, so there is a departure from the historical connection—an anticipation of a departure from the historical connection.

More critically, though, when I spoke of the President having a mandate to be an irritant to the Prime Minister I was not contemplating that he would refuse to act on advice, and I certainly was not contemplating that he would call out the Army. I was thinking of the President making public speeches or addresses which were counter to government policy. So there is no overt refusal to act on advice but, nevertheless, there is the President who, through the noblest of motives possibly, feels both empowered and emboldened to speak out on matters of public controversy and to offer a view which is contrary to government position. It would then be open to the Prime Minister to formally advise the President not to

give any more speeches, not to open his mouth on an issue. But, short of that, I do not think the President would be inhibited.

CHAIRMAN—Didn't Bill Hayden do exactly that?

Mr Holloway—As did Sir William Deane.

CHAIRMAN—Did it cause us any constitutional crisis? If it did, I am not aware of it.

Mr Holloway—It certainly led to political controversy.

CHAIRMAN—So?

Mr Evans—Under this scheme you would have a Prime Minister who thinks, 'I can get rid of this character very easily—sign a piece of paper and get rid of this character.'

CHAIRMAN—Can he not do that today?

Mr Evans—No.

CHAIRMAN—Could not Paul Keating have gotten rid of Bill Hayden?

Mr Evans—Not as easily.

CHAIRMAN—Really?

Mr Evans—It has to go off to the Queen. The Queen might make herself unavailable for a day or so.

Mr Holloway—The Queen might say, 'I want to be advised on this and I want to exercise my prerogative right to warn you, to advise you, to seek information.' Those are all rights that Queen Elizabeth has and continues to bear in respect of Australia. It is quite proper for Queen Elizabeth not to act as a mere cipher for the Prime Minister when it comes to so serious and controversial a matter as dismissing the Governor-General.

CHAIRMAN—Are you arguing that we should not proceed with the bills?

Mr Holloway—That would be my desired position.

Mr CAUSLEY—We can only speculate at this stage. If, for instance, in 1975 the Prime Minister had tried to sack the Governor-General, there was obviously a huge crisis in Australia at the time and the Queen, I think, probably would not have easily taken the advice of the Prime Minister to sack the Governor-General in that case. She would have wanted to ask a lot of questions, wouldn't she?

Mr Williams—That is true. But, at the same time, the Queen could not have refused that advice. Ultimately, she must do as the Prime Minister requests.

Mr CAUSLEY—But she could have asked for a few things to be done first.

Mr Williams—She could warn, she could advise—all of those things—but, ultimately, the power lies with the Prime Minister under the current system, and the Governor-General must go, if advised.

Mr CAUSLEY—But it was not like that, that he could sack the Governor-General on—

Mr Williams—That is right, and that underpins my own view that we do need to change the dismissal mechanism in some way. Picking up an earlier question, when we think about dismissal this issue is important because to a large extent it defines the nature of the post. If you think of judges, they have lifetime tenure; they can only be removed by proved misbehaviour or incapacity. That says a lot about how judges operate within the current system.

If we have a President who can be removed solely at the whim of the Prime Minister, that will say a lot about the President. In my own view, that will be largely negative. We need to change the system in some way to have a higher threshold. My own view is that the government should still be able to remove the President, but not simply on the advice of the Prime Minister.

Senator STOTT DESPOJA—Chair, you raised an interesting question when you asked if the bill should proceed. I would not mind taking a poll. Harry Evans, I have already read your remarks in your submission. I know this may seem a bit fatuous but I am wondering, in terms of the bills as currently drafted, if it would be a preference of all of you, or of a majority, or of a number of you, that they did not proceed.

Mr Evans—I regard the model in the bills as fatally flawed, and we should start over again. In particular, the dismissal power, the power of the Prime Minister to keep a President in office—

Senator STOTT DESPOJA—I will ask you about that in a minute.

Mr Evans—are fatal flaws. They did not come about by any great democratic process. They came about through that strange body that met down in Old Parliament House.

Senator STOTT DESPOJA—Tell me about it!

CHAIRMAN—Can we come down the table on that now. Professor Warhurst.

Prof. Warhurst—I am more than happy to see the bills proceed. I would urge that they proceed. In places they could do with a little bit of polishing, but my position is that I am strongly supportive of the bills.

CHAIRMAN—Mr Holloway.

Mr Holloway—I think they would lead to a worse form of government than we have now and, consequently, I would not be in favour of their passage.

CHAIRMAN—Professor Zines.

Prof. Zines—While I think the bill needs fixing up here and there, I would support it.

CHAIRMAN—Mr Rose.

Mr Rose—So would I. I think the bills are admirable and perfectly acceptable as they stand.

CHAIRMAN—Thank you for that. Mr Williams.

Mr Williams—Yes, I take the same position. The bill should proceed as is, subject perhaps to some small amendments.

CHAIRMAN—Dr Uhr.

Dr Uhr—I am editor of a book called *The Australian Republic. The Case for Yes*, which is coming out this week. It includes a contribution from Senator Payne, and from members of this committee Senator Stott Despoja and Mr McClelland. Like those three, I am for it but I can see plenty of room for improvement.

Mr CAUSLEY—They do not come with open minds.

Senator STOTT DESPOJA—Dr Uhr, I am just going to ask you nice questions after that plug. Clerk of the Senate, Harry Evans: would you elaborate on your comments, not specifically in relation to dismissal but on your request that no President would continue in office beyond the term without parliamentary approval? How do you see it as possible that a President could stay in potentially indefinitely at the behest of the Prime Minister?

Mr Evans—In the bill there is a provision that, if no President takes office at the end of a term, the term is not fixed but the current President continues in office. I think it is well within the bounds of possibility that a Prime Minister would say, 'President X is doing a very good job, is also a very good friend of mine, almost as popular as I am. I am not going to make a nomination. I am going to allow President X to continue in office because he is doing such a good job, until I think the time has come for a change.' If there was an outcry about that, he would say, 'But the Constitution allows me to do that. There is that provision in the Constitution which allows me to do that.' I think we will end up with that situation quite frequently, if you take it over a period of 100 years; that, because of some wrangle about who to appoint, people would say, 'Ah, but we have got this provision in the Constitution—the present one continues. He is all right. Let's just carry on with the present one.'

Senator STOTT DESPOJA—So your solution to that problem is to ensure that a new President is appointed before the end of the presidential term?

Mr Evans—I think there should be a requirement in the bill that a new President be appointed before that fixed term of office ends, so that a President cannot continue in office without parliamentary approval.

Mr Williams—I will just take issue with one thing Harry Evans said. The bill does not allow that to happen. By default that may happen, but there is no authorisation in the bill; in fact, it would be a subversion of the obvious intent of the bill for that to happen. I agree with Harry that it could happen, but there is no authorisation or allowance here. I think Harry does have a point, however, in that, instead of allowing the existing President simply to continue on, you could, for example, allow an Acting President to take the position until the new President was chosen. That would remove the possibility of the 'president friend' continuing on for a period of time.

The other way of dealing with this is to make sure the public nomination and presidential committee process works so well that it leads to a sense of momentum that indeed there will be a change, and for a Prime Minister to go against a publicly known short list and to continue to allow the person to hold the post would just not be politically feasible or in any way realistic. They would be the two ways I would see of dealing with that.

Senator STOTT DESPOJA—Just on the issue of the nomination process, Professor Warhurst, could you elaborate on something we were discussing during the break, and that is how you ensure that there is adequate public consultation in the nomination process not only in relation to the nominees but also in terms of the composition of the committee responsible for that short list? How would you suggest those people are selected?

Prof. Warhurst—To start with, I think there should be more attention given to the selection of the community representatives by the Prime Minister than there is currently. Most of the debate that I have seen has been about how we best ensure that there be adequate popular nomination of names to be considered. Probably equally important in the whole scheme of things is how the community representatives are chosen. As I understand it at the moment, those people will be chosen by the Prime Minister—

Ms JULIE BISHOP—Can I just interject on that point? It might clear something up. As I recall, the ConCon communique said that parliament shall select the community consultation committee, and in the bill it has ended up as the Prime Minister shall. Is there something in there that we should be looking at?

Senator STOTT DESPOJA—That is a good point.

Prof. Warhurst—Yes, I think there is something. I will bow to some of my colleagues on the detail of the difference between the bill and the recommendations of the ConCon but in general I think it is something that should be opened up as much as possible. It probably means making these nominations much more open and widely discussed than is the norm in prime ministerial nominations of individuals to committees and positions, but I think there ought to be attention given to that.

Various options have been put by others, including having an election for those community representatives. I am not necessarily going that far, but I think there may be room for ensuring that there be structured consultation between the Commonwealth parliament and the state parliaments and between the Commonwealth parliament and local government. I think it would be a shame if it was even reduced to public advertisements,

because we know that they do not sink very deeply into community consciousness. I would be looking for a process which would open it up as far as possible.

You will never satisfy many people in the community who want far more extensive public involvement, but I would hope that this committee would investigate a whole range of ways—for example, in putting forward names. Even in minor details there are ways that that could be improved. For example, I think the idea that you should have the agreement of the person you are nominating in writing before you nominate them will put off a whole range of people who may not even know the person they want to nominate. I cannot see any reason why it should not be an open process whereby you can nominate anyone in the community and it can be left up to the process to ascertain later whether that person is on the short list and whether they are willing to have their name go forward. I would throw open that process in a range of ways and I would also try to throw open the process of selection of community members by the Prime Minister.

Senator STOTT DESPOJA—I am happy to take comments from anyone.

Dr Uhr—If the object is to establish a scheme that is faithful to ConCon, then I think in this case the nominating bill is the deviant—and we were talking about deviant before. If you look at the ConCon resolution at page 38, it is certainly as you state—parliament shall establish the committee—and there are a variety of other formulations about ensuring that the Australian people are consulted as thoroughly as possible. On the face of it, excluding you from the background knowledge, there is an invitation there for the committee to look at adventurous ways of getting the community involved, of which I think the most legitimate is in fact inviting the community to elect the nominating committee—not just the community representatives but the whole committee state by state.

Ms JULIE BISHOP—I recall that the word 'parliament' was used deliberately in ConCon as opposed to how it has turned up now as 'Prime Minister'. I was wondering whether you see anything in that. Should we be faithful to ConCon? I have raised this with PM&C and they say, 'What do you mean by parliament appoints a committee?' I said that that was what ConCon wanted; they did not say the PM appoints.

Dr Uhr—It says, 'Parliament shall establish a committee,' so it is up to parliament to establish the framework through which the appointments can be made. They could be at one extreme—prime ministerial appointments—or they could be at another extreme, through a popular election. I vastly favour a popular election.

Ms JULIE BISHOP—If we therefore read it as 'appointed by the Prime Minister', that could be in the technical sense 'appointed', but it could also read 'Selected, chosen and anointed by the Prime Minister'.

Dr Uhr—I think there are a host of possibilities there. As I suggested much earlier, these resolutions allow you as a committee to advise parliament on lots of ways the priorities can be established.

Mr CAUSLEY—I want to go back to some of the comments that you made, I think, in summing up where you stood on this particular position. We are dealing with an alteration to

the Constitution which will need a referendum to change it. I was a little concerned when I heard that some of you said that you still have some concerns about the bill that we are putting before the people. You have some serious concerns about whether in fact it is what you would like and I suppose what you see as being perfect. Given the history of referenda in Australia, what is the sense in going forward with something that is flawed from the start? Why should we not get it right if we are going to the people with a referendum?

Mr Williams—I think the main and most obvious answer is that there is no right model. We are talking here about different preferences, and if you were to go down the table we might agree on what we would see as the perfect model but, at the same time, we might recognise that there is a lot of value in following what the Constitutional Convention said last year.

Mr CAUSLEY—What you are saying here is that you are going to have to have a subsequent referendum to get it the way you see—for example, on the powers of the Prime Minister or the dismissal powers and things such as this which are very serious considerations. Are we going to have to continually go back to the people to get it right?

Mr BAIRD—I apologise that I was absent for part of that discussion, but I would like to follow up that question. Ian Holloway and Harry Evans, I am interested particularly in your comments about why you think we should throw it out and not proceed. The nub of what I heard Harry discuss was the ability of the Prime Minister to increase his power and that it gives him a greater ability to dismiss the President and increase his power. Is that the nub of it?

Mr Evans—That is what I see as the most serious defect of this model.

Mr BAIRD—How would you correct it?

Mr Evans—If you are going to stick with an appointed President—and remember that something like 80 per cent of the electorate do not like that model and the chances of it getting up are pretty slim—

Mr BAIRD—I am not asking that point, but go on.

Mr Evans—But if you are going to stick to an appointed President, it seems obvious to me that removal has to be by the same body that makes the appointment; namely, parliament. I would go further and say that removal should be only on stated grounds like judges and by the same special majority that makes the appointment. To have the removal of the head of state by the head of government at the stroke of a pen is bizarre. There is no other constitution in the world that has such a bizarre provision. We are worried about the monarchy making us a laughing stock; if that gets known around the world, we will be a laughing stock. It simply has no model. It is quite ridiculous.

Mr BAIRD—Mr Holloway, what was the nub of your objection?

Mr Holloway—The nub of my objection is that this model will increase the amount of constitutional controversy. I think that, given our tradition of sharp partisanship in politics,

most of the contentious issues of the day will give rise to a serious potential for constitutional crisis. Mr Chair, at a suitable point I would also like to add something in response to Senator Stott Despoja's question.

CHAIRMAN—We got onto this business of appointing the committee. Apparently, the Constitutional Convention said that parliament shall establish a committee which will have responsibility for considering the nomination. It depends on how you define 'parliament'. The bill says the Prime Minister will establish the committee. I am trying to figure out why the explanatory memorandum is silent on that issue. I apologise for drifting off.

Senator STOTT DESPOJA—I recall moving a successful amendment that ensured cross-party representation.

Mr Holloway—I would like to echo, in a sense, the comments of my colleagues Professor Warhurst and Dr Uhr. I think that, if there is not greater community involvement in the selection of the community members of the nominating committee, it is likely that there will be litigation over it. The Prime Minister is given an obligation to appoint the committee. The section heading is entitled 'Community members'. Section 15AB of the Acts Interpretation Act makes that a relevant thing for a court to look at. Reading that, together with the material which gave rise to this, I think that it is reasonable to assume that a federal judge somewhere in this country would feel that he or she had the jurisdiction to entertain a complaint by a member of the community that his or her interests were not properly represented on the nominating committee. I think that the likelihood of having litigation over community membership will be increased if we do not have elections for the committee.

Senator STOTT DESPOJA—I am curious to hear Mr Williams's response to that.

Mr Williams—I can understand the point that there might be litigation, but my response was that I could not see any circumstances under which such litigation could ever succeed. I cannot see any cause of action in such a case that anybody could possibly argue successfully that they would have a right to have their particular interests represented on such a body.

Prof. Zines—I agree with that. In fact, I think it would be irresponsible for any lawyer to advise anyone to bring such an action.

CHAIRMAN—I ask a general question because this interests me. With respect to the fact that the bill is silent on who those community representatives will be, where the convention referred to ethnic, gender and all of that stuff, how do you draft such a provision in such language that will work 100, 200 or 300 years from now, when we will obviously have a different community from what we do today?

Dr Uhr—One way is that they could let the people determine that themselves. If you had a selection process that allowed for a committee that had equal representation from each of the states and the election process was based upon the Senate system of proportional representation, something that the people could live with would turn up.

CHAIRMAN—Okay, I hear you.

Mr Holloway—One way would be to do what Professor Zines suggested in a different context earlier on; that was to insert a provision saying that nominations to the committee are not justiciable—are not hearable by a court. In response to my colleagues Professor Zines and George Williams, isn't it conceivable that if the Prime Minister were to appoint a committee consisting of 16 white Anglo-Celtic Australians, a judge somewhere in this country would be willing to listen to a complaint by an Aboriginal person, by a woman, by an Australian of Asian ancestry?

CHAIRMAN—If you are asking me, I am an engineer.

Ms JULIE BISHOP—That was raised at the Constitutional Convention. The difficulty with that is that you then had people saying, 'My interests aren't represented.' We had Bruce Ruxton saying, 'The RSL is not represented.' It became ludicrous. So I think they left it as it was.

CHAIRMAN—Gentlemen and colleagues, this has been absolutely fascinating. You have really given us a kick-start.

Senator STOTT DESPOJA—Are we being thrown out? Do we have to leave?

CHAIRMAN—We are getting thrown out.

Senator STOTT DESPOJA—How disappointing. Can I ask whether these gentlemen are willing to take questions on notice, because I think both Julie and I have got a number of questions.

Ms HALL—I would not mind if they were to come back and maybe give us a little more time, rather than putting questions on notice. It has been very, very disjointed because we have had to attend the chamber for divisions and some of us have been called away from time to time. We could actually read through the questions that have been asked when we get the *Hansard* and then make sure that we are not duplicating the questions that have been asked while we have been out of the room. I would like to so move, if someone would like to second what I have put forward.

CHAIRMAN—Gentlemen, I have just had a discussion with our secretary. If we can get a quorum during the last week in July, on a date to be arranged, the secretariat will contact you and we will ask you to come back again. We will be, by that time, I can assure you, better informed than we are today. Again, I thank you very much for coming. I thank my colleagues, Hansard and the secretariat.

Resolved (on motion by **Mr McClelland**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 7.06 p.m.