COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT SELECT COMMITTEE ON THE REPUBLIC REFERENDUM

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

MONDAY, 5 JULY 1999

SYDNEY

BY AUTHORITY OF THE PARLIAMENT

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **http://www.aph.gov.au/hansard**

JOINT SELECT COMMITTEE ON THE REPUBLIC REFERENDUM

Monday, 5 July 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 Abetz, Payne and Schacht and Ms Julie Bishop, Mr Causley, Mr Charles, Mr Danby, Ms Hall, Mr McClelland 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 10.06 a.m.

CHAIRMAN—I will now open this hearing of the Joint Select Committee on the Republic Referendum. The committee is examining the provisions of the draft legislation introduced by the government to provide for the Constitution to be altered to lead the way for Australia to become a republic. Last week the committee held its first public hearing in Canberra and took evidence from the Referendum Task Force and from the Attorney-General's Department. The committee also heard arguments from other witnesses about some perceived weaknesses in the bills. Over the next three weeks the committee will be conducting public hearings around Australia to listen to the arguments about the proposed laws.

The committee sees its task as basically twofold. Firstly, it is to determine if the two bills reasonably represent the collective wisdom of the Constitutional Convention and, secondly, that if approved by the Australian public at a referendum on or about 6 November, that the legislation will work as intended.

JACKSON, Mr David Francis QC (Private capacity)

CHAIRMAN—Welcome, Mr Jackson. In what capacity are you appearing today?

Mr Jackson—I am appearing today on my own behalf but, as you will see from the submission which I have provided to the committee, the occasion for me being here, if I can put it briefly, is because Mr Justice Handley of the New South Wales Court of Appeal has made a submission which is annexed to the one I have provided you with and he asked me, in effect, to represent him. I have a different view of whether there should or should not be a republic from his in the sense that I would prefer one and support the proposal. He is against it, I think, but would like to have the legislation on the Constitution fixed up satisfactorily in the event that there is a republic. So that is the basis upon which I am here.

CHAIRMAN—Would you like to make a brief opening statement before we ask you questions? I would ask you, if you do, to keep it brief.

Mr Jackson—Certainly. I propose, as you will see from paragraph 2 of my submission, to deal with two aspects. One concerns the third paragraph of the proposed section 59, and the second concerns section 70A. As you will see from part B of that submission, which deals with proposed section 59, the third paragraph of section 59 deals with two aspects. One is upon whose advice the President should act, and the second concerns the position in relation to the reserve power.

In relation to the first of those things, you will see that the first half of the third paragraph of section 59 is intended to reflect the existing section 63, which you will see set out on page 2 of the submission. The present section 63 is essentially a definition section in the sense that it says what is meant by the term 'Governor-General in Council' where it is used otherwise in the Constitution.

What I find odd, I must say, and really do not know quite the reason for, is why there has been a change from the mere definition section to the rather more elaborate nature of the third paragraph of section 59.

You will see that I have sought in paragraphs 4, 5 and 6 on pages 2 and 3 of the submission to deal with the constitutional situation as I understand it to be. You will see the first thing I say about it in paragraph 7 is that the difficulty with the first part of the third paragraph of section 59—you will see by that that I mean the part preceding the proviso—is that it seems unnecessary.

The second thing is that it would seem to me to include as part of the Constitution, which will be superior to any law made by the parliament, references to the Prime Minister or another minister of state which could only be productive of potential future difficulty, and on one view gives the President more power than the Governor-General because the President could act on the advice of a minister, as distinct from the Governor-General doing so.

You will see the occasions when the Governor-General will act on the advice of the minister are usually those to which I have referred in paragraph 6(a), and their statutory provisions.

The second point concerns the proviso to the third paragraph of section 59. It raises the difficulty that in the first place the effect of the language of the third paragraph is likely to make justiciable, or perhaps more justiciable, the question of whether a President's exercise of a reserve power was valid. It seems a curious thing to require constitutionally, if I could emphasis that word, that a power be exercised in accordance with conventions which of their very nature are non-binding.

The second feature is that the proviso seems to suggest that the constitutional conventions are to be fixed as of 1 January 2001. The very nature of a convention, of course, is that it can expand or reduce over time.

Can I give two illustrations? The first is the question of whether a President should ask, for example, the Chief Justice of the High Court for advice in a dealing in connection with the Prime Minister. I put it in that neutral, relatively bland form. It would seem to me that whatever might have been the position in 1975, the view that would currently be taken by most people is that it is inappropriate for such a question to be asked or ever asked to be answered. I would not have thought that that was as yet a developed convention. Why is it that the notion of conventions is to be brought to a halt and put in the icebox as of 1 January 2001?

Another example, and that is one referred to by Mr Justice Handley, concerns the question of the extent to which a Governor-General, or no doubt the President, should give notice to a Prime Minister of an intention to remove the Prime Minister from office. Perhaps there is a developing convention in that regard, but is it to be brought to an end? Those are the points I would seek to make about section 59.

Could I move then to what is in the next part of that paper, and it concerns the proposed section 70A. If I could invite you to look at the terms of that, it deals with the prerogatives enjoyed by the Crown. 'Prerogatives' is becoming a slightly dated term for the entitlements of the executive government of one of the polities in the system.

The point that I am seeking to make is that the rights of a polity that could be characterised as being within the prerogative fall into a number of categories. You will see them in annexure B where there is a summary in what is the leading work—although it is of some relative antiquity now—by Dr Evatt in his doctoral thesis. In relation to that, you will see that one of the features about a prerogative is that it can be abolished or regulated by legislation.

The way in which section 70A is expressed is to continue the prerogative, and to make it exercisable by the President, of course. But to pass on, it has to be a prerogative which was enjoyed immediately before 1 January 2001. If the prerogative had been effected or removed by legislation prior to that time, then there would be a lot to be said for the view that the effective section 70A would be that it would not revive. There does not seem any very good reason why that should be the case. It may be desirable that the prerogative does revive. I

suggest that section 70A, if there is to be a provision, be drafted along the lines that I have set out in paragraph 4 on that page.

I did not obey in the slightest degree, Mr Chairman, your injunction to be short, but that is the summary of what I would seek to say. What Mr Justice Handley says is set out in annexure 'A', and I am happy to discuss either of those matters to the extent required.

CHAIRMAN—Thank you very much, Mr Jackson. On the issue of the reserve powers, how would you propose that we deal with the continuity of the reserve powers, which is what the Constitutional Convention clearly recommended, without putting it in the Constitution once we remove the Queen? Once the Crown is gone, how do we continue the reserve powers as a convention, if you will, without saying so?

Mr Jackson—Personally, I do not quite see the need to say anything about it at all. They are there.

CHAIRMAN—Do they remain there once the Crown is gone?

Wouldn't some argue that they might not?

Mr Jackson—It is a question of whether they are right or not. If I can answer your several questions—or endeavour to—what I would say about that is that the reserve powers are, I would have thought, the reserve powers of the person who is head of state at any time. They are not expressed, of course, in the Constitution, except in a number of respects—for example, the power to appoint members of the federal Executive Council. I do not particularly see any reason why, when you take away the Crown—the Crown being the head of state—that affects the situation when you put someone in place.

Mr McCLELLAND—Is it a bad thing, do you think, that they would be justiciable—the exercise of powers other than the reserve powers? Do you think it is a bad thing to make it clear that they would be justiciable?

Mr Jackson—I do not really think it is a particularly disastrous thing, but I find it hard to see the circumstances in which the issue is likely to arise. The present situation is that, if a power has to be exercised by the Governor-General, in the ordinary course of events it is exercised by the Governor-General in Council. In the other cases, isn't that ordinarily dealt with by legislation? In which case it is justiciable. As things stand, the Acts Interpretation Act says 'Governor-General' in an act prima facie means Governor-General in Council.

Mr McCLELLAND—I suppose there is an argument that it would prevent a President running off on their own doing all kinds of things without the advice of the Executive Council.

Mr Jackson—As the proposal is, all that has to happen is for the Prime Minister to catch up with them with a letter in his hand.

Mr McCLELLAND—To sack them?

Mr Jackson—Yes. Really there is not much room for any other sanction, is there? It is one or the other. If you have got a rogue President—say you have got a President who gets Alzheimer's or dementia and behaves very oddly—there is no halfway house.

Mr CAUSLEY—What if you have a rogue Prime Minister?

Mr Jackson—You may have—it is perfectly possible. I have referred to a case there: you could have a Prime Minister with Alzheimer's or a Prime Minister physically incapable of doing anything or a Prime Minister who disappears, like Mr Holt. You have got the same situation as now.

Mr CAUSLEY—Are you satisfied that the bill that is before us protects the freedoms of the people in such a way that no-one on either side—neither the President nor the Prime Minister—could take ultimate power?

Mr Jackson—I do not see the situation being very different from the current situation. I will say two things in relation to section 59. The addition, I think, of the words 'Prime Minister' or 'Minister' in the first part of section 59 has had the ability to bring about confusion. Take the case where you do have a Prime Minister who is having difficulty with the Prime Minister's own party. On the other hand, you have got someone who may well be the next Prime Minister within the party—a minister who is causing the problem, as it were, or who reflects those who believe there is a problem. As the matter stands, an argument, if you make it all justiciable, would be that the President should and could, or perhaps could, legally act on the advice of that minister rather than the Prime Minister in removing the Prime Minister from office.

Mr CAUSLEY—When you say there is no difference between the situation at present and as proposed, isn't it true that the Queen has no ambition to become the dictator of Australia?

Mr Jackson—I assume so.

Mr CAUSLEY—That is the difference. There is that situation where she does not want to take power, but someone else might.

Mr Jackson—That is the 'post-prandial brandies late night at Yarralumla' theory, isn't it? Anything like that is possible. That is one reason why personally I would be against the notion of having a popularly elected President, because I think it does create a separate power base, having got a potentially separate power base, or a legitimacy, because you might have a President elected after the last government. That is why I am against that. But I think at the end of the day one has to assume that, if things have got to that point, there has to be some political way of resolving it. I think the resolution is political one way or the other.

Ms ROXON—I am not sure that I understood the basic thrust of your position. What is your view on the way you treat the conventions, the prerogative powers and the reserve powers? Do you really think it is unnecessary to put it in rather than it being objectionable in itself? Do you think it is spelling out something which will be there in the position of any President or head of state?

Mr Jackson—I think it is unnecessary. My first position is that it is unnecessary. Secondly, I think it does cause potential difficulty. I think the other way you put it glosses over my position.

Ms ROXON—Right. So it goes beyond it being sort of preferable, if you like? You actually have greater concerns than thinking that it spells out something a bit more—

Mr Jackson—Yes, they are the ones set out in that paper.

Ms ROXON—Yes, I have just been presented with that now.

Ms JULIE BISHOP—Mr Jackson, is it your suggestion, firstly, that there not be a third paragraph attached to the proposed section 59 or, secondly, that it be worded along the lines of section 63 or, thirdly, that we take on board the proposed third paragraph of draft section 59 by Mr Justice Brennan?

Mr Jackson—The second of those things. I think it is better simply converting the words of section 63 to accommodate the appointment of a President.

Ms JULIE BISHOP—I guess there is a concern about the status of the reserve powers. I recall that this was an issue that was debated at some length during the Constitutional Convention as to what would happen to the reserve powers in the transition if there was no mention made of them. I cannot recall the detail of the debate, but obviously at the end of the day those present at the convention felt that there must be a reference to them otherwise they would perhaps be lost in the transition. But of course that again raises the issue as to the status of the reserve powers and the conventions as at the date of enactment.

Mr Jackson—If one comes down to the essence of it—the reserve power—the one you are really speaking about, I suspect, is the power to remove the Prime Minister. If that happens, that is not dealt with as a reserve power; it is dealt with by section 64. The way in which the Constitution is currently framed is one that does not require the appointment of the Prime Minister to be something that is done on the advice of the Executive Council or anyone else.

The way in which the Prime Minister will be appointed will depend upon whether the Prime Minister is replacing someone from the same party or replacing someone from another party after an election. In that case, the ordinary constitutional conventions would apply.

Senator SCHACHT—I know we are arguing as though trying to avoid every possible scenario of catastrophe that could apply to the successful management and running of Australia, and these are queries and questions, but the thing is that in many of these areas in a democracy, no matter how you draw the rules, if the goodwill in the community starts falling apart, reserve powers and everything else are going to fall apart under the stress if the civil society falls apart and the divisions occur.

Although the committee quite rightly is raising the worst case scenarios, Mr Causley said the Queen did not want to be a dictator or can't be a dictator. I have to say that if anyone

else were to become a dictator, I suspect elsewhere in the society there would be pretty strong revulsion and the Australian people would take action.

I want to come to the reserve power. With respect to the example you gave of a senior minister who is plotting to knock off the existing Prime Minister and the President took the advice privately of that senior minister and removed the Prime Minister, the real test would be back on the floor of the House of Representatives the next day as to who would have the confidence of the House of Representatives. If the Prime Minister did not have the numbers, then the President's ruling would be upheld in seeking it, but if it was not, then the President would have to consider his or her position quite clearly as to whether they had made the wrong call, and if they were not sacked by the Prime Minister, quite rightly, they would do, as you would say in the reserve powers, the right thing and do Captain Scott's big act and walk out into the snow and never be seen again.

Mr CAUSLEY—That was Oates, wasn't it?

Senator SCHACHT—Sorry, it was Oates, not Scott. I think that with respect to the answers to some of these questions we raise, we will never agree to do anything because the worst case scenario being described is always on the basis that the whole of the democratic institutions in Australia have completely fallen apart.

Mr CAUSLEY—That happened in Germany, didn't it?

Senator SCHACHT—Yes, and if the society falls into that hole, I do not think having the reserve power of the Constitution either way is going to save you from a Hitler if the community is overwhelmingly willing to take it on. The real issue is: is there anything in here to stop the House of Representatives testing the judgment of the President if he makes the wrong call?

Mr Jackson—The answer, I suppose, broadly speaking, is no. The difficulty which I suppose potentially can arise would arise if you do not have a majority party, if you have got a minority government in the House of Representatives. That has not happened in the House for a long time, and maybe the difficulty would not arise. But if you have got a fragmented majority combined of a number of people of different parties or perhaps of different groups in the same party and the Prime Minister is defeated on the floor of the House, one minister might say, 'We have been defeated on the floor of the House,' and the Prime Minister says, 'I can get it through, we can do it again.' Anything is possible.

Senator SCHACHT—We have a number of countries in western Europe with both monarchies and republics which for 50 years have not had a one party majority in the lower house. On every one of those occasions when a coalition government falls apart, the President is consulted and takes a sounding. He may commission another leader to try to form a government and get the confidence of the house. It is not a situation which most of us from majority parties in Australia would welcome, but it is always resolved in the end, in that the parliament takes a vote of confidence which the President takes note of. If the person says to the President, 'I can form a government,' and subsequently fails, the President then makes a judgment—and it would be the case in Australia—to commission somebody else. 'Can you get a majority?', and the House will determine it.

Mr Jackson—That is why I think to add references in the third paragraph of proposed section 59 to the Prime Minister and ministers is to add to possible confusion in doing that.

CHAIRMAN—If you do not put that into that section, what happens if the Prime Minister is ill or absent and you need a minister to advise the Governor-General? You are looking at a conflict situation, but in the normal course of business, a minister who normally would be Deputy Prime Minister but nonetheless is a minister would be required to advise the Governor-General just to carry on the ordinary business of the Commonwealth.

Mr Jackson—Of course.

CHAIRMAN—So why not say so, which is what it says?

Mr Jackson—That is something that I referred to at the bottom of page 2 of my submission, and at the top of page 3, as being the unusual case where you would have a minister other than the Prime Minister advising the President. But that is the situation now. Why does one need to have a constitutional provision making that advice constitutionally binding as distinct from being simply part of the convention?

Ms JULIE BISHOP—Mr Jackson, I am trying to come to terms with the wording that we might use for section 59 or not use, as the case may be. What difficulties would you foresee with an approach whereby there was a provision to the effect that except for the power to appoint or dismiss a Prime Minister, or to dissolve or decline to dissolve parliament, the President must always act with the advice of the federal executive, counsel, the Prime Minister or another minister of state?

Mr Jackson—I would not pretend to be able to remember offhand the list of constitutional conventions, but there are many more than that. As I recall, the activities of the constitutional conventions in the 1970s and 1980s, and also the work of the constitutional commission, identified a significant list of them. I would need to go through them one by one to see if what you are suggesting would be apposite.

I know there are views that say one should identify the conventions, but I think one of the dangers in doing so is that you prevent them from developing. I think conventions do develop.

Ms JULIE BISHOP—They would have to be virtually codified, would they not, if we were to make reference to them?

Mr Jackson—That has been the difficulty. There was great pressure after the November 1975 events for there to be codification of the conventions. There were significant endeavours made in the constitutional conventions that were held prior to the constitutional commission. They achieved something, but an underlying difficulty is that it is very difficult to put an end to them.

Senator SCHACHT—But if they were codified, they are no longer reserve powers. They are actually written down and you know what the rules are. What is your definition of reserve powers based on convention?

Mr Jackson—I find it very hard to define what reserve powers are. Can I say two things about it. The first is that I think the difficulty in definition militates against even using the term. But if one were seeking to give a definition of it, I suppose you have to do it in a negative way, that is to say, it is the powers of the Governor-General or President that may be exercised on the President's own initiative rather than on the advice of the ministry.

Mr McCLELLAND—Section 8 of schedule 3 may cover this issue in terms of specifically acknowledging the potential evolution of constitutional conventions—probably on the last page of the bill.

Mr Jackson—It is right to say that it does not prevent the evolution of them. One of the difficulties is that it relates only to one of the areas of constitutional conventions. There may be others that are affected.

Mr McCLELLAND—In respect of reserve powers, you think it is confined to there?

Mr Jackson—Yes.

Mr McCLELLAND—The other point is that paragraph 5.17 of the explanatory memorandum—you may not have that—reads:

> Proposed section 59 is intended to preserve the existing status of the constitutional conventions as a rule of practice rather than rules of law. It is not intended to make justiciable decisions of the president in relation to the exercise of the reserve that would not have been justiciable if made by the Governor-General.

Would that have any effect in narrowing the potential scope of the third paragraph of section 59?

Mr Jackson—I suppose it would have as much effect as any of the speeches made by ministers introducing successful constitution alterations in the past, which is as some aid to interpretation but not binding.

Senator SCHACHT—On this issue of the definition of reserve powers, in a country with a long established history of parliamentary democracy and institutional democracy at many levels of our community, basically reserve powers, you might say in a blunt political way, are what you can get away with at a particular time in a particular political environment. If the President chooses, or the Governor-General chooses, to use a reserve power, as in 1975, if the election result had been different I suspect, as happened in Canada when a Governor-General had sacked the government, lost the election, he then resigned because the people had made up their mind, whether the theory said he had the power to sack or not. It strikes me that the reserve powers are what the president believes he or she may or may not be able to get away with. I do not want to put it in that crass way, but that seems to me, in the politics of the general broad community, to be what the reserve powers are. You cannot define them and you might say, 'In a particular context I believe the reserve powers allow me to do this.'

Mr Jackson—I suppose if one looks at any of the works on conventions of the constitution, what one sees about them is that they are records of past practices or beliefs

about the ability to engage in practices which are generally accepted, but the way in which they become conventions—which of the very nature are not rules of law, or not up until now—what happens, of course, is that they move incrementally. They might expand or may come in. That is something that is never capable of exact final definition.

Senator SCHACHT—What happened in 1975 demonstrably changed the definition of the reserve power to do with the ability of the Governor-General to sack the Prime Minister. There were many people who believed up until that time that that could not happen.

Mr CAUSLEY—We could have a great debate about that—

Senator SCHACHT—I am just saying that the Governor-General made a decision that has been debated ever since. He exercised the reserve power that changed and added an extra definition to what the reserve powers were.

Mr Jackson—It is no doubt a matter of historical debate what happened a quarter of a century ago, but I would have thought that most people who were not politically involved in any party sense and who knew anything about the topic would have taken the view that what the Governor-General at that stage did was within power; but the question, of course, was whether the power was exercised appropriately in the particular circumstances. That is not something on which I wish to express a view.

CHAIRMAN—Is it not true that some of the most repressive regimes in the world have the most finely delineated and concise constitutions?

Mr Jackson—I believe that to be the case, yes. The USSR constitution has always been a model for a draftsperson.

Ms JULIE BISHOP—I have one other issue in relation to proposed section 59. I appreciate that you believe that third paragraph is unnecessary. Can I get your comment on the fact that in the present section 62 there is reference to a federal council to advise the Governor-General and in the third paragraph of proposed section 59 it conjures up the notion of acting on the advice of the federal council, the Prime Minister or another minister of state. Obviously it could be rather confusing as to whether the president acts disjunctively or conjunctively and whose advice he relies upon in what order, as opposed to just the general notion of advising the Governor-General.

Mr Jackson—That is one of the problems to which I draw attention.

Mr DANBY—There is nothing in your submission about the direct election of the president. Would you care to elaborate your view on that briefly?

Mr Jackson—I have not got anything there because I did not really think that was an issue. Is that something the committee is concerned with?

Mr CAUSLEY—It is popular with the public.

Mr DANBY—With some people.

Senator SCHACHT—I think you mentioned earlier on you are not in favour of an elected president.

Mr Jackson—No, I am not. This is an issue on which I spoke elsewhere, in a paper I gave in New Zealand early this year. My view of it is that it would be undesirable to have a direct election for president because I think it has the potentiality of creating a person who would, I think, be the only person in Australia directly elected by all the people of Australia. If that is so, and one bears in mind that the election of the president might take place at a time after the last election of the House or even after a double dissolution, for example, there is a potential situation where the rogue president, if that term can be used again, could claim greater electoral legitimacy than the government. I think that is an undesirable thing. That is the first thing.

The second thing is that I do think that if you have a parliamentary rather than a presidential system there becomes a strange kind of election for the president. What does the president have to offer? I do not think there is really much that legitimately the president could offer. What can the president say: 'I'll do this or do that'? It would seem very odd to me.

Senator ABETZ—As I understand it, the reserve powers are based on convention. Convention is evolutionary in nature. It can contract or expand as time goes by. In the event that Australia were to become a republic, would you see Australia being able to look overseas for precedents from other Commonwealth countries, or would we be limited to the Australian scene only to determine whether the convention had evolved in an expansive or diminishing way? What would we be bound by?

Mr Jackson—I cannot see why one would not look to see what the position was in other places. That is how the conventions have developed, really. In terms of relatively ancient history, what you are looking at is what is left of the old absolute monarchy powers after many centuries of reduction by the existence of parliaments. There were, of course, in the old British Empire many colonies, many areas that had responsible government and so on, and so the dealings of the governors with the parliaments of those places were really the source of many of the modern views about what are appropriate constitutional conventions. There was a kind of symbiotic, I suppose, relationship between what happened in United Kingdom on the one hand and what happened in the colonies on the other. So I think there is no reason why one would not look at similar things today, but the areas of similarity may be fewer than they were in the past and some of the similarities one would not want to adopt, I would think.

CHAIRMAN—We must move on; time is of the essence for this committee. We thank you for your submission and we thank you for coming and talking to us today and answering our questions. We will table a report on 9 August at 10.30 in the morning, and we will make sure we send you a copy.

Mr Jackson—Thank you very much. I hope the work of the committee proceeds well.

[10.47 a.m.]

JOHNSTON, Mr Adam David (Private citizen)

CHAIRMAN—Welcome to today's committee hearing. Thank you for your submission. Would you like to make a very brief opening statement before we ask you questions about the submission?

Mr Johnston—Thank you. I was formerly the New South Wales youth delegate to the Constitutional Convention. I am here today to complete my portion of the work which was neglected by the Convention. Like a poorly written essay, ConCon's *Hansard* is padded with general addresses. I say 'padded' because most, however eloquent, witty or passionate, are merely recitations of the same old pros and cons. Issues have changed little since the establishment of the Republican Advisory Committee. Why is this? The ARM and the ACM party machines enforced tight party discipline. On the Monday that the *Australian* went to print with the names of the appointees to the Convention, it carried excerpts of my press statement. I had floated the idea of declaring a republic at the conclusion of the current Queen's reign. This brought an immediate call from Kerry Jones. ACM supporters had hit the phones, nervous about my public comment. Wasn't I a monarchist after all? Personally, yes; publicly, as the New South Wales youth delegate, I was responsible for representing a constituency which would include a far wider range of opinion. The only way to look credible was to deal with each issue on its merits and exercise a free vote. So, with offers of research material kindly but firmly declined, Kerry went off uncertain of where my head would pop up in any count.

The whip was dominant on both sides, as is exemplified by Bill Hayden's comments when tabling his model:

> . . . this is described as a people's Convention. It is not. It is a gathering of politicians, not just politicians from parliament, but politicians from outside of parliament . . .
>
> . . . . . .
>
> this assembly is clearly factionalised. The factions are tightly disciplined and it limits the opportunity for free spirits to independently explore views and look for compromises . . .

Mr Hayden went on to say that the discipline was as tight as that of any ALP conference. He was spot-on. Ask yourself how a proposal packaged as bipartisan can come out of an overtly partisan body. Later today, you will be subjected to the mantras of the two main camps. You will not learn anything new and neither will the public. The committee would be well advised to have the combatants incorporate their written answers into *Hansard* and send them on their way.

Now let me unpack the partisan/bipartisan legislation. My submission argues that today's bills are practically clones of the exposure drafts. To demonstrate, yellow highlighter now covers most of schedule 1 of the alteration exposure drafts and its equivalent before this committee—just how verbatim can verbatim be? The curious exception is 70A, relating to the prerogative. The expressions have been rearranged, but taking the section in its entirety and reading it in the context of a schedule, which is practically unaltered, the changes are formal, not substantial. Section 70A in the bill for all practical purposes equates with 70A of

the exposure drafts. Extinguishing the prerogative to prorogue parliament is vital. End prorogation and a rogue Prime Minister has greater difficulty in moulding and/or corrupting the Commonwealth to his liking.

Let us not have midnight judges in Australia. We have a model that claims to preserve Westminster traditions—'minimalist change', says the ARM. If that is the sales pitch for the legislation as it currently stands, then it is false advertising. I submit that the legislation has grown a fourth mutant component. Once, there was a Queen, House and Senate; now there is a President, House, Senate and Prime Minister. I use the word 'mutant' advisedly. The Westminster norm is that ministers act in the Crown's name. The legislation says that executive authority resides in the President. Yet, if the High Court were asked to reconcile this principle with equally plain provisions as to who moves the motion to appoint the President, who fires him and to whom he tenders his resignation, I believe their Honours would be forced to conclude that the statement on the repository of executive authority cannot mean what it says.

As my submission states, the referendum proposals give a Prime Minister positive grants of power. He acts in his own right, not in the sovereign's name. We have suspended a basic tenet of Westminster constitutionalism, and what of parliament's sovereignty? A presidential resignation is delivered to the Prime Minister, not the parliament which made the appointment. My amendments correct this disrespect for parliament and, for all the arguments about national pride and independence, where is the commitment to citizenship in the presidential nomination process? My amendments ensure that community representatives are Australian citizens. If this is not bad enough, community representatives are not even nominated by the community. As Sir Humphrey Appleby once said, 'The Prime Minister giveth and the Prime Minister taketh away. Blessed be the name of the Prime Minister.'

My amendments ensure that people are invited to nominate not only the candidates for President but also those who will represent them on the committee. Appointments should not be left to one partisan politician, particularly if the tag 'community representative' is to have any meaning. Worse still, a President, who at some point is found not to meet citizenship requirements, does not have any of his acts while in office invalidated. Further, there is no suggestion of sanctions against him. This is like saying, 'We would like you to be a citizen, but if you're not, she'll be right, mate.' No way! My amendments require the Nominations Committee to make all reasonable inquiries into the citizenship status of their preferred presidential candidate. Their report to parliament must include a declaration that the candidate is an Australian citizen.

You will wonder why an officer called the presider, a feature of my model to the convention, has been revived here. Appointment and dismissal of the Governor-General is one of the remaining acts which can be performed only by Her Majesty. We should not permit the Prime Minister to assume this role unchecked, and why should the states suffer the appointment of their governors by a President in Canberra and to the presider? A warning came from the west, loud and clear, about the concerns in smaller states:

I remind the delegates to this Convention that Western Australia is the only state in Australia that has never been a part of New South Wales. I just make the point that we will not have any intention of sheepishly following any particular dictates that come out of that state.

To address Mr Court's concerns, I propose that the Presidential Nominations Committee rotate around the states. Each successive committee shall comprise federal and state politicians and community representatives from one state. They will select a resident of their state for the presidential nominations. The bigger states will not monopolise the process. In short, I am ready to engage in any reasonable constitutional reform process, but you will remember that I opened by submission with a quote from the Treasurer. He said that the republican model lacked design and sleek lines. He was correct. If I might draw an analogy: the proposal for an Australian republic would survive a constitutional crisis as well as our Collins class submarines would survive a combat zone. Are there any questions, Mr Chairman?

CHAIRMAN—Thank you, Mr Johnston. I would have to say, in regard to your comparison with the Collins class submarine, that I suspect you must then think an Australian republic would survive very well. Early on in your submission, you talked about the fact that the President should not have discretion to prorogue the parliament. In the case of an unresolvable dispute between the houses, what other mechanism would you propose? If the President is not to have such discretion, is that forever?

Mr Johnston—No, we would still have elections, of course. My main concern with the prorogation was that, as it currently stands, the President acts solely on the advice of the Prime Minister. As I say in my submission, I wrote a letter to the *Australian* responding to Justice Handley in which I suggested that perhaps additions could be made to the Constitution in such a way that if the Prime Minister were to fire the President, or vice versa, this would be like playing a game of double jeopardy—they would both force an election. Furthermore, the Senate would be obliged to consider the government's financial legislation.

The spectre of 1975 hung very heavily over the Convention. It was referred to on numerous occasions. One of my proposals, which you will see in the letter that I wrote to the *Australian* and which I again quote in the submission, was that it shall be deemed in the Constitution that, if the Senate fails to consider the government's legislation, then by virtue of that the House is dissolved. This is not so much a question of prorogation and the parliament going on forever; this is to stop political opportunism by either a Prime Minister or houses which, for political reasons, refuse to agree with each other.

Mr McCLELLAND—Don't you have to compare what is being put up with the current situation? Isn't it the case that the Prime Minister can effectively dismiss the Governor-General at the Prime Minister's whim? Isn't what is proposed in the bill an improvement on the current situation?

Mr Johnston—No. In the current situation—a constitutional monarchy—you have a history and lineage of conventions which the bill before this committee states will continue. However, I doubt that, with all the changes that are proposed, the conventions can continue in their current form.

I also point out that, in a recent television debate moderated by the ABC's *7.30 Report* host where there were various sides in the Senate chamber debating this, Sir James Killen

pointed out that as soon as you mention conventions in the Constitution they become justiciable, they become the creatures of the High Court.

We are getting into very dangerous areas. I am the first to concede that the convention utterly failed. It welshed the hard legal issues—and I say that in my submission. I take responsibility for my part of it. I opened the submission with the statement that I was absolutely appalled that on day 10 I asked for a copy of the model and what I got was 1½ pages of dot points and generalities. This is not sufficient for a constitution. As the Treasurer said in his speech, where he eventually abstained, the founding fathers actually wrote a constitution; they did not write generalities and hope for the best. This would particularly concern the states, because I have already highlighted to you the concerns of Richard Court.

Where I would go further is to suggest that this committee recommend amendments to these bills guaranteeing the states their own position in the Federation. The fact is that a President, who has now assumed not only the Governor-General's powers but the royal prerogatives full stop, will now appoint state governors. If something is going to make the referendum lose or fail, then that will be it. That is why I want the Presidential Nominations Committee to go around the states and why I prefer—as I did in my own model—to have a separate entity to do the dismissing of the Governor-General. Indeed, I would go further and support Richard Court's statements that the term 'Governor-General' should be retained.

Getting back to the states, I would propose that this committee look at the British North America Act, which I have had incorporated as part of the evidence here. That not only gives powers to the Canadian Commonwealth government but provides that certain powers are the prerogatives of the states. Under our Constitution, what we have seen with the fall of the doctrine of immunity of instrumentalities, post the Engineers' Case, is the gradual encroachment of the Commonwealth on state jurisdictions. The states will no doubt see a federal President appointing their governors as yet another encroachment on their sovereign rights as states.

Senator SCHACHT—Mr Johnston, my first question to you is this: do you favour having an Australian head of state?

Mr Johnston—I will make two points about that. First of all, I have tendered two other documents. One is article II of the US Constitution. The other is a copy from *Blacks Law Dictionary*, which goes to the question of heads. In that dictionary, I found 'head of stream', 'head money' and all sorts of things. I have not found 'head of state'. 'Head of state', to my way of thinking, is not a legal term. Again, going back to the American context, in article II you find the statement 'head of department', but nowhere is the President of the United States ever referred to as a 'head of state'. This 'head of state' statement is a nonentity, as far as I can legally work out.

Senator SCHACHT—Put it this way then: do you favour having an Australian in that position, whether it is a President or a monarch?

Mr Johnston—I will favour whatever the majority of Australians choose. I am quite comfortable with the current arrangements. I see nothing irrelevant or unusual with having a Crown. I will accept a President or a Governor-General. However, I will underline it all by

saying that the convention failed to dot the i's and cross the t's. They failed to go through the Constitution line by line and sort out the various issues, like the states. I keep coming back to the states, and I would make a further recommendation if the states perhaps say no to this referendum. You need only four of six, and that worries me. As Richard Court said, he believed—and I would tend to agree with the statement—that, for this process to work, all states have to agree, all territories have to agree, everybody has to pass this.

Senator SCHACHT—Mr Johnston, I asked a simple question, and you have answered it. I want to ask the next question. As Mr McClelland said, at the moment, if the Prime Minister advised the Queen to sack the Governor-General, it is highly unlikely that the Queen would do other than accept his advice. Is that correct?

Mr Johnston—Yes. But again, you qualify that by saying that the Queen has the right to be consulted and the right to make a decision. She can delay a decision if she so chooses. She will eventually follow our Prime Minister's word if he insists. Again, in my submission—

Senator SCHACHT—Doesn't the Prime Minister have more power now than he would have under this model, which you think gives him too much power? This is actually reducing his power to remove the—though you do not like the term—head of state or the Governor-General, or the representative of the head of state of Australia.

Mr Johnston—No, I do not think it is because, to appoint the President, you have to go through both Houses. To dismiss him, you only have to get the approval of the House of Representatives. This assumes, of course, that the House of Representatives is currently in session. What would stop a Prime Minister from deciding to sack a President while the House is—

Senator SCHACHT—I would suggest the phrase 'political chaos in the community'. If the President—

Mr Johnston—Partially, Senator, but let me underline this: what would happen then is that we would have a Deputy President, as the bills provide, but this Deputy President would have full powers. Therefore, I get back to my Marbury v. Madison parallel, where a President is perhaps looking at a Prime Minister politically and has worked out that the Prime Minister is not really doing things in an honourable fashion. He may be stacking a particular organisation, or he may have motives—and I put the scenario in my submission of a Prime Minister who sees his government in decline and, like President Adams did with the midnight judges, suddenly decides to stack all sorts of instrumentalities with his friends. So, with the Deputy President, I said that, until a new President is appointed—and it has to be done quickly; I bring the time back from 30 days to seven days for these processes to work out—and until the processes are worked out, the Deputy President is forced into a caretaker mode, as is the Prime Minister and his government. These are the constitutional checks and balances which I do not think these bills adequately provide for. We are making a very generous assumption for the Prime Minister to assume that, first of all, in the firing of the Prime Minister—

Senator SCHACHT—Mr Johnston, can I just come in here. At the moment, the Prime Minister, in a declining government of any side, has even more power than this allows—to go ahead and stack, as you call it, any institutional body, any bench and so on. He can do that now. My colleague suggests the ABC board, for example. The Prime Minister can do that right up to the date of calling the election.

Mr Johnston—I accept that partially, but—

Senator SCHACHT—And the Prime Minister takes the political consequences by doing so—that is part of a robust democracy.

Mr Johnston—I said 'partially', but I again underline the fact that this proposal suddenly names an as yet undefined officer as Prime Minister. To my legal way of thinking, a positive grant of power rather than a convention—and the Prime Minister's office is a conventional understanding at the moment—changes the whole knack of the system. Again, in my submission, I quoted for you part of the *House of Representatives Practice* which indicates that the Prime Minister's office has never been historically defined; it has always been tacitly understood. Now we are stating that it exists.

Due to the fact that we are not defining what it does, the legal necessity is that a piece of legislation unless it is framed so that the court is told to construct words in a narrow sense will define them in a wide sense. This is the point that I am trying to make. I think the positive grant will mean that what Senator Schacht is pointing out happens already will happen to a greater extent, it will be augmented, and the Prime Minister will have even more legal authority to do it. I do not think that is acceptable.

Senator SCHACHT—I think we have to agree to disagree. I think you have a very bleak view of the motives of people in parliament and the processes et cetera. To take your view, Mr Johnston, you are basically saying our whole democratic society is failing. I do not agree with that.

Mr Johnston—No, I reject that out of hand. I believe that the Westminster style of government is one of the most workable and I believe the current Constitution is working quite well. However, as I said to you in my opening remarks, I am more than happy to accept change but I insist that it be legally sound. I will go to any lengths, I will go to any line in the Constitution to test that out, and I will necessarily look to worst case scenarios and work backwards—I think that is vital. I, as a former delegate, and the rest of us owe it as a duty of care—again, another legal phrase—to ensure that the product of our deliberations and the model we eventually put up can be seen by the Australian people to be at least as good and as workable as the current system.

Again, let me remind you just how factionalised, just how politicised, the convention was. It was not really a forum, as Bill Hayden said, for open, frank and fair discussion. As I see it, the *Hansard* is padded with general addresses. We did not go through the Constitution in a loyally judicious fashion and deal with the issues such as the states.

CHAIRMAN—Thank you, Mr Johnston. We are going to have to move on. We thank you for your submission and for coming and answering our questions today. We will report

to the parliament on 9 August at 10.30 in the morning and we will certainly send you a copy of our report. Thank you very much.

Mr Johnston—Thank you very much.

[11.15 a.m.]

LEGG, Mr Michael, Member, Australian Constitutional Issues Taskforce, Law Society of New South Wales

CHAIRMAN—Welcome. We have received your submission, for which we thank you. Would you like to make a very brief opening statement before we ask you questions?

Mr Legg—The first thing to state is that the Law Society does not express any view for or against a republic. The submission that you have and the analysis that was undertaken was on a purely legal perspective, with a view to maintaining the Australian form of governments which can be characterised by concepts such as democracy, rule of law, and civil society. So what you have here is in some ways what some people might call pedantic in some areas and more broad comments in other areas, but it is aimed at trying to provide some feedback to this committee on how we perceive the bills operating. I can answer questions on the entire submission but, because it was prepared by a committee, there are some areas I am obviously more familiar with than others.

Senator ABETZ—The Law Society of New South Wales has got a governing body. How many members are there on that?

Mr Legg—There are 21.

Senator ABETZ—You say the committee of 32 is too large to have a single role of choosing a President. How does a council of 2l people, which is about two-thirds that size, have the capacity to administer all manner of things in relation to the legal profession of New South Wales? I would not have thought the size of a body was a legal point to raise, quite frankly, as a law council body.

Mr Legg—When you are looking at any decision making body it is obviously expedient to have a smaller body rather than a larger one. If you have a presidential nominations bill which is going to put into law a particular number of members, we are merely commenting on that number and suggesting that it may be better to look at 24. There are obviously all sorts of alternatives available. The perspective that we have taken is a matter of having a tripartite classification to be able to try to balance the interests that exist.

CHAIRMAN—Do you have any concerns about the committee nomination process?

Mr Legg—When you first look at the nominations process you might want to draw some comparisons with somebody who is going along for a job interview for which they have perhaps applied. I think there is a general feeling that, when that happens, there are going to be certain criteria that a person can evaluate themselves against, or somebody who is putting them forward can evaluate them against, and that the criteria will be specified in advance and will be the same for all people who are nominated.

The concern that we raise is that the criteria are not specifically set out. Although there is provision within the bill for that to be able to take place, section 22(4) says that the

committee may consider any other matter. The problem that can arise from that is that in looking at one particular nominee you may consider some matters, and in looking at another you may look at other matters. As a matter of fairness and due process for anybody that is put forward, we think it would be better to specify what they are beforehand.

Ms JULIE BISHOP—Just following on from that, on the qualifications of the President: are you suggesting—and I note that you do in one instance—that issues such as whether or not the nominees have dual citizenship, whether or not the nominees are members of a political party, et cetera, are matters that ought be left to the discretion of the committee, rather than having in the bill statements such as, 'The President shall not be a member of a political party,' and all the interpretation issues that follow from that?

Mr Legg—It depends on the particular criterion. Dual citizenship is something which I think should be specified separately from the nominations process. In relation to whether somebody is a member of a political party, I do not see that as being something that should exclude anybody from being put forward. As a result, I think you should be able to weigh where people's interests and allegiances may lie in the process, rather than having a blanket statement that anybody who is a member of a political party is simply ineligible.

The point I would like to add is that the whole educational process that goes along with the Republic is going to be saying to a lot of people in our community, 'This is how our government works. There is an opportunity for you to become involved.' The reality is that the chief way that people become involved is through political parties, and I do not think there should be a denigration of that involvement. I think it should just be weighed the same as any other factor.

Ms JULIE BISHOP—And not specified as a provision?

Mr Legg—I do not think there is any need to specify it, either in the Constitution, as is currently proposed, or as a specific criterion.

Senator ABETZ—What did ConCon decide on that and how slavishly should we as a government follow the ConCon recommendations?

Mr Legg—I am not familiar with the ConCon.

Senator ABETZ—That is the Constitutional Convention. They made certain suggestions and, as I understand it, that was one of their suggestions, that the nominee should not be a member of a political party. Is that right or not?

Ms JULIE BISHOP—I think it is a little confusing. I think ConCon was suggesting that the person who is appointed at that time will not be—

Senator SCHACHT—They could have just resigned.

Ms JULIE BISHOP—Yes, they could have resigned the day before. The difficulty with the way it is drafted now is whether or not it means that if your name happens to be going forward to this nominating committee you should not be a member of a political party.

Mr Legg—I think the comment that is made by the Republic Advisory Committee in its report on an Australian Republic says that if you are going to have the method which is being currently put forward, of a two-thirds majority, then any concerns about somebody being impartial are going to be dealt with because you have got both houses of parliament voting, requiring a two-thirds majority, so it is unlikely that somebody who is considered to have particular links or an inability to be impartial would get through that process.

CHAIRMAN—Mr Legg, would that be true if one major political party controlled both the House and the Senate?

Mr Legg—It would be true if they had the two-thirds majority. That would obviously mean that they could put up somebody that they supported as President. But I suppose the response to that is that the houses of parliament are democratically elected, and if that is who the people have chosen to vote for, then—

Ms ROXON—I have just been reading your submission as you have been speaking—we did not have the opportunity to read it in detail beforehand, or I did not—so correct me if you have already set this out. You have got a couple of pages on the removal of the President and you go through some concerns that there are and some options for how you might change that so that the removal process is different from what is proposed in the current bill, but you do not appear to draw any conclusion about what the society regards as the appropriate process. Would you like to talk to us a little bit about that?

Mr Legg—I guess the first comment on the removal of the President is that we did not go into it at length, for the very reason that it has been discussed on numerous occasions. I guess the first point is that it appears that the mechanism that has been put into place is one which is aimed at trying to replicate the current situation with the Governor-General. We do not see that as being an exact replication, and as a result what we have tried to suggest is more procedural mechanisms for trying to remove the stand-off position or, as some commentators put it, the whoever shoots first wins type approach. That is why, rather than saying this approach should be adopted, we have suggested that, if you have mechanisms whereby the Prime Minister is to give reasons and the President is able to address the House of Representatives before any vote, that may in fact be a closer replication of what would happen if a Prime Minister wanted to dismiss a Governor-General on the basis of the comments of former Chief Justice Mason of the High Court, which is the idea that there would be some sort of notice and there would be some time for the monarch to consider that.

What we are suggesting in this process would effectively remove the arbitrary nature that may be associated with a Prime Minister simply going, 'We have decided to dismiss the President.' I guess the point that needs to go with that is that, when it comes to looking at the removal of a President or the dismissal of a Prime Minister, those mechanisms need to be looked at together, because at present we have a situation where it is really whoever happens to move first that is in the best position and there is not really a great deal of ability to say, 'Was it justified?' It becomes more just a political argument as to whether it was or was not.

Mr McCLELLAND—When you say 'at the moment', do you mean under our current constitutional arrangements?

Mr Legg—That is right, yes. The way that that deadlock can be broken is either to specify that these are the reserve powers, putting them in writing, so as a result you have a President who is able to say, 'These are the only times I can act' or you have a Prime Minister who can remove only for particular reasons. It is a balancing act that I think requires more consideration.

Ms JULIE BISHOP—On page 506, paragraph 4, powers of the President, in your fourth paragraph you speak of the issue of the reserve powers and the fact that the reserve powers are unwritten and their exercise is not justiciable. However, you then go on to say:

It is submitted that it would be better to avoid the crisis by having clear rules rather than amorphous conventions that no-one fully understands.

Are you suggesting codifying the reserve powers and the conventions that surround them? If so, wouldn't that make them justiciable?

Mr Legg—I guess the answer to that is that codifying them is a solution, and certainly it would follow from that that they would be justiciable. I would not go so far as to say that is the mechanism to be adopted. As I am saying, there is a balancing act there. If you want to leave the reserve powers so that they are not codified, and you are going to say, as I suggest here, 'A President should give notice if they intend to use a reserve power,' but you have a Prime Minister in a situation where there are specific heads that the Prime Minister can dismiss a President for, then you have a circuit-breaker in terms of the deadlock. But that is not to say that that is the only way that it could be done. The other way would be to reverse that, specify the reserve powers but allow the Prime Minister to dismiss by going through a certain procedure.

Ms JULIE BISHOP—The other way is not to mention it at all, which has been suggested by an earlier witness—to have no reference to the conventions at all.

Mr Legg—If you do not have reference to the conventions, you leave the question open as to what does govern the exercise of reserve powers.

Ms JULIE BISHOP—As it is now?

Mr Legg—My understanding is that there are conventions which a government would be expected to follow on the basis of precedent. The problem is that, because they are not written down and because there is an argument—is this situation that the Governor-General is facing the same as the situation that was considered on another occasion, or is it somehow different?—there is obviously a lot of room for manoeuvre and argument as to whether those conventions apply.

Ms JULIE BISHOP—On the idea of their being justiciable, I think Mr Justice Handley had a scenario where if we took the 1975 scenario the action of the Governor-General in dismissing the Prime Minister would then be subject to constitutional challenge, and it could

then be weeks, maybe months, while the High Court deliberated on the constitutional validity of the act, which would presumably override the holding of an election. I am not sure that he actually elaborated on that. Isn't that the sort of situation we would be seeking to avoid?

Mr Legg—It could certainly create a prolonged stalemate position in terms of your waiting for the High Court to decide what happens and as a result government being in limbo.

Ms JULIE BISHOP—Particularly if it is governing without supply.

Mr Legg—Yes. But at the same time, if the Governor-General did not act and things continued on, you would still have had that limbo for a certain amount of time. The thrust of our argument is that there can be procedural steps which are going to avoid the idea of somebody simply arbitrarily making a decision. It is about forcing the people who were involved to be knowing what is happening and for there to be discussion and negotiation. That is obviously going to be something that takes place in parliament all the time, but it seems to have been the very thing that fell down between the Prime Minister and the Governor-General in 1975.

Mr McCLELLAND—To change tack, in terms of the appointment, the bill has perhaps a double protection mechanism. Not only does the appointment have to be approved by a two-thirds majority but it also has to be seconded by the Leader of the Opposition. That would prevent a situation where one party had an overwhelming two-thirds majority from simply appointing one of its mates, wouldn't it? That is an additional safeguard.

Mr Legg—Yes, I think that is a fair comment. I do note that in relation to the Leader of the Opposition an earlier draft of the bills said 'if there was one' and that has now been taken out. I guess the assumption is that you always have a Leader of the Opposition, even if we have a situation where one political party is so popular that they do have the two-thirds majority in both houses. I guess the question that flows from that, though, is whether you would have the mandate that a Leader of the Opposition would have to be able to say, 'This person is completely unacceptable,' and not second that. It is an issue which I cannot say I have thought of before.

CHAIRMAN—On page 11 of your submission you talked about how the bill alters the Constitution and basically only deals with those redundant areas where the Governor-General is specified, or the Queen, as the case may be. You say:

> This is an idiosyncratic approach to constitutional amendment, as similar clauses will stay or be removed on the irrelevant issue of whether the Governor-General happens to be mentioned. A more consistent approach is needed.

I was of the view that the Constitutional Convention laid down the areas that it thought were minimum areas to be modified in the Constitution in order to move to a republic at this stage, but not to address a total rewrite of the Constitution. In fact, it is my understanding, all the way back from opposition days, that we never intended any constitutional convention to propose a total rewrite of the Constitution.

Mr Legg—That is my understanding as well. I guess all we are suggesting here is that, if there are going to be some sections removed and others not removed, there are obviously going to be sections that can be updated which are not controversial. The example I would give of that is your section 44, talking about the qualifications to be able to be a member of the House of Representatives and references to ages, et cetera. That has been altered by the parliament. We are trying to suggest that members of the public should be able to look at the Constitution, know what it says and understand it. It is not particularly helpful for them to look at that page and go, 'This does not accord with what I thought was the case.' That is all I would say on that point.

Mr CAUSLEY—Could I shift to another section that you probably have not mentioned in your submission. It is the term of the President. Have you got any opinions on the term?

Mr Legg—As far as I understand it, the term is five years and a person is able to be reappointed. No comment.

Mr CAUSLEY—You are happy with that?

Mr Legg—That is fine.

Senator SCHACHT—You said that the submission you put in from the Law Society of New South Wales is agnostic on whether they are in favour of or against Australia becoming a republic. Your submission is basically what we might call technical finetuning of the bill to meet concerns of your society to make sure that it is, in your terms, a better bill technically. If your recommendations were not accepted, is that likely to change the view of the Law Society in any way about not having a view either way on whether we should become a republic? If these amendments to improve the bill were not accepted, does that make the bill for the referendum so unacceptable that the Law Society would then campaign against the proposition to have a republic?

Mr Legg—The comment I can make on that is that it is obviously a matter for the Law Society's council. The policy position at the moment is that the position of not supporting either for or against is based purely on the fact that the Law Society has members who are for and members who are against. We do not see that the Law Society should be advocating a particular position because of that reason. So the position is not determined by how this particular submission is received.

Senator SCHACHT—Accepting the fact that, as in many organisations, particularly like yours, there would be differences of opinion amongst members, do members of your society who favour a republic support these changes technically being made to the draft bill? Let me put it another way. Was there any dispute in the organisation that the amendments being put forward in your submission had overwhelming support, whether people were in favour of or against a republic?

Mr Legg—I can only answer that question from the representation that was on the task force. The task force's view was that there are a number of issues here, some of them more important than others. Those people felt that these changes, these additions, would make a more workable model. There are concerns, such as the stalemate in relation to President and

Prime Minister. We have a feeling that the broader community may react adversely to a situation of uncertainty.

Ms JULIE BISHOP—On page 5.2 you talk about the possible grounds for removal. A whole series of suggestions are raised, including adopting the procedure which is used to appoint, that is, involving the dismissal being considered by the nominations committee, which I must say is an issue I have not thought of before. You go on to speak about the Prime Minister giving reasons and there being, in effect, an address in the House of Representatives by the President and the like.

My recollection is that the Constitutional Convention tried to get around that difficulty by recommending that, if a Prime Minister failed to secure the support of the House of Representatives in the dismissal, it would be seen as a vote of no-confidence in the Prime Minister, which perhaps is a shortcut method of—

Senator SCHACHT—You would get into a bit of strife if you did not get the House of Representatives to support you.

Ms JULIE BISHOP—I think it was seen as a way of ensuring that there was not a drawn out debate in the House about the position of the President. In fact, you have suggested that there be an extension of it and that the Prime Minister be required to give reasons, that the President be given the opportunity to address the House, and the like. As an answer to what you are suggesting, have you thought about the Constitutional Convention's added clause that if he failed to secure the approval it would be seen as a vote of no-confidence?

Mr Legg—My comment on that would be that for a Prime Minister to hold his or her position he or she must already have a majority in the House of Representatives. No Prime Minister is going to sack a President without having consulted his or her own party beforehand. As a result, I do not see that providing the sorts of safeguards that would cause a Prime Minister to pause and think a little harder and a little longer before going through the process that we have suggested here—

Mr CAUSLEY—You are suggesting the same method as used for removing a judge, are you?

Mr Legg—That is an alternative, but the one we are putting forward at the moment is based purely on procedure. It would simply be making minimal changes to the bill, a matter of having the Prime Minister basically explain why the removal was necessary, giving the President the opportunity to reply, and then having the vote for the House. This is obviously going to be something that the public is going to watch with intense interest. If the reasons that are put forward do not stack up, then we argue that that will come back before the Prime Minister at the next election.

ACTING CHAIR (Mr McClelland)—Would you need some way to have a temporary vacancy or to suspend the powers of the President in the interim?

Mr Legg—This is the point we make at the end. Whilst the Prime Minister might be going through these steps and behaving in the correct manner, if the President's powers are not looked at, then as soon as the President is given the notice and is told that he is to turn up to the House of Representatives, the President could dismiss the Prime Minister. I agree that there is a danger there that the procedure could break down. That is why I return to the earlier point that the reserve powers of the President and a Prime Minister's ability to dismiss a President have to be looked at together.

Ms JULIE BISHOP—A number of the problems that you have identified are problems that already exist within the current Constitution. I sometimes feel a little bit confused about why you are not arguing strongly to change the current Constitution in the same terms that you are arguing now.

Mr Legg—Looking at the specific issue of reserve powers—

Ms JULIE BISHOP—Yes, particularly the reserve power.

Mr Legg—I guess the point here is that we are changing the procedure that exists at present in terms of having a Prime Minister who can unilaterally remove somebody, as opposed to giving advice to the Queen. I would follow the argument that was put forward by Chief Justice Mason which was that unilateral removal of the President does not perhaps mirror the way things are at the moment. There may in fact be steps which a monarch may require. I guess the simple answer is: if you are going to change one part of the process, and we believe this is a change, then you should look at the entire process. That is why we would say that we do not see this as being a continuation of the way things are at the moment. It is going to be different and, as a result, it should be analysed.

Ms HALL—So if the referendum question were unsuccessful in November, you would argue then to change the current Constitution to address all these problems that currently exist?

Mr Legg—I guess there are two responses to that. The first is: if it were unsuccessful, you may have to query whether it was unsuccessful as a result of public feeling—

Ms HALL—But would you not still feel strongly about these issues?

Mr Legg—Yes, and that is why the Law Society of New South Wales has had a task force set up for numerous years and looks at these things on a regular basis.

Ms HALL—So you would then argue to change the current Constitution?

Mr Legg—I think the point is that the current Constitution has a process. That process may be imperfect and we recognise that and agree that it could be improved. The process that we are talking about changes, and because that changes, it has to be looked at. If it were a complete replication, then I think the argument that you are putting forward would be valid. Because there are alterations, I do not see it as following.

CHAIRMAN—On that issue, would you argue that there is some other parliamentary democratic system in the world that works better than ours?

Mr Legg—No.

CHAIRMAN—That being the case, why would you find it necessary to mess with something that works well and has only been modified eight times in 98½ years?

Mr Legg—To me that seems a question such as: why would you want a republic? That is the modification and, as I have already said, that is not a question that we are expressing a view upon. If you are going to change one of the balances or checks that exist within the system, you have got to look at the others.

Senator SCHACHT—There are fewer checks in the system now than there are in the proposal. We are actually putting more checks in, Mr Legg.

Mr CAUSLEY—We disagree on that.

CHAIRMAN—Let us not debate the issue.

Mr CAUSLEY—I am usually not that vulgar.

CHAIRMAN—Mr Legg, thank you very much. I thank the Law Society of New South Wales for their submission. We will report to the parliament at 10.30 on the morning of 9 August and we will certainly send you a copy of our report.

Mr Legg—Thank you.

[11.52 a.m.]

LI, Mr Jason Yat-Sen (Private capacity)

CHAIRMAN—Welcome, Mr Li. Do you have any comments to make on the capacity in which you appear?

Mr Li—I am appearing in a personal capacity, and also representing the Ethnic Communities Council of New South Wales.

CHAIRMAN—We have not yet, of course, had a chance to read your submission. Would you like to make a brief opening statement before we try to come to grips with what you have submitted to us?

Mr Li—May I suggest that in my introductory statement I take you through the submission very briefly? Would that be agreeable?

CHAIRMAN—Very briefly, thank you.

Mr Li—There are just two quite straightforward submissions. One has to do with the appointment of the community members to the Presidential Nominations Committee, and the second one is to do with the long title of the bill. Both of these submissions are based on what, in my submission, is a fundamental component of the bipartisan model, and that is the fair and inclusive participation of the Australian public in the procedures for selecting the President.

On the first submission regarding appointment of community models, the participation of the Australian public in this model is crucial, not only in terms of substance—you can see that by the way that the communique of the convention sets out the appointment mechanism of the bipartisan model—but also in the dynamic of the convention. I see that Ms Bishop was there as well and she would probably agree that in order to broker that circuit-breaker between the delegates in support of the pure bipartisan model, that proposed by the Australian Republican Movement, in its original form, did not have any nomination procedure, so wholly excluded the Australian public from any direct involvement in the selection process. To broker an agreement between those delegates and delegates demanding more direct participation of the public in the form of direct election, this nominations procedure was absolutely critical. In that sense, I guess, these submissions are to do with that—that the model as set out in the bill reflect that as much as possible.

The participation was to be as inclusive of all different groups in the community—that, again, is reflected in the way that the model is set out in the communique. It says the process is to ensure:

. . . that the Australian public are consulted as thoroughly as possible. This process of consultation shall involve the whole community . . .

This is in paragraph 2.4 of my submission. Most relevant here is the requirement that the composition of the Presidential Nominations Committee should:

. . . take into account so far as practicable considerations of federalism, gender, age and cultural diversity.

Finally, there is the requirement that the short list compiled by the Presidential Nominations Committee should bear in mind or be mindful of community diversity as well.

My submission is that clause 11 of the Presidential Nominations Committee Bill, which provides for the appointment of the committee members, completely neglects that statement of principle that the committee should reflect community diversity. I understand that the political reality may well be such that the Prime Minister will take those considerations into account anyway but, given the fact that the Constitutional Convention attached great importance to it—it really went to great pains; it took this statement of guiding principle quite importantly, and evidence of that is a late amendment that was moved to include age as one of the factors taken into account—it should be kept in mind. So the ConCon took these sorts of statements of guiding principle very seriously, and it is my submission that as a statement of guiding principle it should at least, at the very least, be included in ordinary legislation here.

So the submission is to amend clause 11 of the Presidential Nominations Committee Bill by adding a sentence. That is simply that the 16 places are to be allocated taking into account, so far as practicable, considerations of federalism, gender, age and cultural diversity.

Just quickly, the second submission is in regard to the long title of the Constitution Alteration (Establishment of Republic) Bill. Presently, the long title reads that the bill is intended:

. . . to alter the Constitution to establish the Commonwealth of Australia as a republic with a President chosen by a two-thirds majority of the members of the Commonwealth Parliament

As you probably know, this long title will appear on the ballot paper on which voters have to mark their choice. My submission is that this long title does not accurately reflect what the bipartisan model does, in that it again omits the crucial role played by the public nomination procedure. The use of the word ‘chosen’ suggests that the parliament’s role is exhaustive and complete and thereby it neglects the role played by public nominations and the Presidential Nominations Committee.

I also submit that the use of the term ‘republic’ is not preferable because the term ‘republic’ is capable of many definitions. It also carries with it political and historical connotations. For certain immigrant or refugee voters their views of a republic might be reminiscent of political turmoil. They might have escaped from republics in order to come to the political stability of Australia. These are issues that are not relevant in the issues raised by this referendum. There is no suggestion that the Constitution will be changed to do away with our stable parliamentary democracy.

So it is my submission that a more neutral terminology be used to describe what is happening. Instead of the word ‘republic’, let us simply use what these amendments in fact

change and how the law will change in Australia, and that is the establishment of an Australian citizen as our head of state. In that way it is much more emotionally neutral. In essence, the proposed amendment is that the long title of the Constitution alteration bill be amended as follows:

A Bill for an Act to alter the Constitution to provide for an Australian citizen as Australia's head of state chosen by a process of public nomination and affirmed by a two-thirds majority of a joint sitting of both houses of the Commonwealth Parliament.

CHAIRMAN—Thank you for that. I have two questions that I would appreciate you addressing about the nominating committee. The first is that the Constitution is not meant to codify—as you would accept, I am sure—everything that happens in the robust parliamentary democratic system that we have. That being the case—and because our Constitution, by virtue of the Swiss model for referendum, has meant that we have only ever had eight amendments to the Constitution in our 98½ years—if we codify that the committee must take into account these specific issues, aren't we prescribing something that may be out of date in 20, 30 or 40 years?

Mr Li—Thank you for your question. The guidance as to the composition of the Presidential Nominations Committee is not in the Constitution alteration bill. It is in the Presidential Nominations Committee Bill, which is an ordinary act of parliament and so may be amended by a simple majority through ordinary parliamentary processes. So, in that sense, it is flexible and can change with time; it will not require a referendum to change it.

The second point is that the wording of the formula 'shall take into account as far as practicable' again allows a certain amount of flexibility there. It exists largely as a statement of guiding principle enshrined in ordinary legislation flexibly to state what, in the view of the Constitutional Convention—and consistent with our rights and our values as Australians, as the Australian community—the composition of that committee should look like.

CHAIRMAN—Half of the committee is 'appointed', if you will, by the Commonwealth and by the states and the two territories as we exist at the moment. Would you maintain that representation would not take into account the diversity of the Australian public?

Mr Li—No. The essence of that particular resolution is that certain groups in the Australian community who may not be adequately represented through members of parliament, who may be marginalised or disadvantaged groups, are able to participate as much as possible in this very important process of selecting the President. So, in a flexible way, the legislation hopefully will provide a guide to the Prime Minister as to the sorts of people that should be appointed as community members and not as representatives of Commonwealth, state or territory parliaments.

CHAIRMAN—The second question goes back to the basis of the appointment of the committee in the first place. The constitutional committee recommended that parliament provide for such a committee and the government has interpreted that provision, as I understand it, to mean that the Prime Minister, in representing the parliament, will determine what individuals serve on that committee. Do you see the bill as reflecting the will of the constitutional committee?

Mr Li—In the sense that it is the Prime Minister who appoints the committee members, I am happy with that aspect of it. I have full confidence that the Prime Minister is able to make a suitable appointment of those people. But I think it is infinitely preferable that that statement of guiding principle be in there.

Ms JULIE BISHOP—In relation to your issue about the long title, the reality is that under the current proposal the nominating committee may provide a short-list of candidates. The reality is that the Prime Minister is not required to accept any of the nominees. In fact, it may end up as a scenario whereby the President is the Prime Minister's choice approved by a two-thirds majority of the members of the parliament, hence the wording of the long title which stands proposed as 'a President chosen by a two-thirds majority of the members of the Commonwealth Parliament'. In fact, the nominating committee might not be, at the end of the day, part of the process. Do you accept that, while it might be unpalatable politically, it is a scenario that could occur?

Mr Li—My acceptance of the fact that the Prime Minister need not necessarily put up a candidate from that short-list is based on an understanding that politically that scenario will not happen. That is complicated by the fact that the report and nominations are to be kept confidential. Looking at the legality of it, although the participants in the report must keep the contents of the report—the short-list—confidential, that does not then prevent them from stating that the Prime Minister's final choice was not on that list; I do not think it goes that far.

Say a Prime Minister, after lots of money has been spent and a presidential nominations committee has been painstakingly appointed, spends months going through public nominations and comes up with a diverse and representative short-list. I think the political reality is that, if the Prime Minister were then to put up his or her own candidate and completely neglect the recommendations of that committee, that would be unpalatable. That is extremely unlikely to happen. So the nominations process in terms of reality—the way it is meant to work—is an integral component in the model.

Ms JULIE BISHOP—But it might be the case that the nominating committee comes up with one or two names that the Prime Minister and the Leader of the Opposition find inappropriate, yet the process is a nomination by the Prime Minister accepted by the Leader of the Opposition and—

Ms HALL—But the Leader of the Opposition will not know.

Mr CAUSLEY—It has to be seconded by the Leader of the Opposition.

Ms JULIE BISHOP—It goes to the Leader of the Opposition.

Ms ROXON—That is the final nomination.

Ms HALL—The final nomination, but not necessarily the short-list.

Ms JULIE BISHOP—Just hear me out. I am not talking about the short-list. The Prime Minister rejects your short-list, chooses a person that the Leader of the Opposition happens

to agree with and therefore the two-thirds majority is achieved by a nomination by the Prime Minister and acceptance by the Leader of the Opposition. I agree with you that it would be an extraordinary situation. But it could occur and it is a reality; therefore your wording—'chosen by a process of public nomination'—might not in fact reflect what happens. Hence, I suspect that is why the Attorney-General worded it along the lines of a republic with a President chosen by a two-thirds majority, because at the end of the day that is how the nomination will get through wherever the nomination comes from.

Mr Li—I think it is important that the long title, in giving an accurate description of the model itself, not focus entirely on a hypothetical or very theoretical academic possibility but reflect as much as possible what in reality will happen. I take your point that theoretically it is possible that this might happen. I would suggest that would be very unacceptable if it were to happen.

Ms JULIE BISHOP—And if it did happen?

Mr Li—If it did happen, there would be an argument that the Presidential Nominations Committee Act, as it would be then, would require further amendment to state that the candidate proposed by the Prime Minister must come from that committee. Otherwise, it will make a joke of the nomination procedure.

Ms JULIE BISHOP—Would you suggest that be an amendment now?

Mr Li—I am sufficiently confident that will not happen and that is not necessary. I have enough confidence in the system of democracy now that that will not be necessary.

Ms JULIE BISHOP—Why not have, as part of the proposal, that the nominee shall come from the nominating committee, if that is your concern, as opposed to leaving it entirely in the hands of the Prime Minister to reject the nominating committee's recommendation?

Mr Li—Now I am speaking on my own behalf and not on behalf of the Ethnic Communities Council. I have tried to keep my submissions here simple and I cut them down to bare bones. I take your point: yes, it would make it cleaner. But I wanted to make as few submissions as possible on the form of the legislation, so I focused on what I thought was absolutely necessary. Looking at it, I was sufficiently confident that the procedure would work well—that I did not need to make that submission—but, if you are looking for an absolutely airtight procedure, yes, that would be a good amendment to make to the bill.

Ms JULIE BISHOP—I understand.

Mr DANBY—I also want to focus on the title of the bill that is before the public and on whether they get to vote or not. You have identified an area that a lot of commentators have said is the crucial area of where this will be decided, including how it is brought forward to the public. In your view, if it went forward as it is at the moment, would that be a decisive or crucial advantage to those who were opposed to the establishment of an Australian as head of state?

Mr Li—It would, absolutely. I do not want to attribute any particular agendas or intentions to those who are against change, but the reality is that there is a high level of ignorance in the Australian population as to our system of government and the term 'republic' conjures up all sorts of images of political turmoil. So, purely in respect of having an informed debate—making sure that the Australian people have the most neutral and non-partisan information possible—I think it is absolutely crucial that the long title accurately reflects what the bipartisan model does.

I know that there is going to be an extensive process of public education and information but I think it has to be expected that that information will not reach all people voting in this referendum. So, in focusing merely on the role of the parliament as choosing the President, a misconception might be had by voters when they read the ballot paper. It is likely that, as they come up to vote, reading the long title will be all voters understand of what these constitutional alterations will do. If it just suggests that the parliament will choose the President, that will be all the voters understand of it—and that will be misleading. So, in that sense, it is important that the full process be explained consistently with the bipartisan model.

Ms JULIE BISHOP—Including the dismissal process?

Mr Li—One has to reach a balance on what reasonably to include and what reasonably to exclude. Because the long title of the bill mentions the appointment procedure now and only the appointment procedure and it does not mention the dismissal procedure, if it is just going to be appointment then let us do that accurately.

Mr DANBY—I think that it is very important to include the reference to the process of public nomination. You might address Julie Bishop's concern by changing the word 'chosen' to 'including'. That might be a way of making it even more flexible and a bit more amorphous while still mentioning the process so that Australian citizens are aware of that important process of public nomination when they are voting on it.

Are you aware of proposals, including one from the Australian Democrats' Senator Murray, to make the bill include references to—as Julie Bishop talked about before—removal by the Prime Minister? Senator Murray's constitutional alteration suggests changing back to the unfettered discretion of the Prime Minister. He says:

. . . a President chosen by a two-thirds majority of the members of the Commonwealth Parliament and removable according to the unfettered discretion of the Prime Minister.

How do you think that would affect the Australian public?

Mr Li—Again, that has the potential to mislead the Australian public in the sense that they might think that these changes will render dismissal a lot more discretionary than it is now. In essence, there is very little change in the dismissal procedure under the bipartisan model from the way it happens now. The only difference is that the letter does not have to be sent to the Queen and, unless she has email, it would probably take a week to get there, during which time Australia would be in a situation of constitutional limbo until the letter back from the Queen arrived. Who knows what the Queen would decide. She may decide to

side with the Prime Minister and act on the advice of her minister—which is consistent with convention. If the Queen decided to side with the Governor-General, would that not then be undue interference by a foreign monarch in the political affairs of an independent nation?

Essentially, the changes to dismissal, in my submission, on the whole are improvements on the status quo in that dismissal is accountable to parliament. Although it is merely a ratification by the House of Representatives, the political fallout from the unjustified sacking of a President by the Prime Minister would be enormous. As somebody said, all political actions have political consequences and it is highly unlikely that the Prime Minister would so sack, because the crucial point about the bipartisan model is that the Prime Minister cannot then reappoint. So there would be no real sense in sacking if the Prime Minister were not to know that he or she would get somebody more amenable to their agenda than the old President.

Ms ROXON—I have a quick question about your proposed amendment to the long title. Would you have any objection if, instead of saying 'to provide for an Australian citizen as Australia's head of state', you actually used the word 'President' rather than the term 'head of state'? Do you have any particular reason for thinking that that will resonate in a particular way with the community?

Mr Li—I use the term 'head of state' merely to be consistent with my point that the terminology be as neutral as possible. If you are going to exclude the word 'Republic' then, by the same logic, you would exclude the word 'President'.

Ms ROXON—So you do not think that that confuses people. If your point is right and many people will vote on this referendum without perhaps knowing more than is actually in the question—which will be the long title—do you think that people will have a good understanding that you are talking about a head of state, a President or whatever you want to call them, rather than the Prime Minister, for example?

Mr Li—I think the term 'head of state' is reasonably self-explanatory—it is the head of the state, literally—whereas the term 'President' is capable of all sorts of definitions and carries connotations with it. This is not an issue that I would die in a ditch over. In selecting the term 'head of state', I was mindful of terms that carry political and historical loads with them.

Ms ROXON—I think that you have said this before—and it might be another issue that you would not die in a ditch over—but would the nomination process as is currently provided for be assisted by the list being made public? Once the committee has gone through its work and the short list goes to the Prime Minister and is made public, or at least made available to the Leader of the Opposition, or to the Senate—

Mr DANBY—Or to the public.

Ms ROXON—That was my original question. Do you think that that would actually bolster the provisions in the way they are currently drafted?

Mr Li—I think it would strengthen the model if that were the case, but I am also alive to the fact that people nominated may not want their nominations revealed to the general public. My impression is that if somebody made it to the final short list of five, that is such an honour already that it is unlikely that the person would not want their name to be publicised—but you never know. So, in deference to those who want to remain confidential, it is important that there be some procedure.

I think perhaps the procedure could be that the people on the short list would be approached to see if they had any problem with their names being publicised. If they did, their name would be left off, but for those who did not have a problem with it, their names could then be publicised and released to the Leader of the Opposition or to the parliament.

Ms JULIE BISHOP—I think one of the problems that arose during the Constitutional Convention on that issue of confidentiality was if it were someone like a presiding High Court judge who was currently presiding over constitutional legislation and the like. I think that was the sort of argument that swayed them in favour of secretive—

Mr Li—That is right. That would be answered by a written request for approval from the Presidential Nominations Committee itself, which would ask, 'Would you object to your name being made public as one of the short-listed people?' If they objected, there could simply be a space left blank.

Mr CAUSLEY—Mr Li, could I take you back to your version of the use of the word 'republic' and your suggestion that we have an Australian head of state. I put it to you that this is probably at the core of the argument between the two groups at the present time, and it is more or less an emotional issue of trying to win public opinion. It does not really get to the detail of the matter. I put to you a suggestion that, in fact, instead of reference to head of state or a republic, in fact we might use the term 'independent free democracy'.

Mr Li—In what context?

Mr CAUSLEY—We certainly will not be a pure republic and we will not be a constitutional monarchy.

Mr Li—Right.

Mr CAUSLEY—So, in fact, instead of talking about a republic we could just use—

Mr Li—The term 'to establish an independent free democracy'. The difficulty I would have with that is that many people would argue that we already are an independent free—

Mr CAUSLEY—Many people argue that we have an Australian head of state, too, at the present time.

Mr Li—I would find that argument inconsistent with the plain words of the Constitution, which states, literally and expressly, that the head of state of Australia is the British monarch and her heirs and successors. I do not really want to engage in that argument. The difficulty

with saying 'to establish Australia as a free democracy' is that, in some senses, that would help the yes case, because it is an intrinsically irrefutable proposition.

Mr CAUSLEY—But the problem is that we are taking sides in this instead of being objective.

Mr Li—I do not think that for the long title to state that the purpose of the alterations is 'to establish an Australian head of state' is necessarily taking sides. It is stating in very unemotional terms exactly what these constitutional alterations will do. They will establish an Australian citizen as head of state without the emotional connotations of using the word 'republic'—whatever that means. A republic is essentially a political entity whereby the people have sovereignty rather than any hereditary monarch. In that sense, the terminology guiding this entire debate is misguided. What this debate is all about is having an Australian as head of state.

Mr CAUSLEY—But I put it to you that there is more emotion involved in talking about an Australian head of state than in talking about a republic.

Ms ROXON—What is wrong with emotion?

Mr CAUSLEY—If you are going to change your Constitution, it should not be based on emotion; it should be based on objectivity and what the protection for the people is.

Ms HALL—I am hearing a lot of emotion now.

Mr CAUSLEY—From that side over there.

Ms HALL—No, from that side over there.

CHAIRMAN—Come on, let him answer the question.

Mr Li—My submission would be for the long title to state that these amendments are to establish an Australian head of state. That is about as objective and unemotional as you can get because it states the pure objective facts about what in fact and in law will happen under these alterations, which is merely that an Australian citizen will be our head of state in place of the monarch of the United Kingdom.

Senator ABETZ—You said that the republican movement and the constitutional monarch movement—the ARM and the ACM—are misguided with the terms or the names they have given themselves. This is really an argument, isn't it, about a constitutional monarchy or a republic, and isn't it fudging around the real issue to use a different term?

Mr Li—I think that is the real issue. The real issue is whether we want an Australian as head of state. The terms 'republic' and 'constitutional monarchy' are the popular way of understanding what those changes in more emotional terms will mean. The bare bones of it in fact and in law are that because there is no universally accepted legal definition or political definition of a republic. But if you were to say that these changes establish an Australian as head of state, I think what that means is beyond argument.

Senator ABETZ—Is there such a definition of a monarchy?

Mr Li—There is a definition.

Senator ABETZ—Every monarchy is different like every republic is different. There are some monarchies that were absolutely draconian just as there were and are republics that are absolutely draconian.

Mr Li—That is right. Perhaps that is an argument for why reference to the monarchy would be inappropriate in the long title. That is not what we are talking about here.

CHAIRMAN—Mr Li, thank you very much for your submission. We appreciate your very comprehensive and frank answers. We will report to the parliament at 10.30 a.m. on 9 August, and we will certainly send you a copy of our report.

Mr Li—Thank you for your time.

[12.22 p.m.]

McLELLAND, the Hon. Malcolm Herbert QC (Private capacity)

CHAIRMAN—Welcome. We have received your very comprehensive submission, replacing your submission of 28 June. Would you care to make some brief opening statements regarding your position before we start to ask you questions?

Mr McLelland—Yes, thank you. The scheme of the submission is to identify particular perceived problems, to explain why I think they are problems and to suggest possible remedies. There are five general subjects in the submissions. They are under headings B to F, inclusive. The first heading relates to the appointment of the President. Two problems are identified and they are both mainly procedural, needing little elaboration. The first is that there does not appear to be any machinery to convene the joint sitting. That should be provided for in two ways: firstly, generally, and, secondly, to enable it to happen before 1 January 2001. I have drafted suggestions to deal with those.

The second procedural problem under that heading relates to the role of the Leader of the Opposition. It seems to me potentially troublesome to have a legal requirement that the Leader of the Opposition second the Prime Minister's motion. Obviously he would if there were bipartisan support, but there may be circumstances in which it is impossible that he do so. It would be very unfortunate if that invalidated the whole procedure.

The next main heading relates to the removal of the President. There are three problems I identify there, all of which are of substantive importance, I suggest. The first relates to the question of a sanction if the Prime Minister is not supported by a resolution of the House of Representatives. I suggest that there should be a sanction which should be substantial and specific and that it should be the removal of the Prime Minister from office and ineligibility to be reappointed unless a general election has supervened between the removal and the reappointment. I propose a possible way in which that could be drafted.

The second problem, under that heading, relates to the actual machinery of removal by the Prime Minister of the President. At the moment, under the present proposal, that is a secret process. It happens without any notification to anybody, simply by the Prime Minister signing a document. That seems to me to be highly undesirable and, dare I say it, almost un-Australian. The purpose seems to be to enable the Prime Minister to get in first in any race to the notices, but it seems to me there is a much better way of achieving that—keeping control within the Prime Minister's hands by preventing dismissal of the Prime Minister without some notice from the President. I have drafted proposals which would give effect to that.

The third problem, which is not really a problem but a suggestion, is that cases may occur, in relation to both a President and an Acting President, where it is quite clear that the office holder should be removed, by reason of illness or some other clear incapacity or unfitness for office. It seems to me that, in such a circumstance, there should be provision to enable that to be done without any complex procedure involving parliament, simply by joint action of the Prime Minister and the Leader of the Opposition. I have drafted a possible way in which that could be achieved.

The next subject heading relates to Acting Presidents. The bipartisan model adopted at the Constitutional Convention has no reference at all to Acting Presidents but it seems to me, on analysis, that the question of an Acting President is the most critical aspect of that model. That is because a singular feature of the bipartisan appointment model is that there is no guarantee that any President will be appointed under its machinery. There is no way of compelling people to agree, and in the absence of agreement there can be no appointment of a President. Therefore it is likely that occasions will arise, bearing in mind that we are looking well into the future here, when the presidential power can be exercised only by an Acting President. That may continue for quite long periods.

Under the present proposal, the supply of potential Acting Presidents is not assured, and it is likely to become more limited when state constitutions are amended to a republican form so that the function, status and nature of a state governor may alter radically. Furthermore, under the present proposal, any Acting President can be unilaterally removed by the Prime Minister just as any President can. That conjures up the spectre of sequential removal by a Prime Minister gone mad of every eligible Acting President, and there may not be more than three or four of them. If that happened, if there was no Acting President and the President had been removed or had died, there would simply be a breakdown in government. That is a possibility which I would suggest every effort should be made to avoid. In paragraphs 5, 6 and 7, under heading D, I have suggested possible ways of dealing with that particular contingency. As I say, I regard that as an extremely important matter, perhaps the most important of the matters which this committee should be considering.

Under headings E and F there are two drafting matters which are self-explanatory. The first relates to the provisions of the present proposal that the executive councillors on the one hand and ministers of state on the other each hold office during the pleasure of the President. That expression ‘during the pleasure’ has an ancient history. There is an argument available—on which I elaborate in my submission—that it could mean that, when a President ceases to hold office, then executive councillors and ministers of state whom that President has appointed automatically cease to hold office. That can be easily avoided by redrafting, and I suggest that it be avoided.

Finally, under heading F, ‘Reserve powers and constitutional conventions’, I think that the third paragraph of section 59 is quite unsatisfactory. The effect of that, as it presently stands, seems to be to convert the conventions into rules of law, which is highly undesirable without very close definition. I was here this morning when Mr Jackson was discussing with the committee that particular provision. Having reflected on what was then said, I would just add a comment. That section—and, indeed, my redraft of it suffers from the same problem—seems to assume that constitutional conventions relate only to the reserve powers of the Governor-General and the President. That is not strictly right. There are constitutional conventions relating to all the powers of the Governor-General and the President, except perhaps those powers that are vested expressly in the Governor-General in Council or the President in Council under the new proposals.

I think that it is highly undesirable to have a constitutional provision which is based on and makes explicit that false assumption. I now think that it is positively undesirable to have the first part of the third paragraph of section 59 in its present form which provides that the President shall act on the advice of the Federal Executive Council, the Prime Minister or

another minister of state. In certain circumstances, the Governor-General presently no doubt acts on the advice of one or other of those three people or institutions but there are conventions which dictate which, in any particular circumstances, is the appropriate source of advice.

If one simply puts in a general statement like the first sentence in the third paragraph of section 59, the suggestion is that in any circumstances the President can act on the advice of any of them. That may not be intended, and certainly should be avoided. Having reflected on the matter in the last couple of hours, I would have thought perhaps the simplest way of dealing with it is to replace the third paragraph of section 59 by something along these lines: 'Any constitutional conventions applicable to a power of the Governor-General immediately before the office of Governor-General ceases to exist shall, subject to any evolution of such conventions in the meantime, apply to the exercise of any equivalent power of the President, but no such conventions have the force of law.' Provision along those lines in place of the present third paragraph of section 59 would seem to me to solve both the problem that I have identified in my submissions together with the problem that arose out of this morning's examination of Mr Jackson. I think that is all I need to say in opening, Mr Chairman.

CHAIRMAN—Thank you very much for that. We appreciate your advice. With respect to item 1, I have asked our counsel to have a look at that. I am not a lawyer, but I suspect you could be right that there is no provision for the joint sitting itself, notwithstanding what the bill says. That is an easily rectifiable matter if that happens to be true.

I am interested in the issue of succession. I was not aware of this, but you said that the Constitutional Convention was quiet on the issue of Acting Governor-Generals or a 'succession model'. Have you thought about this at all: in the scenario which you present as being a doomsday worst-case scenario, if we run out of either state Governors or state Presidents—whatever they are called—would it be appropriate in such a circumstance to add a sentence which simply then put in place the current Chief Justice of the High Court?

Mr McLelland—I think it would have to go beyond the current Chief Justice of the High Court. I think that there should be put in place some default of state Governors, but it should not just be one individual. It should list a whole series of individuals, for example, the Presiding Officers of the respective houses and, in default of them, the senior members of the Senate or whoever. I am just speaking at large here. Obviously, a lot of thought would have to go into who should be on that list. It should be a list in respect of which it can be said that there is no real possibility of the list being exhausted, because if it is exhausted then the government breaks down.

Senator ABETZ—What happens now in relation to the Governor-General? If the senior state Governor acts can't the Prime Minister then write to Her Majesty and say, 'Look, this person is unsuitable. Please withdraw the commission.' The position would then go to the second most senior state Governor, and you would go round the circuit until all your state Governors have been dismissed.

Mr McLelland—I think the Queen might well baulk at dismissing the last one because that would leave nobody.

Senator ABETZ—So what you are saying is that we would still have the reserve power of the monarch available to say, 'This has gone on long enough; I am going to bounce the ball,' and, in effect, call an election.

Mr McLelland—I think so.

CHAIRMAN—How do we create an inexhaustible list?

Senator ABETZ—That is a good point.

Senator Schacht interjecting—

CHAIRMAN—I agree with that, and that is in effect no doubt would happen as a practical solution to the doomsday scenario.

Ms HALL—The government parties would definitely step in if we had a Prime Minister who was systematically working his way through every state Governor. There would be headlines in every paper. It would be an unbelievable situation. This is where commonsense comes in. We are probably taking it a little too far and getting very much into an area of fantasy.

Senator ABETZ—But the parliamentary Labor Party did not try to stop Gough Whitlam and Jack Lang from governing without supply.

CHAIRMAN—Let us let our honoured guest answer the questions because these are, indeed, serious matters.

Mr McLelland—At the moment, you might think that it is hard to imagine all the state Governors being exhausted but, assuming that state constitutions were changed to combine the positions of state Governor and Premier, some change is going to have to occur to make state constitutions republican constitutions. That is one way it may well be done in some states. Then you are going to have a political state Governor, bearing in mind that under our Constitution state Governor is defined to include not only the state Governor but also the chief executive officer of the state if there is no state Governor. So you might have a state Premier being next in line to be the Acting President of the Commonwealth, and the state Premier may not want to be the Acting President of the Commonwealth.

Ms ROXON—Isn't the Chief Justice of the state Supreme Court the Acting Governor in the absence of the Governor in various states?

Mr CAUSLEY—Yes.

Mr McLelland—Yes, at present.

Ms ROXON—Isn't that what we were just talking about?

Mr McLelland—No, we are talking about who occupies the position of Acting President of the Commonwealth.

Mr CAUSLEY—They just change their arrangements?

Mr McLelland—Yes, if the states change. Under the present proposal, the Acting President of the Commonwealth is the longest serving available Governor of a state. 'Governor of a state' under section 110 of our Constitution is defined to mean not only Governor of a state but also chief executive officer of a state. So you do not have to be called Governor to be, within the meaning of our Constitution, the Governor of a state.

CHAIRMAN—With the scenario that you present—that is, if we go through the entire list of those available to serve and have no-one left—if we added a provision that the position then goes to the current Chief Justice of the High Court, would that not solve the potential problem?

Mr McLelland—It would solve the problem provided you could rely on there always being in office a Chief Justice of the High Court who was willing to become Acting President of the Commonwealth. You cannot have an Acting President who does not want to be Acting President. What you say, Mr Chairman, would go some distance but, because of the disastrous consequences of this exhaustion of possibilities, one has to be certain that there is always going to be someone. With the Crown, of course, if the monarch gets assassinated, there is always another monarch popping up somewhere or other.

Senator SCHACHT—Mr McLelland, because of your concern—which, I think, is the equivalent of an argument about how many camels you can put through the eye of a needle and so on—what would you do in, say, 10 years time if, by law, the parliament of Great Britain abolishes the monarchy and establishes a President? What would we do if there were no reserve power and no Queen sitting in Buckingham Palace to stop, as you say, the last Governor being sacked as President? We would have to be back on our own devices, wouldn't we?

Mr McLelland—Certainly.

Senator SCHACHT—It seems to me that what you are raising here is an interesting legal point based on the fact that you believe all Australians are dysfunctional and the whole system is utterly dysfunctional and can fall apart. If we took all this stuff to the nth degree, back in the 1890s, they would never have written a constitution to even get the Federation together, because every possible angle you and others have raised here this morning would have been seen as an objection to it. I do not believe—in all the stuff I have read on the 1890 constitutional conventions—they ever thought all of these things that you have raised were possible. I think they are interesting legal points, but they defy political description—that a Prime Minister sacks the President, does not call parliament and then works his way down the list of Governors and the rest of Australia, and his own party, the parliament and all the other institutions in our community are going to sit still as he calmly works his way down the list. If he is successful in working his way down the list, I would then have to say that all my belief in the democracy in Australia is not worth anything.

Mr Causley interjecting—

Senator SCHACHT—You may believe it is not worth anything. I think our democratic institutions are strong enough to ensure a maniac Prime Minister would be removed by either his party—

Mr CAUSLEY—Are you still making a statement?

Senator SCHACHT—No. We are asking questions about something that is so absurd.

Mr CAUSLEY—That is your opinion.

Senator SCHACHT—It is my opinion, but if we are going to have to argue to the nth degree about this it is an absurdity.

CHAIRMAN—Let us let our guest answer the question.

Mr McLelland—I am not making an assumption that the whole of Australian society is dysfunctional; I am merely pointing out a possible scenario which, if it can be practically provided against, ought to be provided against. It may very well be that this scenario is unlikely, but the unlikely things sometimes do happen and one should be aware of the possibility. I am not suggesting this as an argument against having a republic. Personally, I hope there is a republic. It is not meant to torpedo the idea of a republic at all; it is simply a matter which we ought to be aware of and take such steps as are available to us to make sensible provision against.

Ms ROXON—Isn't that sensible provision already provided for in section 63 of the bill, which says at the start, 'Until the parliament otherwise provides,' and then goes on to deal with the longest serving state governor, et cetera? Doesn't that actually answer all our concerns about a situation where there are not governors in states, or where the premier is the acting governor, or where there is some transitional period where we could not follow that process? Are you really saying that you think it is not sufficient to allow the federal parliament to be able to provide a sensible format as and when the states change their systems?

Mr McLelland—No, with great respect, I agree with what you say and, in fact, in paragraph 7, under heading D, I virtually say as much. This is a matter which can be dealt with by the Commonwealth parliament, but it is a matter which cannot be dealt with until the Commonwealth parliament thinks about it. Because it is an important matter, I would suggest that this committee might consider reminding the Commonwealth parliament that this is a matter which they ought to start thinking about, or somebody ought to start thinking about.

Ms ROXON—Can I just be clear then: you think that this provision potentially works, but your suggestion is that maybe some of those other options, when this committee's work is done, could be part of the consideration for whether there should be some other provision put in at this stage? But you are acknowledging that this particular model could work, even though you were raising some of these fairly scary concerns.

Mr McLelland—Yes, the model can work all right. But I agree with you: it is something that can be dealt with by Commonwealth legislation under section 63, but it should not just be forgotten about. It needs to be borne in mind.

Ms ROXON—Thank you.

Senator ABETZ—If we did have a maniacal Prime Minister that was described before who has control of both houses of parliament, then that Prime Minister, through the parliament, could then determine who the next President would be or who the Acting President would be?

Mr McLelland—He could eliminate Acting Presidents, yes. I tend to respectfully agree with what Senator Schacht said a little while ago. If the Prime Minister has to rely on the whole of parliament to back him up, then one would have thought that sooner or later somebody is going to call a halt to his activities.

Mr CAUSLEY—My question is on a point of law. This bill does provide the Prime Minister with the ability to sack an Acting President or can he sack the subsequent appointed President?

Mr McLelland—He can sack an Acting President.

Mr CAUSLEY—As well?

Mr McLelland—Yes.

Mr CAUSLEY—Because an Acting President presumably is for a short period of time and then another President will be appointed.

Mr McLelland—That is right. But if another President is not appointed for a considerable period of time, the Prime Minister can sack an Acting President. Part of my proposal is that that power be eliminated, that the Prime Minister not have the power unilaterally to sack an Acting President.

Mr DANBY—Your belief is that in addition to the legislation proposed, which you mentioned in paragraph 7, if the Commonwealth parliament made legislation to that effect—and perhaps this committee recommended it—that would strengthen the republic referendum if that was subsequently passed.

Mr McLelland—I believe so, yes. In relation to what Mr Causley was saying, at the bottom of page 3 of my submission, in paragraph 5 under heading D, I say:

The Prime Minister's unilateral power of peremptory removal of a President should not extend to an acting President.

Then I suggest ways of achieving that.

Mr DANBY—Can you just draw that to our attention again?

Mr McLelland—At the bottom of page 3, under the heading 'Remedy', paragraph 5.

Ms ROXON—Can I just clarify that with you, Mr McLelland, because one of our earlier witnesses today—I think Mr Jackson—said that the power for the Prime Minister to remove the President actually did only relate to the President. In fact, the terms of section 62 certainly only use the word 'President' and do not use those words for Acting President. Then when you read section 63, the appointment by the Prime Minister of an Acting President is 'until the parliament otherwise provides'. I may have this wrong. It is really just a question on the technicalities. My understanding was that the Prime Minister's power was limited to removing a President, not an Acting President.

Mr McLelland—It is clear that that is not so if one reads the second sentence of section 63, which states:

> The State Governor is not available if the Governor has been removed (as acting President) by the current Prime Minister under section 62.

It is implicit in that that an Acting President can be removed under section 62.

Mr CAUSLEY—Justice Handley says the same thing.

Ms ROXON—I think everyone would be confused when they read sections 62 and 63 together about whether that is really intended, but I take your point. That is why I was not sure. We certainly have had some evidence that seems to suggest it could not happen that way.

Mr McLelland—There is no other explanation for that second sentence.

Ms ROXON—No, that sentence does not make sense otherwise.

Ms JULIE BISHOP—In relation to the powers of the Prime Minister to appoint, there has been a suggestion in some of the submissions that the way the legislation is drafted means that a Prime Minister could manipulate the position by leaving it vacant. There is no compulsion on his or her part to appoint a President, to actually take a name from the nominating committee, to actually put someone forward to the Leader of the Opposition and then to the joint sitting. Do you think that is an area that ought to be addressed? We can talk about the fact that a Prime Minister would do it at his peril, but it is a scenario that could occur. It has been raised by a number of people.

Mr McLelland—That did not appear to me to be an awful difficulty in the sense that the Prime Minister could only do that with the support of the House of Representatives.

Ms JULIE BISHOP—Say, the appointment of the first President.

Mr McLelland—Whatever the Prime Minister does in that regard, he would have to be supported by his parliamentary party, otherwise he would not remain as Prime Minister, one would assume. He would lose the confidence of his party.

Mr CAUSLEY—Leaders do carry enormous power and strength in their positions. I have seen votes taken one to 19 and two to 18.

Ms JULIE BISHOP—I am just wondering if there ought be a mechanism that triggers the appointment. It has been raised in so many submissions that I just thought I should put it to you, that there is no compulsion on the Prime Minister to actually appoint anyone.

Mr McLelland—In theory perhaps there ought to be a mechanism, but it is hard to think what it would be, because the Prime Minister has got to get the agreement of the Leader of the Opposition and there is no way to compel him to do that.

CHAIRMAN—Mr McLelland, could I ask you in more practical terms: how could the Prime Minister not appoint a President if the President cannot pass into law any legislation?

Ms JULIE BISHOP—He would have an acting—it demeans and manipulates the position—state governor for however long.

Mr CAUSLEY—Acting as President.

Ms JULIE BISHOP—Acting as President and would never actually appoint one under this scenario.

CHAIRMAN—I see what you are getting at. You are saying that two-thirds of the parliament sitting in joint session does not have to approve the Acting President.

Ms JULIE BISHOP—He does not have to put anyone forward.

Mr McLelland—One answer to it may be that if it went on for so long that it was such an obvious abuse that the community would not stand for it, the Acting President may dismiss the Prime Minister for that reason and call a general election.

Ms JULIE BISHOP—I am just wondering whether there should be something in the legislation to deal with that scenario.

Senator ABETZ—What if the Acting President is a state premier of the same party, which is a possibility?

Senator SCHACHT—He may well be. Also you might say, 'Gee, we found out that he is the second cousin of the Prime Minister,' or something like that—a family connection. Where do you start drawing the line? I think that the real issue—as does Mr McLelland—is the pressure of public opinion in a democracy.

Mr CAUSLEY—It has caused things to fall down in the past.

Senator SCHACHT—Nothing is perfect.

CHAIRMAN—I have to say to you that 1996 was a defining moment for me in terms of our democratic system. When we first convened in the House of Representatives, we walked

into the House and, instead of sitting on the left of the Speaker, I went over and sat on the right, and the former members of the government sat on the left. There were no guns, no police, no justices, no anything. It occurred because people had spoken at the election, but there is no real compulsion that makes any of this system work. It seems to me that it works totally by convention. Isn't that right?

Mr McLelland—That is so, but at times of high excitement custom is not as strong an influence as one would hope it would be, and that is why one has to try to anticipate difficult situations. Perhaps if I could just—

Senator SCHACHT—Mr McLelland, can you describe what would be a time of high excitement? We have had 100 years of experience and two world wars, and we had a change of government in 1941—a real crisis moment in the country's existence. It all worked reasonably well. In 1975 we might say that we got the rough end of the pineapple from the then Governor-General, but the system worked its way through in a general process. Can you give me an example of where you think that high excitement may bring the place to an end, where, as the chairman said, we did not automatically go to the other side of the chamber and accept the decision of the people—or accepting the decision in 1983, 1975 or 1972?

Mr McLelland—I think that we have been fortunate in that we have not had that experience in this country, but there have been plenty of places around the world which have, and that is part of history which we have to bear in mind.

Senator SCHACHT—If we go back to that point of saying, 'It happened in Uganda,' therefore, we draw up our Constitution on what happened in Uganda 30 years ago—

Mr CAUSLEY—It happened in Germany in a democracy.

Senator SCHACHT—I know, but you have raised a couple of points on legislation where some finetuning may be necessary. All I can say is that I find it hard to believe that, even if we did not make this finetuning, the arrangements in Australia would mean that this would all come under stress and fall apart.

Mr McLelland—I hope that I have not suggested that that was going to happen. I simply suggest that, if we can predict a possibility and can avoid it easily, we should do so.

Ms JULIE BISHOP—In relation to the bill as it stands, the exposure draft has been changed to the extent that it has included a provision where, on the dismissal of the President, the Prime Minister must seek the approval of the House within 30 days unless parliament has been prorogued. The scenario then could be that, with a change of government in the new election, there is never a time when the dismissal of that President goes before the House. It might be just academic, but should there be some requirement? I am wondering whether your proposals address that precise position—that any dismissal of a President must go before the House, whether there has been an election called or not and where parliament has been prorogued. I guess that is why they have drafted it in that way.

Mr McLelland—May I take you to page 2 of my submission. About a third of the way down that page, in paragraph 3, is my suggestion for this scenario. On the sixth-last line it says:

If, at the time of the removal, the Parliament has been prorogued, or the House has been adjourned, the House shall nevertheless meet for the purpose of considering approval of the removal on the first business day after the expiration of seven days from the date of the removal, unless it has earlier met.

Ms JULIE BISHOP—That parliament has been prorogued?

Mr McLelland—Yes, this is a constitutional overriding of that—bringing the House back specifically for that very purpose.

Senator SCHACHT—So this would override the writs being issued, and the members, although still being paid until the day of the election, are not actually in office?

Ms HALL—Not until retiring?

Senator SCHACHT—I agree with you—that, if this overrides, this is a constitutional change to override all those complications of the proroguing of parliament.

Mr McLelland—Exactly.

Senator SCHACHT—I agree that, if this is in the referendum and carried, it can override it, but I have to say that I suspect the detail will have to be more extensive than your suggestion in paragraph 3. Ms Hall has just mentioned that, if a member is retiring, their office runs out on the date on which the writ is issued; they are not even standing for re-election. There are those issues to be dealt with. I think it is more technical than you put there, but I agree with you that, if it is in the referendum and carried, it can overcome the other constitutional aspects about the proroguing of parliament.

Mr McLelland—I accept that. I do not hold myself out to be an infallible draftsman.

Senator SCHACHT—We do not either.

CHAIRMAN—As an engineer, I can guarantee that I do not even come into play. Thank you very much for your submission and thank you for coming to talk to us. As I have said to others, we will report at 10.30 on the morning of 9 August, and we will send you a copy of our report.

As the Rt Hon. Malcolm Fraser would like to talk to us, would the committee agree to sit until 4.30 p.m. tomorrow in Melbourne? It has been so resolved. Thank you. Colleagues, I am advised that the Monarchist League does not now wish to appear, but to have only a chat to me, so we will adjourn for lunch and resume at 2.15 p.m.

Proceedings suspended from 1.03 p.m. to 2.27 p.m.

WINTERTON, Professor George Graham (Private capacity)

CHAIRMAN—We will recommence today's public hearing into the referendum bills. I welcome before the committee Professor George Winterton. Professor, we have not received a submission from you. Are there issues surrounding these two bills on which you would like to put a brief view to the committee?

Prof. Winterton—Yes, Mr Chairman, there are. Perhaps I could make an opening statement, if that is acceptable. Basically, I thought I would deal with the republic bill first, where I have a few suggestions, and then the Presidential Nominations Committee Bill. I will just go through the points I have in the order of the sections, not necessarily in order of importance—just for the ease of the committee—and then I will make a more general point later about possible change, because I understand the committee is not really concerned generally with the issue of departing from the ConCon resolutions. I do have a suggestion there if the committee is interested. The first provision I want to draw attention to is section 59, paragraph 3, of the republic bill. This is the provision that, as the committee knows, says that the President should generally act on advice, but the reserve powers continue subject to the conventions. Then there is a later provision in the schedule that, as you know, says 'the convention should continue to adapt'.

In paragraph 5.17 of the explanatory memorandum—that is on page 10—it stated that, in the opinion of the writer of the explanatory memorandum, that provision would leave the conventions non-justiciable. I would query that before the committee. The statement in the explanatory memorandum is:

It is not intended to make justiciable decisions of the President in relation to the exercise of the reserve—

the word 'powers' is missed out—

that would not have been justiciable if made by the Governor-General.

But because you have an express provision now in the Constitution in section 59, paragraph 3, referring to conventions, I think it is quite likely that the High Court would regard these matters as justiciable. The only reason they might not is that the word 'convention' is used, but I do not think that alone would necessarily prevent them regarding these matters as justiciable.

I personally think these matters should be justiciable but I point out to the committee that I would suggest that, if it is the wish of parliament that they should not be justiciable, there should be an express provision along the lines of, for example, a provision like this: 'However, the question of whether the President has acted in accordance with such convention shall not be justiciable or shall not be examined in a court of law'—something like that. But I personally would prefer to leave it as it is with the possibility of justiciability.

The second provision I want to draw attention to, if I may, is section 60, paragraph 1, line 3. This provides that the Prime Minister may nominate a named Australian to be

President. I would suggest that that 'may' should be changed to 'must'. The word 'must' is used constantly with respect to the Prime Minister in the Presidential Nominations Committee Bill. I think the word 'may' is inappropriate here because it is certainly intended that the Prime Minister will nominate, and not that the Prime Minister at his or her discretion might decline to nominate, someone to be President. So I would urge that the word 'may' be changed to 'must'.

With respect to section 60, paragraph 2, as you know, the procedure is that the Prime Minister nominates, the Leader of the Opposition seconds and then the parliament would approve by two-thirds majority. The question arises: what happens if there is no Leader of the Opposition? This is not totally fanciful. A Canadian province about 15 years ago had such a monumental landslide election victory that the opposition received absolutely no members of parliament at all. I know it is probably unlikely, but one has to, in a constitution, envisage that possibility. The explanatory memorandum alludes to this in paragraph 6.9 on page 11. It says in the last sentence:

> The constitutional reference to the leader of the Opposition is not intended to create any impediment to the appointment of a President in the unlikely event that the Parliament would not recognise a leader of the Opposition.

But, with all respect again to the people who drafted the explanatory memorandum, I cannot see how this is so because it seems an essential precondition to the election of a President that it be seconded by the Leader of the Opposition. This is in paragraph 2 of section 60.

John Hirst has suggested a form of words which would overcome that problem, and I suggest that something along that line might be considered. He suggested a provision along these lines:

> If there is a Leader of the Opposition in the House of Representatives, the motion can be put to a vote only if it is seconded by that person.

The previous draft of this bill—the draft that was generally circulated but not introduced in parliament—actually went a little further in this respect than the current bill by saying:

> The Leader of the Opposition, if any—

That has been dropped. I cannot see that the explanatory memorandum is correct in suggesting that if there is no Leader of the Opposition the process is not going to be stymied. It does seem an essential pre-condition. I would urge the committee to address that. I do not think the explanatory memorandum is correct on that.

Senator ABETZ—Just to get it clear, are you suggesting that the words 'if any' be included?

Prof. Winterton—I would prefer something along the lines of John Hirst—that is to say, 'if there is a Leader of the Opposition'. But I think 'if any' at least would be better than the current one, which I do not think is adequately addressed, notwithstanding the memorandum. The fourth point is section 61(2). This provides that the President holds office for five years but says that the term continues until the new President is sworn in or takes an affirmation. This has the potential for abuse, as will no doubt be pointed out by opponents of the

republic. In theory, the Prime Minister, especially with the word 'may' in the earlier section, might never nominate a successor.

I do urge the committee to consider a time limit. I think 30 days. In a republican constitution I drafted some years ago, I had a 30-day limit. This was following some other national constitutions in the world. I think there is advantage in flexibility allowing the previous President to continue in office for a while, but I do suggest some time limit. Thirty days seems suitable, or a little longer if the committee thinks that appropriate, but I do not think an indefinite extension is wise. It does lend itself to abuse.

The sixth point relates to section 63 paragraphs 1 and 2, and this refers to the provision concerning Acting President. Each of those paragraphs, 1 and 2, begins with the words:

Until the Parliament otherwise provides, the longest-serving State Governor . . . shall act as President

. . . . . .

Until the Parliament otherwise provides, the Prime Minister may appoint the longest-serving State Governor . . . [if] the President is incapacitated.

I cannot see the reason for those opening words, 'Until the Parliament otherwise provides'. It again lends itself to abuse. In theory, there would be nothing to stop the parliament providing that the Acting President should be the President of one of the political parties. I know it would not happen, but in theory it could. People are always pointing out dangers when you are looking at a referendum. The explanatory memorandum at paragraph 9.10 does not seem to me to give any adequate explanation for those words. I would suggest that they be deleted and the Constitution make the provision and not include the possibility of parliament otherwise providing.

The last point I want to make generally about the Referendum Legislation Amendment Bill is the preamble. I would agree with the explanatory memorandum at paragraph 1.7 which says that altering the preamble to the current Constitution and the covering clauses is not legally necessary for the establishment of a republic. I do not think the Constitution Act, including the preamble, represents any legal barrier to a republic. But I think it would be bizarre if we had a republic, if the referendum is carried, and the Constitution in which it appears begins by saying that it is under the Crown of Great Britain and Ireland.

Covering clause 2 still refers to the Queen as referring to the successors and the sovereignty of the United Kingdom. I would urge that the Referendum Legislation Amendment Bill include amendment of the preamble to the existing preamble by adding another two provisions along the lines that I did in my draft constitution some years ago saying that the Constitution evolved into a constitution under the Crown of Australia and now the Australian people have decided to become a republic and repeal covering clause 2. This could be done under section 15 of the Australia Act. In this respect, I do not think there would be any state opposition, or should be any, to using section 15(3) because this would not infringe on state autonomy since this is purely a Commonwealth amendment. I can see the argument and the reason why the bills have altered the provision regarding section 7 of the Australia Act which would involve the Crown at the state level, but this would be an amendment at the Commonwealth level. I would not have thought that the states would have any objection to use of section 15(3).

There is a more general point about the removal mechanism which I would like to refer to perhaps later, but I move on to the Presidential Nomination Committee Bill. There are only three points that I wanted to raise about that. The first one concerns clause 9(4). This is the provision concerning the appointment of the eight Commonwealth MPs to the Presidential Nomination Committee. I would query whether clause 9(4) is clear enough. Maybe I am just inadequate in my reading of it, but the way I understand how the filling of the eight places would work is that, first of all, all parties with five members of parliament would get one seat. If we look at the current parliament, I imagine that would be four seats filled. Then if that does not fill all the eight seats, you move to the next provision, which is section 9(4).

Parties with 15 MPs get one seat. As I understand it, in the current parliament, that would be three parties. That would bring us to seven. I imagine the intention is that you then go on another round and the largest of the three, probably the Labor Party, would get an extra member. But I do not see any express authorisation in clause 9(4) for doing another round among the 15. Maybe I am reading it incorrectly. There seems to be more concern about having more than enough to fill the eight spots than not filling the eight when you have gone two rounds. I cannot read 9(4) as being totally clear on that. As I say, I would infer that you would start again and a party, which I think would be the Labor Party in the current parliament which has more overall members than the Liberal Party by itself, would get an extra member. I just think that needs clarification. I do not know whether members of the committee feel that I have misread it, but I would urge that that be looked at.

The second comment is just a brief one. In relation to clause 11 with regard to the Prime Minister's filling of 16 community members, I think there would be advantage in expressly stating that the Prime Minister should consider the diversity of the members that is alluded to in paragraph 20 of the communique—that is, to consider federal matters, federalism, gender, age and cultural diversity. The Australian Republican Movement, as I understand it, is urging the same thing—in other words, an express allusion to the ConCon's recognition of diversity. A good model for that is actually clause 22(3) of the current bill which does say that, in regard to the nominations, the diversity of the Australian community should be taken into account.

The last comment on this relates to clause 22(2), which requires the committee to draw up a short list. I notice that there is no minimum number stipulated for the short list, so there would potentially be the possibility of just one candidate being chosen. I do not feel very strongly on this, but I would just query for the committee whether it might not be wise to specify a minimum. I do not think the minimum should be large. I would suggest perhaps three. I just draw the committee's attention to that point. I think there would be advantage in giving the Prime Minister and the Leader of the Opposition a little choice, that is all. As I say, I do have a more general point about the removal mechanism which would depart from the ConCon resolution, but perhaps I can stop there, Mr Chairman, for the moment to see whether there is anything else you wish to allude to.

CHAIRMAN—Thank you very much for that. If I can start at the top of your list, with respect to the conventions being justiciable or not: does it matter?

Prof. Winterton—I think it does. Potentially, if they are justiciable, then the exercise of a reserve power—for example, dismissal of the Prime Minister—could be challenged in the High Court.

CHAIRMAN—Could you say that, if we had a constitutional crisis today, our common law in the practice of the High Court has not moved on to such an extent as would prevent them from deciding to hear such an issue today?

Prof. Winterton—I agree. In fact, I have written on this elsewhere. I have argued that these matters are justiciable. Professor Geoffrey Sawer took that view. Colin Howard took that view. Yes, there is uncertainty, but I think they are currently justiciable. I think that the prospects of them being justiciable are increased by that express provision in new clause 59 paragraph 3.

CHAIRMAN—Considering that the nature of this provision or non-provision is in fact evolving and does so rather naturally of its own accord, need we interfere?

Prof. Winterton—No. In fact, I would urge you not to interfere. My point was to say that I do not think the explanatory memorandum is correct. If the feeling in parliament was that these matters should not be justiciable, and I think the judges would prefer that, from what I understand, then one needs to make an express provision. But I would prefer to leave matters as they are.

CHAIRMAN—One other thing that you did not mention but interests me is that the convention itself talked about the parliament establishing a nominating committee but the bill leaves that role to the Prime Minister. I assume that the draftsman intended that 'the Prime Minister' means 'the parliament'. Are you satisfied with that?

Prof. Winterton—As I understand it, the Prime Minister's discretion is principally with the community members, because the state ones are chosen by the state and the ones in the Commonwealth parliament by the party leaders, by the parties. Yes, I am satisfied with that, especially if you make a provision saying that the Prime Minister should consider those issues of diversity that the communique referred to. I am not unhappy with that.

CHAIRMAN—You suggest 'must nominate' rather than 'may nominate'. Why do you feel so strongly about this?

Prof. Winterton—It seems to me that the word 'may' implies that the Prime Minister has a discretion and may leave the presidency unfilled. That is certainly not the intention, as I understand it.

CHAIRMAN—Regardless of the intention or otherwise, would not leaving the position unfilled lead to a situation where the Prime Minister could not govern in any case?

Prof. Winterton—No. As I understand it, the acting President will be the senior state governor, and it might well be that the Prime Minister, for example, likes the person who is the senior state governor. I think that it would be very bad for the Commonwealth. Particularly with the provision at the moment that the existing President can stay in office

indefinitely, especially with the word 'may', it could easily be read as saying that the Prime Minister may nominate someone after the five-year term has expired or may not at his or her discretion, which is certainly not intended and I think far too loose and open-ended for a constitution.

CHAIRMAN—Is there anything in the existing Constitution that requires the Prime Minister to advise the Queen of his or her requested nomination for a Governor-General?

Prof. Winterton—No, except the fact that the appointment is made by the Queen and one would imagine that the Queen would in fact enforce that and might well say that the term of the current person should expire; might suggest, 'Shouldn't we have a change?'; might suggest, 'Shouldn't we fill the office?' if the office is left open. So the Queen under the current Constitution is authorised to appoint the Governor-General and would represent some enforcement mechanism.

Ms ROXON—I have two questions. The first one is about section 63, where you were proposing that we delete the initial introductory clause 'until the parliament otherwise provides'. We had an interesting discussion about that this morning, where one of our witnesses discussed all sorts of difficulties that might be in place if you could not determine who was the most senior state governor, if you did not have governors because the states will eventually make their own arrangements to sever their relationships with the Queen, if the Prime Minister sacks multiple Presidents, acting Presidents and so on—a whole lot of disaster scenarios. Is there really any reason why it is objectionable for it to remain in there that the parliament can otherwise provide for a process for appointing an acting president?

My second question is about this justiciability matter. I think you were acknowledging that there is disagreement about whether these questions are currently justiciable or not. Could you go through for me in a little bit of detail why they should be justiciable? Why would that be a good thing? If they are there, what do you think the advantages are for strengthening our democracy? I do not necessarily share that view but I am not sure that I fully understand your reasons behind it.

Prof. Winterton—I will answer the second point first, if I may. If the reserve power conventions are left only to the governor or to the President to enforce—or the Governor-General in the current system—there is really no supervisor of the exercise of those powers other than perhaps ultimately some prime minister recommending to the Queen to dismiss the person after the power has been exercised perhaps wrongly. It seems to me that it is always advisable for power to be subject to review. I have sufficient faith in the High Court to feel that, if the matter could be brought properly to the High Court and the High Court could review the exercise of reserve power—for example, Sir John Kerr's action in 1975—this would exercise some constraint on a public office holder, which I think is generally desirable. Nobody should have unreviewable power.

Ms ROXON—But you acknowledge that that is what exists now.

Prof. Winterton—I believe that exists now, but I think that is probably a minority view. As I say, people like Geoffrey Sawer, who is highly respected, and Colin Howard have also taken that view, though I think it is probably a minority view. But it is also the view of quite

a few constitutional lawyers that the position for justiciability is strengthened by paragraph 59(3) because you now have express mention. It is true that you have mention of the word 'convention', but conventions generally are not considered justiciable. The Supreme Court of Canada has illustrated several times over the last few years that they do not regard conventions as non-reviewable. They did this in regard to the secession reference and they did it in regard to the patriation reference.

In short, the answer to the question is that I favour justiciability because I think that review of the exercise of public power ultimately by the High Court is desirable unless there is some other more appropriate mechanism, but here it is either review by the High Court or review by nobody. Therefore, I ultimately favour review by the High Court.

Ms ROXON—This is in some ways against party interest; as a Labor member I know that many of us have views about what happened in 1975. Isn't the review process that is used in that sort of situation really what happened, the calling of another election? The parliament is reconstituted once the people have expressed their view on it, and on other things, of course. Isn't that what our safeguard is now, which would continue to exist if these bills were enacted in the form that they are in?

Prof. Winterton—That is a safeguard, if you like, on that particular exercise of the reserve power. There are other exercises of the reserve power that need not manifest themselves that way. Let me illustrate. Let us assume that the House of Representatives passed a constructive no confidence resolution today, by which I mean that they said expressly, 'We don't wish John Howard to be Prime Minister; we want Ms X to be Prime Minister.' Most people would say that, if that is the expressed view of the House of Representatives, X should be Prime Minister. But if the Governor-General chose to ignore that and leave Mr Howard as Prime Minister, you would think that is a matter the High Court might review, but that would not necessarily be a situation that would lead to any election or review by the people. So I agree with you that some exercise of the reserve power, like 1975, did lead to review by the people, but there are other exercises of the reserve power—for example, a refusal of dissolution of parliament by the President or a refusal to follow a constructive no confidence resolution—that might not be reviewed by the people. Ultimately they would be reviewed at the next election, but that might be well down the track.

On the other point, I accept that. I thought of that myself as the reason why those words were put in there. One possible suggestion I have is something I again did in the draft constitution I drafted some years ago. I made provision for parliament regulating the reserve powers, which I think they actually could do at the moment. There was a lot of opposition, though, to allowing parliament to appear to interfere with the reserve powers, so what I did was suggest that that be done by a two-thirds majority.

In the sort of situation that has been suggested, where basically everyone would agree that this needs to be finetuned because of the fact that the states do not have governors or whatever—and that is quite conceivable, I realise—I think if parliament by a two-thirds majority so provided, this would prevent one party abusing it but still allow room for genuine change. If you added that provision, that might satisfy the potential for abuse.

Mr CAUSLEY—I accept what you are trying to get to but, practically, it has been put to us before: if it went to the High Court—and I assume it would be a priority because obviously it is very important—how long would this process take, though?

Prof. Winterton—I am talking about a review of the removal of the Prime Minister, not the President. The High Court can act immediately—the whole of the hearing—

Mr CAUSLEY—There would be evidence taken on each side. How long would it take?

Prof. Winterton—It could be dealt with in a morning.

Mr CAUSLEY—In a morning?

Prof. Winterton—Yes, I should think so. The High Court can act extremely quickly.

Ms JULIE BISHOP—Sometimes.

Prof. Winterton—Yes, it can—unless they are all on holidays. It could be resolved within a day or so. I really think that is the case.

Mr CAUSLEY—It is pretty important because in 1975, for instance, there was no supply. We could not have the High Court dithering for weeks over whether in fact this was legal or not.

Prof. Winterton—What would have happened in 1975 is that, after the events occurred—that is to say, after Malcolm Fraser had become Prime Minister and supply had been granted—Gough Whitlam could have gone, as I understand it, to the High Court and sought a judicial review of those events. The High Court might or might not. Sir Garfield Barwick, for example, clearly thought that they could not review that, but others might have disagreed. Then, if they had taken the view that Sir John Kerr had acted improperly, the High Court could have issued such a declaration or perhaps an order that Mr Whitlam be restored. There would be supply. There would have been the restoration of Mr Whitlam.

Mr CAUSLEY—But after an election?

Prof. Winterton—No, before the election.

Ms JULIE BISHOP—Proposed section 59 and this third paragraph are troubling me somewhat. I think it was the intention of the ConCon to continue to ensure that the conventions not have the force of law. I do not think it is in the communique, but the discussion was that the reserve powers not be codified and that the convention still not have the force of law. Isn't it then contradictory in section 59 to in effect require the President to act constitutionally in the exercise of the reserve powers yet in accordance with the conventions that are in fact non-binding? He or she is being required to act constitutionally with regard to reserve powers in accordance with conventions that are non-binding. Does that seem a contradiction to you?

Prof. Winterton—No, conventions are generally considered binding. The great difference between a convention and a practice, for example, is that a convention is generally considered to be binding—although not legally binding—as a matter of public ethics and that the political actors regard them as binding. That is generally the meaning of a convention—that it is binding but not legally binding. I do not see any inconsistency, but if you wanted to implement the ConCon feeling—and I agree with you that that is probably what was intended, although it was not spelt out—then I think one needs to make an express provision. As I say, the explanatory memorandum also appears to believe that is the intention, but I do not think the intention is fulfilled by the bill.

Ms JULIE BISHOP—Can I just follow on from that. The other issue about that third paragraph in section 59 is the use of the word 'advice'. The current Constitution speaks about a federal executive council to advise the Governor-General. In this proposed section 59, it says:

The President shall act on the advice . . .

and then lists a series of people upon whose advice he or she must act. Again, does that cause you concern that we have now imported a notion of conjunctive or disjunctive acting on the advice of a series of people?

Prof. Winterton—No, I think that is proper. Indeed, I think that fulfils the ConCon resolution that the powers that are not reserve powers be spelt out as far as possible. I think this is really saying that, in regard to non-reserve powers, the power must be exercised on advice. It is appropriate to spell out the various officers because section 63 of the current Constitution means that the Governor-General and council acts on the advice of the Executive Council. There are provisions in section 61 in the current Constitution which refer to the Governor-General, where the Governor-General does not have to act on the advice of the federal Executive Council but on the advice of the other officers, like the Prime Minister or a minister. I think this is fulfilled by that paragraph.

Ms JULIE BISHOP—It has been suggested by a previous witness today that we do not need the third paragraph of section 59 and that we should delete it. It was suggested that we have no reference to the reserve powers and the conventions, and that we just allow the current situation to stand. It was put to us quite strongly that we do not need that third paragraph and that it is unnecessary. Do you have a comment on this?

Prof. Winterton—I do, absolutely. I totally and fundamentally disagree with that. I think it is essential.

Ms JULIE BISHOP—I should tell you who it was. It was David Jackson.

Prof. Winterton—I am very surprised by that basically because, as you know, the current Constitution confers power on the Governor-General like, in section 64, where it says that the ministers hold office at the pleasure of the Governor-General. The only reason that that is subject to the conventions—as we all know the reserve powers are—is because the Governor-General is exercising the powers of the Crown. That brings in the conventions that have developed in respect of the Crown, first in Great Britain and then in the other

dominions. Once the link with the Crown is cut, as it would be here, there is absolutely no reason why a President should act on these conventions because the monarchy is gone, and so there is no reason why the conventions of the Crown would exist. And that means that chapter II would potentially be read as it stands. We would end up with a situation that Donald Horne parodied years ago in his book, where the country is run by the Governor-General. So I do think that it is absolutely essential.

Ms JULIE BISHOP—There must be a transition?

Prof. Winterton—There must. There must be a provision saying that the current conventions continue to apply notwithstanding abolition of the monarchy. In 1961, when South Africa changed from a monarchy to a republic, they had an express provision, and I suggest that, on this one point, we ought to follow South Africa.

Senator PAYNE—Turning your mind to the drafting of proposed section 70A and the actual continuation of prerogative in that regard, do you think that caters adequately for the issues?

Prof. Winterton—Yes, I do. The earlier provision said prerogative, immunities, properties and so on, and I suggested to the drafters that they ought to consider powers as well. I think they went the other way then and decided that, rather than list all the prerogatives, the general term 'prerogative' would suffice. I think that is probably correct. I think paragraph 70A is adequate.

CHAIRMAN—I have a question by de facto. Senator Stott Despoja is ill and could not be here today, but she did want to ask for your view on incorporating the Senate into the dismissal procedures.

Prof. Winterton—If it is acceptable, I will deal with that in the general point I was going to make about the dismissal procedure.

CHAIRMAN—Yes, go for it.

Prof. Winterton—It seems to me that, in regard to presidential dismissal, there are two models that we can have. One is what I would call the responsible government model, which is really the current system which, in effect, allows the Prime Minister to remove the head of state—the Governor-General at the moment or, maybe, the President in the future. The advantage of that is that it is a swift action. You do not have the President in office, for example, while there is a long, lingering debate about whether misbehaviour or whatever has been established. We have seen with judges, such as Justice Murphy and now even Justice Callinan, debate about whether conduct represents misbehaviour and so on. It means that one person takes the action, the action is immediate and that person is responsible to the House of Representatives and, ultimately, to the people for that action. I can understand that. That is an acceptable model and is certainly the current model. I think the present bill is based upon that.

The ConCon resolution implemented that model and, I think, in fact, it improves upon the current position because it ensures that the House of Representatives considers the

presidential removal, and it also prevents the Prime Minister appointing a successor without taking into account the views of the Leader of the Opposition and of the two-thirds parliamentary majority. That is ultimately why, notwithstanding my reservations, I think the current bill should be supported, and I will urge people to support it.

With the sort of President we have in mind, who is really an impartial, non-political, ultimate constitutional umpire, I do not personally think that the responsible government model is the ideal model, nor is it the one that most republics around the world adopt. What I would call the quasi-judicial model, which would give the President greater security of tenure, is more appropriate. I would therefore suggest—and this now picks up Senator Stott Despoja's point—a provision modelled on the one we have in the current Constitution in section 72 for the removal of federal judges—that is to say, a provision to specify grounds for removal. The grounds for the proved misbehaviour or incapacity of federal judges are pretty clear. I know it has been debated whenever the position has arisen regarding judges, but the grounds seem to me to be pretty clear in the sense that they indicate that, if the person misbehaves or is incapable—which are basically the two grounds—the person should be potentially removed. And I think it should be left, as with judges, to both houses.

If the committee, for example, favoured that but felt that there were a risk that the two houses might disagree, you could have a joint sitting which would, to some extent, mirror the method of appointment—but I do not think two-thirds, just a simple majority. I realise that the committee is somewhat constrained in this and that the intention is that the ConCon resolution be adopted, and that would represent a departure. In short, I am saying that I think the quasi-judicial approach is the more appropriate model. The ConCon took the view that the responsible government model, which is the current position with the Governor-General, is the more appropriate one. In that respect, I think they have actually improved upon the current system.

CHAIRMAN—Taking the Constitutional Convention model as a given, notwithstanding your comments, that model recommended that it be an automatic referral to the House of Representatives in a vote of confidence for the Prime Minister. The bill has chosen to be silent on that issue. Would you care to comment on that?

Prof. Winterton—Yes, in fact that is a point I omitted to mention in my earlier comment. I urge that the bill make an express provision that a vote in the House against the removal of the President be treated as a vote of no confidence. At the moment, that is left open, and I do not think that is adequate. First of all, it does not implement the ConCon resolution. It leaves it completely open-ended. If you envisage the current situation, there could be a House consideration of the Prime Minister's action of removing the President, a negative vote, and then the Prime Minister could seek an express vote of confidence from the House of Representatives, presumably obtain it and say to the President or Acting President, 'Well, I know I lost the vote on the removal of the President, but I have received an express vote of confidence and, therefore, I can continue in office.' And, according to the current conventions, that would be the case. I think the bill should follow the ConCon and specify that such a vote be treated as a vote of no confidence—which means, basically, that the House should be dissolved and there should be a general election to allow the people to judge.

CHAIRMAN—I have two more questions, and let us try to go as quickly as we can because we need to move on.

Ms ROXON—If you did use the second model, the quasi-judicial model, what would stop a President, once an allegation of misbehaviour was made against him or her, dismissing the Prime Minister, as is within his or her powers, before the case has been brought? It is slightly different with a judge—and I am not sure what view I have on this—but what would stop the President then saying, 'Before this happens, I am going to—'

Prof. Winterton—Nothing would. That demonstrates one of the problems with the current model in the sense that everything depends upon the Prime Minister with the current removal mechanism. You can stymie removal in the current system by removing the Prime Minister and, if you envisage a President who is misbehaving, why would the President stop at that? Whereas if you look at the section 72 procedure, for example, the House and the Senate are able to act, and I would envisage a provision saying that they cannot be dissolved once the procedure begins so that it does not depend upon one person. In your scenario—that is, if the Prime Minister were removed—that would still leave the House and the Senate intact and able to judge the President.

Ms ROXON—You would potentially be in a situation where you do not have a Prime Minister or a President. It requires a lot more thought. The responsible government model that we have got presumably works quite well unless you are going to change a whole range of other things, because your suggested model cannot work without instituting all of those other provisions.

Prof. Winterton—You would need to make a different provision for removal and you would need to ensure that the House and the Senate cannot be dissolved once the procedure has begun. That is about all. The current mechanism does have the deficiency that it all depends upon the Prime Minister. You remove the Prime Minister and then the President can carry on regardless.

CHAIRMAN—But, Professor Winterton, the Constitution does not even name a Prime Minister?

Prof. Winterton—It does now, doesn't it?

CHAIRMAN—Not yet.

Prof. Winterton—Not the current one, but it will here. And it will also refer to the Leader of the Opposition.

Ms JULIE BISHOP—Firstly, in your quasi-judicial model, would you give the President the right of reply to the reasons for dismissal? Secondly, the bill as it has been amended subsequent to the exposure drafts has included a provision where the necessity to seek the approval of the House is suspended where parliament is prorogued. An election is held, there may or may not be a change of government, and the dismissed President never has his position put before the House. Could you comment on that scenario as well? It is sort of under the umbrella of natural justice for the President.

Prof. Winterton—As I understand it, the provisions dealing with the situation where the House is basically dissolved are that, in a sense, the electors will judge. I would imagine the President would put his or her position to the electors.

Ms JULIE BISHOP—It might not be on that issue though. Parliament may well have been prorogued for entirely different reasons than the dismissal of the President. The election might be fought on different grounds.

Prof. Winterton—It might. There would be a general election and one cannot imagine that, if there has just been a dismissal of the President, that would not be a factor in the election. The public might consider that not worthy of serious consideration in the voting, but I would certainly imagine the President would have the opportunity of putting his or her case to the public. As I understand it, the change is reasonable because it means that the President would have an opportunity to be heard either by the House of Representatives or, if there has been a general election, by the public.

Ms JULIE BISHOP—So under your quasi-judicial model, he would have the right of reply?

Prof. Winterton—I would definitely think so. For example, if you used the words 'proved misbehaviour', that has generally been understood as meaning there is a certain standard of procedural fairness that has to be established. A judge, under the current section 72, would have an opportunity to be heard in order for the misbehaviour to be established as proved.

It is true that this bill makes no provision for the President to be heard by the House. That is something that could be added. Certainly that would be desirable. I would think practice would certainly indicate that, if the House of Representatives is reviewing the Prime Minister's actions, it would give the President a fair hearing. I agree that, if you do not want to leave it to political practice and you want to make an expressed provision, there would be advantage in it.

CHAIRMAN—Professor Winterton, thank you very much for coming to us today and raising these important issues. As I have told other witnesses today, we will report at 10.30 in the morning on 9 August. We will certainly send you a copy of our report.

Prof. Winterton—May I thank the committee very much for giving me this opportunity.

CHAIRMAN—Thank you.

[3.12 p.m.]

BARNS, Mr Gregory, National Campaign Director, Australian Republican Movement

TURNBULL, Mr Malcolm Bligh, Chairman, Australian Republican Movement

CHAIRMAN—Welcome, Mr Malcolm Turnbull and Mr Greg Barns. Thank you both for coming to talk to us today. We have received your submission. Would you like to make a brief opening statement or statements to the committee before we start our intensive questions?

Mr Turnbull—Thank you, Mr Chairman. The Australian Republican Movement compliments the Attorney-General and the government on the drafting of this legislation which reflects overall the intent of the resolutions of the Constitutional Convention consistent with the Prime Minister's commitment at the end of the Convention. There are three specific issues that we want to raise, but I just have a couple of general propositions to put to you and, in a sense, they follow from what Nicola Roxon was saying earlier in Professor Winterton's testimony.

Looking through the submissions, it is very easy to conceive of complex and problematic scenarios arising in any constitutional arrangement, including our Constitution as it stands and including the Constitution as amended. However, it is important to bear in mind that there are no defects in the model as proposed which are not already defects in the system we have at the moment. Also, there is a great tendency for some people to postulate bizarre scenarios as though public opinion, politics, the press and the nation did not exist.

For example, I understand one of your witnesses this morning said, 'What happens if the Prime Minister sacks the President and then proceeds to sack each of the six State Governors as they come through as Acting Presidents, and then presumably the Lieutenant Governors and so forth?' It is an interesting question, but is it any more than a legal parlour game? The fact of the matter is we live in a practical, political world where, as members of parliament, you know better than anyone that the boundaries and the limits on your conduct are as much imposed by the political environment and the public debate that you live as they are by the words of any particular statute or constitution.

It seems to us, nonetheless, that the legislation ought to do at least two things. In the context of the long title it should fairly represent and describe the nature of the bill being put to the people on the referendum. And in respect of the mechanics of both the constitution amendment bill and the nominations procedure—which is as recommended by the Convention, ordinary legislation, and so not coming up on the referendum ballot paper—it should more closely represent what the Convention recommended.

I will deal with the long title first. We feel that the long title is deficient, as currently drafted, and we identify three respects in which it is deficient. It fails to mention a very crucial element of the bipartisan model adopted by the Convention, that is, the nomination process. That was a very, very key element. It does not indicate the single most important part of the change, which is the replacement of the Queen as Head of State with an

Australian citizen. That, after all, is what this is all about and that should be in the long title. It also uses the word 'chosen' to describe the two-thirds parliamentary majority process, and this is inconsistent with the Constitutional Convention's resolution, and indeed the Attorney-General's second reading speech on the bill.

Therefore, we would submit, for the reasons in our submission, that the long title should read as follows:

A Bill for an Act to alter the Constitution to provide for an Australian citizen to replace the Queen as Australia's Head of State following consideration of nominations submitted by the people and approved by a two-thirds majority of a joint sitting of both Houses of the Commonwealth Parliament.

That is strictly accurate, and it also makes it clear that what we are talking about is replacing the Queen. We can go into that in further detail if you wish in your questions.

In the dismissal procedure, we submit that the reference to a no confidence motion should be inserted in the legislation. We entirely understand and respect the Attorney-General's reasons for not putting it in there. You can say—as I think we said in the submission—that putting it in there is a case of belt and braces. It is somewhat superfluous. We all know that a Prime Minister who removed a President and who did not have overwhelming support in his or her party room, his or her cabinet, and the nation at large, would be dead political meat long before 30 days were up. This is belt and braces. But, the omission of those words is being used every day by the opponents of this legislation as a reason for voting against it.

It seems to us that both the government and the parliament should not deviate from the language of the Convention recommendations where in doing so they actually provide arguments for the proponents of the no case. It is one thing for the government to say, 'That's what the Convention recommended, good luck, let's see how it goes,' but it is another thing to make changes which actually strengthen some of the arguments for the no case. We have to remember that not everybody who is debating this or discussing this or reading this legislation is as politically experienced as you are, and indeed some of us non-members of parliament may be.

A lot of people look at that omission of the reference to the motion of no confidence and say, 'This means that the Prime Minister can get away with it.' Given that it does no harm having it in there, and given that it was recommended by the Convention, we think it should be in there. I do not recall any member of the government, including the Attorney-General, criticising its inclusion at the time. Therefore, we respectfully submit that the Convention's recommendation should be respected.

The second of the two points after the long title issue, which again falls into a similar category, relates to the criteria for membership of the Presidential Nominations Committee. As you know, the Convention—and this was a matter upon which there was considerable discussion—set out a number of criteria in order to ensure that the non-parliamentarian members of the Presidential Nominations Committee were genuinely representative of the diversity of Australia. There were a few mutterings about political correctness and so forth, but that was what the Convention overwhelmingly endorsed.

The explanatory memoranda to the bill suggests that the Prime Minister would take this into account, but again it is not stated in the bill. It is difficult to conceive of a Prime Minister who would be so insensitive to public opinion, or so arrogant, as to appoint, as a lot of people suggest he or she might, 16 middle aged white males from Sydney or Melbourne—presumably members of the Melbourne and Australian Clubs, and the law societies. Again, I am very comfortable that that would never happen. Why? Because public opinion and sentiment would never allow it to happen. But what is lost by faithfully reflecting the Convention's recommendation?

I fully understand that you would want to be assured that that was not reviewable or justiciable. You would not want somebody going to court and saying that because a Tasmanian or a South Australian or someone from the far north of New South Wales was not included that therefore the Prime Minister had failed to take into account the criteria in the bill. It should be there as language that gives an additional reminder to the Prime Minister of the day. Of course, that Prime Minister may not be today's Prime Minister, it may be a Prime Minister less concerned about the recommendations of the Convention. We should have it there as a salutary encouragement for Prime Ministers to take into account the intentions of the Convention.

Again, I can see no harm in having it there, and certainly some good. From a political/moral point of view, this falls into the same category as my previous point: I do not believe the government or the parliament should deviate from the recommendations of the Convention where, in doing so, it provides ammunition to the proponents of the no case. I have had to defend the lack of these words on half a dozen occasions now and I expect, if they are not put in here, I will be doing it every day for the next four months. With respect, Mr Chairman, the advocates of the yes case should be entitled to be defending legislation which reflects the Convention that the government and, of course, the opposition as well undertook to see through the parliament. Those are our submissions.

CHAIRMAN—Thank you very much for that, Mr Turnbull. In the first dot point that you make in respect of reviewing the language of the long title, or the distinct words, you say the long title:

. . . fails to mention a crucial element of the bipartisan model adopted by the Convention, namely, the nomination process.

But in fact the nomination process is a bill which will not be submitted to referendum and will not in fact result in a change in the Constitution.

Mr Turnbull—Yes but the constitutional amendment to section 60, new section 60, says:

After considering the report of a committee established and operating as the Parliament provides to invite and consider nominations for appointment . . .

So while the nominations committee bill is not part of the Constitution—and there are very good reasons for that being the case because, as the Convention said, this mechanism, this practice, will evolve with experience—it is expressly reflected in section 60. It is not as though section 60 simply says, 'The Prime Minister shall move and the Leader of the

Opposition shall second.' There is express reference to a committee established by parliament.

CHAIRMAN—If we accept that argument, then why should we accept the argument that we must today nominate the diversity of the Australian public who will serve on the nominating committee? I am reasonably confident that if the Constitution has continued to last—it being some 98½ years old now—then those conventions and, in fact, the distribution of age, gender, ethnicity and everything else amongst the Australian population will continue to evolve and, 200 years from now, heaven only knows what it will look like—except that none of us will be here.

Mr Turnbull—That is a fair point, Mr Chairman, subject to one proviso, which is that the Presidential Nominations Committee Bill is an ordinary act of parliament. So if, for example, subsequent generations of Australians felt that these issues of diversity, geography, gender, ethnic background, et cetera, were irrelevant and that it would be better to have the 16 community members chosen by the bar associations of Sydney and Melbourne—an unlikely outcome, one would think, but let us assume it for the moment—it is open to parliament to change the legislation. So there is a big distinction between the Presidential Nominations Committee Bill and the constitution amendment bill, because the latter, if it is passed by the people in November, will of course require another constitutional referendum to change.

Again, I just do not see any harm in making reference to this and to say that the Prime Minister shall, without being bound so to do, have regard to X, Y and Z. Again, that just provides a fair reflection of the Convention. A Prime Minister could ignore it, but he would ignore it at his cost.

Ms JULIE BISHOP—Mr Turnbull, could I go back to the proposed section 62—the removal of the President—and your point about there not being incorporated the reference to it being a vote of no confidence. Would you agree that section 62 is currently somewhat obscure in that it does not specify what would happen or what the consequence would be if the Prime Minister did not, within 30 days, seek the approval of the House of Representatives? Practically speaking, there would be an outcry, presumably, and political process would have its way.

But, in something as important as this, would it be better to have some sort of provision that if the Prime Minister did not seek the approval of the House of Representatives within the period he ceases to hold office and the Acting President—because the President has been dismissed—would presumably call an election? It is almost saying it is a vote of no confidence, but it is actually putting in place a mechanism whereby you do not get a Prime Minister who just refuses to seek the approval of the House of Representatives because he does not want to be put to the numbers.

Mr Turnbull—I think we need to be very careful to ensure that these changes faithfully reflect the traditions of responsible government in Australia which do place a great weight on the responsibility of the Prime Minister to the House of Representatives. I recognise the force of your proposition in the sense that you are saying, 'What happens if a Prime Minister does not comply with the Constitution; he does not bring it to the parliament for

ratification?' It would seem to me to be inconceivable that a Prime Minister could survive in circumstances like that. With respect, I think you may be erring on the side of taking too little account of public opinion. No Governor-General has ever been removed. Consider what an enormous step it would be to remove a President. For a Prime Minister not to comply with the Constitution is just politically inconceivable.

Ms JULIE BISHOP—I was picking up on your point, actually, that you want the words 'it is deemed to be a vote of no confidence in the Prime Minister' there for a belts and braces approach. I am suggesting: why not really give it some force and say, 'If he doesn't act in accordance with the provisions here and doesn't seek the approval of the House of Representatives, then he ceases to hold office and the Acting President call an election'?

Mr Turnbull—It is very probable that the Acting President would have the right to remove the Prime Minister under the conventional reserve power exercised by Philip Game in respect of Jack Lang in 1932 and arguably by Sir John Kerr in 1975—that is to say, the power to remove a Prime Minister who is in flagrant or persistent breach of the Constitution. This would be about as persistent as it would be. It would seem to me that you have got enough protection in the conventions as they stand. My reason for suggesting that the reference to no confidence be put into the section is that it faithfully reflects the ConCon's recommendation; and it allays concerns of citizens who look at what the Constitutional Convention recommended, see where this legislation deviates from it and say, 'Ah ha, there must be a reason for that,' and find the perfectly sensible arguments of the Attorney-General unconvincing. There is no way that any of the defects we have identified here, or the two defects to the legislation, are fatal or will affect in any way the substantive working of them. But I think it is important to bear in mind that these laws are not just for lawyers; these laws are for ordinary citizens to read and get some force from.

Ms JULIE BISHOP—In other words, it is more of a perception problem—

Mr Turnbull—Correct.

Ms JULIE BISHOP—that the public would see this as some unfettered power on the part of the Prime Minister to sack a President, without thinking through the consequences of what that will mean, if you do not say it is a vote of no confidence.

Mr Turnbull—The number of times on the hustings, as it were, we have confronted our opponents saying to us, 'A Prime Minister can take it to the House of Representatives for ratification. If they don't ratify it nothing happens to him—he just continues being Prime Minister. It is not a vote of no confidence because it has not been said to be so.' You see, you can look at the Constitutional Convention's recommendations as a draftsman and say, 'Well, that is unnecessary, that is unnecessary, that is unnecessary.' I think one should not deviate from the Convention's recommendations unless you really need to do so to prevent some mischief.

Clearly, to include that language would not undermine the intention of the Convention. It is the Convention's intention and it would be perfectly workable. A Prime Minister whose decision was not ratified would be finished. It is theoretical, as Professor Winterton said, that it could be not ratified. His own members could cross the floor and vote against him on that

and then solemnly pass a motion of confidence in him, or her, continuing to be Prime Minister. You are getting into the realm of fantasy there. But, sadly, it is where a number of the debaters in this argument live sometimes, and it is important not to give them any more ammunition than we need to.

Mr CAUSLEY—Which side?

Mr Turnbull—I will leave you, Mr Causley, to allocate the fantasy awards.

Senator ABETZ—There is a lot of discussion about the long title because the long title will be the question that the punters are going to read when they decide to cast their vote. It is interesting how you have suggested in your submission that it ought be worded, because I would have thought the average punter reading that would say that the head of state was to be appointed following consideration of nominations submitted by the people and approved by two-thirds majority of the parliament. Where would the punters get to read in that long title that the Prime Minister could absolutely ignore the nominations of the community? And whereabouts in that long title is there the suggestion that in fact the approval, if we use that term, is by two-thirds majority, because it sounds as though parliament has really got to be a rubber stamp and it has no active voice in the matter other than to approve it?

Mr Turnbull—It is not a rubber stamp at all.

Senator ABETZ—It is bit like, let us say, the Governor-General at the moment signing off on a piece of legislation: it is anticipated that that is what would happen.

Mr Turnbull—I think the requirement that the nomination have the support of both the Leader of the Opposition and the Prime Minister ensures that the two-thirds majority is there. It is inconceivable, in a practical sense, that the two-thirds majority would not exist, given the support of the leaders of the two majority political forces in the parliament. It would certainly be open to put the bipartisan element into this. But, of course, you have to balance between a long title and an extremely long title. I do not think, as a matter of principle, we would have a problem with a reference to 'with the support of both the Prime Minister and the Leader of the Opposition', or words like that, being included. I do not have a problem with that. It is, after all, the single most politically appealing element of the model, leaving aside the removal of the Queen.

Senator ABETZ—But your opponents have got a slogan to the effect of 'vote no to the politicians' President', or something of that nature, that I think I have seen on a bumper sticker somewhere. Is that right, Senator Payne?

Senator PAYNE—I do not know, Senator Abetz. I just imagined you had seen it, that was all.

Senator ABETZ—Something of that nature.

Senator PAYNE—On the back of his car—when you put things in the boot, perhaps, Senator Abetz.

Senator ABETZ—No. In fact, Senator Payne, as with so many of the enthusiastic republicans, they are wrong.

Mr Turnbull—There is no doubt that our opponents are doing everything they can—

Senator ABETZ—Many people would be surprised to know what my view is on all this, but that is an aside. The question that I want to ask you is: don't they have a point and couldn't they come before us and argue that the title ought be that the person that is accepted by the Prime Minister and Leader of the Opposition and then ratified by two-thirds is in fact the politicians' President? Whereas you guys are very desperate to put the other side, which is that it is all community lovey-dovey, everybody is involved and it is going to be a consensus candidate—that is your view. Whereas the ACM puts the view the person that we get could be as a result of a nasty deal done between the Prime Minister and the Leader of the Opposition, nobody else involved, and they then using their party numbers in the parliament to steamroller it through, completely ignoring the community consultative process.

CHAIRMAN—Can I say he has asked my question, in 200 more words.

Senator ABETZ—Only because of the interruptions.

Mr Turnbull—Senator, just address this: the ACM are endeavouring to not only take advantage of but to promote in the community a contempt for the representative institutions of which you are part. What they are seeking to take advantage of and promote is popular distrust of politicians, including you and every single member of parliament around this table. It surprises me that a committee like this would want to further that. The fact is that the Queen was chosen by heredity and the laws of the British parliament, laws which are made by members of a parliament elected by the people, but not the Australian people. The Governor-General is not chosen through a sleazy deal between the Prime Minister and the Leader of the Opposition, he is chosen by the Prime Minister and his good self looking in the mirror as he has a shave in the morning, or on whatever other occasion.

Mr CAUSLEY—It is usually discussed in cabinet.

Mr Turnbull—That may be right, Mr Causley, but there is no requirement for that to be the case.

Senator ABETZ—It is the same under this. I know you want to use the time to bag the ACM a bit and I can understand that but, with respect, the question I asked was: can't you make out just as convincing an argument that, rather than following consideration of nominations submitted by the people, it could be simply those two people getting together to determine whom the nominee ought to be and then steamrolling it through the parliament?

Mr Turnbull—You have to reflect the legislation. It is one thing for a long title to engage in political rhetoric, which I do not think anyone would be in favour of, but it is another thing for it to be positively misleading. Section 60 of the Constitution amendment bill says:

After considering the report of a committee established and operating as the Parliament proposes provides to invite and consider nominations for appointment as President, the Prime Minister may . . .

What does the long title that we have proposed say? It says 'following consideration of nominations submitted by the people'. If you go on and say, 'consideration of nominations provided by a committee which has, in turn, considered nominations by the people', then the difficulty is that it gets too long.

The fact is that the committee will consider nominations by the people. Every nomination the committee receives will come from a person each of whom is a member of the Australian people and it will, in accordance with both the nominations committee bill and the Constitution itself, submit some nominations to the Prime Minister. I say this with great respect: I think the arguable point that you make is that there should be reference in the long title to the support of the Prime Minister and the Leader of the Opposition. The only reason we did not include that was because of length. If you put it in, it does not concern us particularly, as long as the language is reasonably clear and elegant, because the bipartisan support element is a very important one. It does us no harm at all. One of the arguments that we have in our case is to say that at the moment you have a Governor-General appointed by the Prime Minister—Mr Causley says, with the support of his cabinet, but nonetheless by the Prime Minister—presumably with the support of his party. Under this, you need the support of the opposition as well. That introduces an element of bipartisanship.

Senator ABETZ—Isn't the bottom line, in the question of who is going to become the President, the two-thirds majority of the parliament? You could have this nominations committee getting together and thinking that it is a wonderful idea to nominate X, but the Prime Minister rejecting that. You could have the Prime Minister and the Leader of the Opposition thinking that Y would be an excellent nominee, but unless that two-thirds majority of the parliament is able to be delivered, nobody is going to become President. Given that that is the final requirement for somebody to become President, I would have thought that the long title, as it currently stands, is more reflective than trying to go the nominations committee way or the Leader of the Opposition and Prime Minister way.

Mr Turnbull—Let us look at what the statute actually says in section 60. First, it says that there is a report of a committee which is considered. That is there at the beginning. The Prime Minister moves that an Australian citizen be chosen as President and, if it is seconded by the Leader of the Opposition and affirmed by a two-thirds majority, the named Australian citizen is chosen as President. So you have the following elements: consideration by a committee, motioned by the Prime Minister and seconded by the Leader of the Opposition and a two-thirds majority.

Again, I do not cavil with your point that there should and could be reference to the Prime Minister's and the Leader of the Opposition's support. Again, it is a question of how long you want to make this, but I do not see how you can fairly remove reference to the consideration of the Nominations Committee because it is actually in the statute. The Prime Minister and the Leader of the Opposition can consider it and they can ignore it. Again, we are in the realm of political fantasy to imagine that that would happen.

Senator ABETZ—Why?

Mr Turnbull—Do you really imagine that if a bipartisan committee with 16 representatives from the community and representatives from every state and territory parliament produced, say, five names on a short list, the Prime Minister and the Leader of the Opposition—each of whom would be represented on that committee—would then propose to tear it up?

Senator ABETZ—It is a confidential list, isn't it?

Mr Turnbull—It would not remain confidential for very long if it was ignored.

Senator ABETZ—Then the people would be breaking the requirements of holding office on the Nominations Committee. Are you suggesting that would happen?

Mr Turnbull—Every time there is a leak out of the cabinet, there is a breach of the law and yet they happen almost as often as there is a cabinet meeting. Again, I think we have to be careful not to get into fantasy land here. There are those elements. The statute says: consideration by a committee, the PM, the Leader of the Opposition and a two-thirds majority. It begins at the nomination; it concludes at the two-thirds majority. They are the two elements that we have referred to here.

Senator ABETZ—But the only thing that can be completely dispensed with is the Nominations Committee. You cannot dispense with the Prime Minister moving it, the Leader of the Opposition and the two-thirds majority, but you only want the nomination.

Mr Turnbull—With respect, you are not right. The statute says that they have to consider it.

Senator ABETZ—Yes, but dispense with it. They can say, 'We have considered it, but we reject it.'

Mr Turnbull—Please read what we said in the draft long title. We have not said 'slavishly following the nominations from the committee'. We have said 'following consideration of the Nominations Committee'.

Senator ABETZ—But the average punter would read it as such.

Mr Turnbull—I do not know what racegoers' attitudes to this are—I do not know about punters—but if by that you mean voters, citizens, then I think people understand that 'consideration of nominations' means that you take them into account. It does not necessarily mean that you have to slavishly follow them. Bearing in mind that the Prime Minister and the Leader of the Opposition will be represented on this committee: do you imagine that the Prime Minister and the Leader of the Opposition would not, if they wanted Joe Smith to be the President, ensure that Mr Smith's name was on the short list?

CHAIRMAN—I think we understand Mr Turnbull's views on this issue and when we want to argue this issue ourselves, when we decide to write a report, we will do that, Senator.

Mr McCLELLAND—If I can summarise the debate though, we had evidence from the Department of the Prime Minister and Cabinet saying that there was going to be these two conflicting arguments as to what should be in the long title, but page 2 of your submission, as I understand it, suggests that the current wording 'chosen by a two-thirds majority of members of the Commonwealth parliament' is actually misleading in the sense that the parliament itself does not have the power to choose; it has the power to approve.

Mr Turnbull—Yes, or to ratify. I recognise that 'choose' is used in the statute, but it says, 'Following the vote, the named Australian citizen is chosen as the President.' There is a subtle difference. The long title says 'the two-thirds majority chooses'.

Mr McCLELLAND—As a conclusion of a procedure?

Mr Turnbull—Yes. Really, we are saying that there is a nomination by the Prime Minister and the Leader of the Opposition, having taken into account the report of this committee, and that nomination is either approved or not approved. If the two-thirds majority had the ability to choose, it would presumably be able to move that another person become the President, which it does not have the power to do. So I think, whether it has used the word 'approve' or 'ratify', 'approve' is the better word because it is more vernacular; it is a simpler word and more accurately reflects the process. It is a bit like, say, a shareholders' meeting for a company.

I could move that Mr Barns be elected a director, and the meeting could approve that, or they could disapprove it, and someone else could stand up and say, 'I move that Senator Payne be elected a director.' So in that case the meeting has a power which the two-thirds majority does not.

CHAIRMAN—The word 'approve' is consistent, though, in the sense that since 1 January 1998 JCPAA has had an approval power for both the Auditor-General and the independent auditor, which is the same as the advise and consent rules of the United States Senate. It is an approval power, not a renomination power.

Mr Barns—Mr Chairman, can I just make the point that the second reading speech of the Attorney-General, which ought to have some impact here I would have thought, indicates that the nomination would take effect if seconded by the Leader of the Opposition and approved by a two-thirds majority. So I think that it gives some strength to the arm of the argument that the second reading speech, which is very precise—deliberately precise in its language—ought to be reflected in the long title.

CHAIRMAN—We take your point.

Ms ROXON—I have two quick questions about the long title as well. This morning we discussed with Jason Li of the Ethnic Communities Council his concerns about using the word 'republic' in the long title. I have noticed that in your suggested change you have also dropped the reference to a republic. I am wondering whether you can talk to me about that. I am surprised that that would not be something you would view as having a lot of public resonance about what this referendum is about, so if you could comment on that it would be good.

The other thing is that I have noticed you use 'Australia's head of state', rather than 'President', and I wondered if there was any particular objection to using 'President'. That last thing deals with this question of the nominations. Wouldn't you get around the difficulties of putting in the nomination process—even though people might say it is going to be ignored, or could be ignored—if you required the Prime Minister to, perhaps, as one of the other members of the committee suggested, have a minimum number of people who had to be on the short list; so that the committee could not suggest just one but that there be a requirement that the Prime Minister select from that short list? That goes a little beyond my other issues with the long title, but I just wondered if you could comment on that as well.

Mr Turnbull—I will deal with your points in turn but in reverse order. I think the last point you make is, again, a fair one. It is one that was certainly considered at the Constitutional Convention but, again, it was felt that it was inconceivable that you would get a situation where there was nobody on the committee short list that did not have favour with either the Prime Minister or the Leader of the Opposition, bearing in mind—

Ms ROXON—Even though that list will not be public?

Mr Turnbull—Yes, that is right, because the Leader of the Opposition and the Prime Minister are in effect represented on the committee. It is very hard to imagine a committee of that kind if it is preparing a short list of four or five people, whatever the number is, refusing to agree to somebody supported by the Prime Minister and the Leader of the Opposition. Again, there is an element of unreality there. Again, in the interests of minimal change and this sort of responsible government tradition approach, I think that it is fair to leave it is as it is.

Dealing with the reference to the word 'republic', we do not have a particular problem with that except that I think it is very important that people understand what we are talking about. As you know, there has been extensive research done by the government—to which this committee should get access, if you do not have access to it already; that is a very important—on the level of public awareness and knowledge on these constitutional issues; not on whether people are republicans, monarchists, or whatever. Very troubling is the number of people who really do not understand the nature of the model at all but think that it involves widespread political change; they think that it involves a President like the American President and so forth. If you just use the word 'republic', of course to those in the know that means the bipartisan model that has been recommended by the Convention.

But, given that the long title ought to be in this case a fair description of the nature of the model—without being too long, because if it becomes too long it becomes as long as the bill itself—we felt it was important to refer to the replacement of the Queen, because that after all is the central point, and by an Australian citizen called the President, if you like, to replace the Queen as Australia's head of state, who would have the same powers as the Governor-General. The difficulty is that the longer you get the more problems you are going to have with people saying that it is just going on and on and on, and it becomes not a long title but an extremely long title. We are not running away from the term 'republic'. What we are concerned about is summarising it as neatly as you can, or at least summarising it enough so that people understand what it is they are voting on.

Mr DANBY—I have heard more today, in writing and in testimony, about the dismissal procedure than I have heard in the years leading up today. One proposal we have in writing before us is a suggestion from Australian Democrats Senator Andrew Murray that would end the long resolution by including the words 'removable according to the unfettered discretion of the Prime Minister'. That is probably a very formed view of the whole referendum, in my view, by including those words. But why do you and why did the Constitutional Convention not argue that reference to removal be in the long title?

Mr Turnbull—The Convention did not consider the long title. I think the reason for not referring to it is that there is no change to the status quo. It would be utterly misleading to say 'removable by the Prime Minister' without explaining that that is exactly how the Governor-General is removed and that in fact this model reduces the power of the Prime Minister. I do not want to engage in a political debate here, but you will have heard our opponents saying that this model gives unprecedented power to the Prime Minister. In fact, it gives less power to the Prime Minister vis-a-vis removing the President than the Prime Minister has with respect to the Governor-General today.

I have discussed this with Senator Murray. He is your colleague in the parliament, so you should no doubt hear from him yourself, but Senator Murray has a view that the Queen has a live, active discretion to ignore the advice of the Australian Prime Minister. With due respect to him, he is wrong. If that were so, Australia would not be an independent country. The Queen's duty—no-one would be quicker to assert this than the Queen, I am sure—is to implement the recommendations of the Prime Minister whether to appoint or remove; otherwise we are back where we were in 1901.

So the reason for not including reference to it is that, unless you explain it in the context of the current system and point out that it is in fact a limitation on the powers of the Prime Minister, all of which would make the long title unworkable, it is potentially very misleading. I would submit that the long title should flag the nature of the proposal being put up and point to the changes to the current system rather than going through every detail, otherwise you end up with a small treatise on constitutional law and practice.

Ms JULIE BISHOP—In proposed section 60 it says, 'The Prime Minister may, in a joint sitting . . . '. Professor Winterton was adamant that it should read 'must' not 'may'. Do you have any comments about that, or do you see any consequences or ramifications?

Mr Turnbull—I do not think this is a huge point, and I would not be troubled. I think 'must' is a bit unusual. I think that in normal drafting language, and Professor Winterton would no doubt correct me, it should be 'shall'. I would not have a problem with it being changed to 'shall', but again it is not something we have a particularly strong view about. I understand the reasoning to allow a bit of flexibility there, but it is inconceivable, for example, that a Prime Minister could allow a particular Acting President to stay in office indefinitely, given public opinion.

Ms JULIE BISHOP—He came up with a scenario where I think his concern was where the Prime Minister used the opportunity to manipulate the position and happened to like an Acting President and left him there. Professor Winterton wanted there to be a definitive

'must', or 'shall'—I did not actually put 'shall' to him—and that there be no opportunity for the Prime Minister not to act.

Mr Turnbull—We would certainly support a recommendation to change 'may' to 'shall', but I do not think it is a big point. With respect, it is not a significant point.

Mr CAUSLEY—Can you give me one instance where our present Constitution has failed us?

Mr Turnbull—Our present Constitution fails us because it has as its head of state somebody who cannot and does not represent the Australian nation. Apart from that, it is not too bad.

Mr CAUSLEY—We have had quite a lot of evidence from constitutional lawyers about their concerns with this present bill that is before us, on the election of the committee, the powers of the Prime Minister, the dismissal of the President, powers of the President and other things. You are saying to us that, despite all those problems, you are prepared to support it.

Mr Turnbull—Yes. I can quote Professor Winterton, who is one of the leading experts, if not the leading expert, writing on this topic. The real question is not whether a particular scholar recommends a particular change. Professor Winterton and I have worked together on this topic in the past, respect each other and are friends and so forth. Professor Winterton and I disagree on the dismissal procedure. I am for the responsible government approach. I think having a dismissal for cause approved by two houses, the quasi-judicial approach, would involve a significant change to our parliamentary system. What we are talking about here, as Ms Bishop understands better than anyone, because she was one of the leaders of the responsible government group keeping us ARM people in line, is that the whole aim of the Convention was to make the symbolic change at the top, to have an Australian citizen as President, as head of state, rather than the Queen, but to do so with the minimal change to the way our parliamentary system works.

Of course, the bill achieves that, because in so far as there are defects with the dismissal, or appointment, they are defects that exist at the moment. With appointment, it is clearly an improvement. Again, nobody would do anything but praise a Prime Minister who said, 'Not only will I seek the consent of my colleagues in cabinet to the next Governor-General but I'm going to get the Leader of the Opposition's agreement to it too.' That would be regarded as an act of statesmanship. That is what the appointment mechanism in fact does.

On dismissal, leaving aside the obligation to bring it back to the House of Representatives—and I recognise you could well argue that a Prime Minister who sacked a Governor-General today would be answerable to parliament and public opinion anyway—the critical change, and probably the most important one, is that the Prime Minister cannot replace the President. At the moment the Prime Minister can sack the Governor-General and put anyone the Prime Minister likes in the place of the Governor-General. That is a very significant change and clearly reduces the power of the Prime Minister, but maintains the traditions of the responsible government system, which decrees that if the Prime Minister and the President simply cannot work together the Prime Minister prevails. So the Prime

Minister prevails over the person in the office of President, but he or she does not prevail over the office and he or she can never control the office of President. That is the critical thing, whereas today a Prime Minister can, in effect, control the office of Governor-General by appointing whomsoever he or she likes to that office.

CHAIRMAN—Thank you very much for your submission, and thank you for coming to talk to us. As I have told other participants today, we will report at 10.30 a.m. on 9 August, and we will certainly send you a copy of our report.

Mr Turnbull—Thank you very much.

[4.03 p.m.]

FLINT, Professor David, National Convenor, Australians for a Constitutional Monarchy

JONES, Mrs Kerry Lyn, Executive Director, Australians for a Constitutional Monarchy, and Chairperson, the Government No Case Advertising Committee

CHAIRMAN—Thank you both for coming to talk with the committee today. I understand that you sent us a submission. We had not received it in Parliament House up until Saturday morning, but I believe that you have just given us a copy. Would you like to make a brief opening statement to the committee?

Mrs Jones—The submission was forwarded earlier in response to the draft bills, with a few minor changes to it. We certainly had sent it down to Parliament House, so I am not quite sure why you did not receive it.

CHAIRMAN—That does not necessarily make it simple for this committee.

Mrs Jones—It certainly was sent down separately to the committee on the 29th, but copies are coming for you. In essence, the submission clearly says that the question should include the dismissal. We suggest that the words 'appointed for a term of five years but removable by the Prime Minister at any time by a signed notice with immediate effect' be added following the words 'chosen by a two-thirds majority of the members of the Commonwealth parliament'. David Flint will speak to these amendments briefly after I have summarised them.

The reference to the President being head of state is absolutely unnecessary. It is inappropriate. The term is not used in Australian constitutional law. We have explained our views on that. We are concerned that the addition of the Prime Minister and another minister of state to the Federal Executive Council as authorised sources of advice to the President reflects current constitutional practice. Their express inclusion creates a situation where the President may receive conflicting advice of apparently equal validity from different sources. We are also concerned that the President may be denied the traditional rights of the Governor-General, along with the sovereign and her other representatives, to be consulted to advise and to warn, because the President is now bound to act on advice. The reference to the reserve powers appears to make their exercise judiciable in the High Court, and David Flint will speak to that briefly.

Finally, we have grave concerns with the Prime Minister's unprecedented power to dismiss the President. The bill extends this power even further in ways that were not envisaged by the Convention model giving the Prime Minister a further unprecedented power to dismiss any Acting President. Moreover, the provisions of proposed section 63 may be superseded by an ordinary act of parliament without any reference to the people, which could further increase the power of the Prime Minister. We also say that the Prime Minister should not have the power to dismiss an Acting President, which again was something that was not included in the Convention.

That is a summary of our submission. I say up-front that the ACM will be opposing the change to the republic in whatever way possible. As Chairman of the Government No Case Advertising Committee, the no case committee will be running a substantial advertising campaign in the last month. We agree that the bill submitted to the people should be consistent with the Convention model, as promised by the Prime Minister at the close of the Convention. The bill has gone on further than some of those agreements of the Convention. Finally, within the constraints of the Convention model, the amendments to our Constitution should provide the best republican constitution that can be devised, and clearly it is not doing that at this stage.

Prof. Flint—I will briefly add to that. As Mrs Jones has said, we are opposed to the republican model which emerged from the Convention. However, we took the view that, if this model were to succeed, it ought to at least reflect and go no further than what emerged from the Convention. I say 'emerged' because the model itself, as you would know, failed on the floor of the Convention, but we joined with the republican majority so that it could be put to the people's referendum. That was a view that the Prime Minister adopted.

But we see it going further than was actually agreed in those respects which are set out in our memorandum—in particular, that it requires the Governor-General, outside of the reserve powers, always to act on advice. We see this as a serious defect, because at the present time the Governor-General and the governors may, in exercising their powers, ensure that what comes to them has been properly presented and has gone through all the requirements of the law. A recent example was when the Governor of this state insisted on a briefing before he was prepared to issue the liquor licences at the showground. We read the act as saying, 'The President is now bound to act on advice. The President shall act on the advice of,' and the names of three bodies are set out. We regard that as denying that discretion that the Governor-General should have.

As Mrs Jones says, we also do not think that it was necessarily part of the Convention model that the reserve powers would be justiciable—that is, reviewable in the High Court. We see that as potentially dragging out any constitutional crisis. In a rerun of 1975, it could drag out a crisis from weeks to months, and we think that is unwise. Further, we say that, in accordance with the Convention model, not only can the President be sacked at any time by the Prime Minister—in other words, he holds office at the whim of the Prime Minister—but the same applies to the whole series of Acting Presidents. We do not think that was the intention even of the Convention model, and we think that that is unwise. Those views are the principal parts of our submission. They were put as good citizens still opposing the model but thinking that at least the model should not go beyond what emerged from the Convention.

CHAIRMAN—Thank you. We appreciate your attitude. We do understand that you are opposed but we appreciate your constructive advice, which is why we are all here. Regardless of our individual views around this table, we have a responsibility to listen to the people of Australia who have something to say about these bills, to make sure that they reasonably reflect the ConCon model and that, if in fact it wins on or about 6 November, the model will work properly.

I am interested in your views on the dismissal procedure. Many others, quite frankly, in their submissions have discussed the dismissal procedures, either in writing or here with us today and last week. Is it a possibility in real life that a Prime Minister would either not appoint a President or sack a President and then continue to go down the list of state Presidents, or whatever they are called—or state Governors if they happen to still be under the Crown—until he exhausts the list and there is no-one to act in the office or until he finds someone who totally agrees with him and becomes a puppet? Do you honestly believe that that is a real life scenario?

Prof. Flint—The purpose of a constitution is to prevent even the unlikely happening. Professor Blainey, when he gave a speech recently, reminded us that—and he was in no way suggesting, as some of the newspapers did say, that we were going to go down the path of the Weimar Republic—had the constitution itself contained sufficient safeguards, the aggregation of power that the chancellor was able to obtain in Germany might have been prevented. Constitutions are about checks on power, and surely one of the things that both the Westminster system and the American system have learned is that there must be checks on power so that you prevent aggregations of absolute power. This would be an unusual constitution in that it would be the only republic in the world where the President holds office at the whim of the Prime Minister.

CHAIRMAN—Professor Flint, I would have thought that our system probably had more checks and balances than any comparable democratic system in the world. When you take the model of an American type Senate, with equal representations for the states, or the constitutional model itself, which gives us states that have definable powers beyond those defined for the Commonwealth, and you add the United States Supreme Court model that we call a High Court and you put the states themselves in as part of that process, with the Senate acting as a brake on power, and then the Governor-General—or, as proposed, a President—I would have thought that the possibility of runaway executive power in Australia was far less than many more prescribed models around the world where dictators have come and gone?

Prof. Flint—I agree with you entirely, but we are speaking about the present Constitution. This is, in effect, a substantially changed Constitution. The Republic Advisory Committee, which Mr Turnbull chaired, reported to Mr Keating that there was an almost universal view that the President should not hold office at the whim of the Prime Minister. This is being presented to us for the federal Constitution and, if it is adopted, it will no doubt be replicated in the states. The Westminster system in a federal structure requires somebody there at the centre—the Crown at the moment—to prevent that accrual of power which results from the dominance of the Prime Minister over the House. Senator Murray, as one of the members of the Senate and a patron of the Australian Republican Movement, said that the danger of this constitution is that it has the potential to give absolute executive power to the Prime Minister. That is what the Constitution, we submit, ought to prevent.

CHAIRMAN—If you two will accept my apologies, I have to go and catch an aircraft. I will turn the chair over to Robert McClelland. I remind colleagues that we commence at 9.30 tomorrow morning in Melbourne.

ACTING CHAIR (Mr McClelland)—In what way is the Prime Minister currently accountable to the Australian people if he or she dismisses the Governor-General?

Prof. Flint—The process of dismissal, which some say is replicated in the model, is not in fact replicated in the model. The process, which was established in the Commonwealth conference in the 1930s, is that there must be informal consultation with the palace and a formal document must go to the palace.

ACTING CHAIR—I am sorry. An informal document must go where?

Prof. Flint—A formal document must go to the palace. It takes time for this to happen. There is a break of time built in, and there are precedents where the Crown has indicated that a proposal would not be accepted. Two indications concerning the appointment of the Governor-General of Ireland were rejected because they were thought to be inappropriate. One was that the Chief Justice be the Governor-General; the other was that there be a committee as Governor-General. A recommendation that the Governor-General be dismissed was mulled over by the then sovereign with a view to at least giving the Governor-General time to withdraw gracefully if he wished and wanting reasons for this action. There is no guarantee that the sovereign will act. There is something built into our situation.

Let us look at a re-run, for example, in 1975. There was a fear, it was said, on the part of Sir John Kerr that Mr Whitlam would move against him. Mr Whitlam describes the proposition that he could instantly remove the Governor-General as preposterous and ludicrous. He said that in *The Truth of the Matter*. He refers to the removal of the dormant commission that Sir Colin Hannah held as Governor of Queensland. He held a dormant commission to act as administrator of the Commonwealth. Sir Colin publicly criticised the Whitlam government, which was most inappropriate for a person in his position, and he lost his dormant commission. But that process, which was an open-and-shut case for the removal of that dormant commission, took 10 days. There is no resemblance between what is being proposed—that is, that the Prime Minister just scratch his signature to a piece of paper without any notice whatsoever and without any grounds—and what exists at the present time.

ACTING CHAIR—Although, in this day and age, you have to have regard to electronic communication technology, surely, and the instantaneity of that means of communication.

Prof. Flint—It has been stated very definitely that the Queen would not react to a telephone call.

ACTING CHAIR—Yes, but there are facsimile transmissions. There are email transmissions. Surely, these things are much more instantaneous than ships travelling to the home country.

Prof. Flint—In 1975, though, we had those facilities. I think, after that time, that a disc jockey in Quebec phoned the palace and spoke to the Queen, portraying himself as the Prime Minister of Canada. The likelihood of the Queen ever reacting is low. In fact, the private secretary has stated that that would never be entertained.

ACTING CHAIR—A phone call would never be entertained?

Prof. Flint—Yes.

ACTING CHAIR—Nonetheless, the other means of communication still exist.

Prof. Flint—Yes. When the proposition was put to Sir William McKell about what he would have done—you might recall he was the Labor Premier of New South Wales and became Governor-General—he said, 'I wouldn't be terribly worried about that sort of thing happening. The Queen is a very busy woman. My predicament could be told to the palace and there would be obviously a substantial amount of time.'

ACTING CHAIR—When you say that sort of thing, you are not talking about facsimile and email transmission existing in the times of Sir William McKell?

Prof. Flint—No, but a facsimile is still different because a facsimile goes to another person who then has to decide whether she would exercise her reserve powers—which the Canadian premiers, including the Premier of Quebec, have unanimously said they want to hold on to—not only of refusing it but of asking further questions, and whether the Prime Minister would just sign a piece of paper and perhaps even date a blank piece of paper that he had already signed which he had in his pocket—

Ms HALL—My question follows on from what Rob was asking you, and in fact you pre-empted half of it. Can you share with me an occasion where the Queen has not followed the request of a Prime Minister of this country either to appoint a Governor-General or to terminate the services of a Governor-General?

Prof. Flint—No Governor-General's services have ever been terminated. The only appointment that we are aware of where there was a discussion was in the proposal to appoint Sir Isaac Isaacs but, of course, the King eventually accepted the appointment. His reservation was about not having somebody who was acquainted with, and known by, other Australians. He wanted to put in somebody who was completely strange or new.

Ms HALL—To a large extent your argument is based on the possibility that such and such would happen. Under the current Constitution, you do not have a precedent with which you can argue along those lines.

Prof. Flint—We belong to a Commonwealth of Nations and there are several examples from the Commonwealth.

Ms HALL—But we are talking about Australia and Australia's system of government here, aren't we?

Prof. Flint—The point is that the Queen is not bound to act on advice. If, for example, a Prime Minister were behaving in a dictatorial way—as we had in the case of Fiji—the Queen may not act that way, or she may take time. That time is very important. Think back to 1975. Sir John Kerr acted in the morning. Even if Mr Whitlam had decided to send a fax—if he could find a fax, because Sir John said that he stood up and said, 'Where's the phone?'—to Buckingham Palace, it would have arrived after Sir John had withdrawn his commission.

Ms HALL—But you can give me no precedent or occasion where the fears that you are expressing of the possibilities that you are saying could happen have ever happened. You cannot point out to me one occasion where the Queen has not followed a recommendation of the Prime Minister of this country, and now you are saying that this will change. You have not convinced me, I am sorry, because I do not think that you can back up what you are saying.

Prof. Flint—There are several examples in the Commonwealth, and I would also say to you that this will be the only republic in the world where the President can be removed at the whim of the Prime Minister. No other democratic republic in the world has this.

Ms HALL—And I put to you that that can happen now.

Ms JULIE BISHOP—Professor Flint, I appreciate your position in relation to this matter. Could I ask for your comment on a suggestion that Professor Winterton put forward—and, in fact, I think it has been suggested in a couple of the submissions—in relation to the dismissal procedure. Professor Winterton suggested that there be a form of quasi-judicial dismissal whereby reasons are required and there may or may not be a right of reply on behalf of the dismissed President, akin to the dismissal of justices of the High Court. Could you give me your views on that proposal?

Prof. Flint—Certainly. I was looking at Singapore's republic last week because I had to speak at an Australia-Singapore chamber of commerce. The Singapore constitution is typical in that there have to be grounds, there has to be something akin to a committal—that is to say, some procedure which weighs whether the charges are serious—and there has to be a fair trial. In Singapore it is a trial before five judges chaired by the Chief Justice. Then there has to be a verdict in parliament at a special majority—in Singapore it is a three-quarters majority. So that is the process which the democratic republic normally requires so that the President has some tenure. But, of course, then you have to codify the President's powers.

Mr DANBY—Are you suggesting that Singapore is a democratic republic?

Prof. Flint—I am suggesting that the Singapore constitution is more democratic than the one which is being put before the Australian people.

Mr CAUSLEY—Professor, my question comes back down to the bill itself. What concerns me in this debate is that this referendum may well be carried in November, yet on one side of the debate we have people who are saying, 'We're so desperate for a republic we're prepared to ignore the deficiencies,' and on the other side of the debate you are saying, 'We don't want to even talk about it.' If this is likely to get up, surely we need to have a model that we can live with; a responsible model that will carry us forward into the next centuries. Why aren't we discussing the bill and making sure that the bill is effective?

Prof. Flint—We have, in our submission, looked at certain aspects of the bill which we think go even beyond the convention model, so we have tried to be constructive to that extent. On the other hand, we still think this is a lamentable model and should not be carried. If Australia wants to become a republic, there is no need for people to say yes.

Mr CAUSLEY—It may well be carried.

Prof. Flint—It may well be, but—

Mr CAUSLEY—What do we do with it then?

Prof. Flint—I put my faith in the good sense of the Australian people, and they have demonstrated that in previous referenda. But of course one can never be sure. I think it is unfortunate that people in the universities and the media are not subjecting this document to the sort of analysis which can happen—even a tax bill gets analysed to a far greater extent than this, and this is about our Constitution. I find it—

Mr CAUSLEY—I find it frightening, quite frankly.

Prof. Flint—Yes.

Mrs Jones—Professor Flint did mention that when it was finally presented to the Convention—at which I was a delegate—it was actually defeated 79 to 73 on the floor, and the Convention was probably attended, as most of you would know, for a variety of reasons, with three-quarters of the delegates being republican in mind. If there is any indication of how the model will go in a referendum, if the people of Australia do look at this sort of detail that we feel is unworkable—and, as Professor Flint said, the dismissal model has never been tried anywhere in any republic in the world—it should go down. But it was defeated on the floor by a delegation that was substantially republican. It was defeated 79 to 73.

Mr CAUSLEY—But the reality is that both your campaign and the opposing campaign will be on emotion, not fact.

Mrs Jones—We hope it will be on fact, and that is why we are spending so much time analysing the model. It was the model that got pushed through the Convention, and it was accepted by the Prime Minister to go to a referendum. But that does not mean that it is not our duty to point out the many constitutional flaws in the model. We have certainly got available many papers written by Sir Harry Gibbs and many other eminent Australians, as well as by republicans such as Sir Anthony Mason and so on, pointing out these fundamental flaws. I think the dilemma for you is to come up with how you do honour that model when it is such a substantially flawed model.

Mr DANBY—I have got a double-sided question to ask Professor Flint. Given the real constraints of Australian parliamentary democracy, isn't it a very pessimistic and dismissive view to describe, as you did before, the Prime Minister's potential very grave step of removing a President, with all the parliamentary implications that would have, as a 'mere scratch of a pen'? The other question that follows from that is: if the Queen is not bound to act on advice, are you saying that Australia is not fully independent? Surely the overwhelming evidence is that the Queen would accept the advice of the Prime Minister?

Prof. Flint—My first answer to your last question—that is, about the Queen's reserve powers—is: when she acts, as the High Court very clearly told us the other week, she acts as Queen of Australia. Similarly, the Canadians: when Mr Trudeau wanted to make the

Governor-General dismissible, the Canadian premiers unanimously, including the Premier of Quebec, said they needed this external arbiter.

The Queen, we would expect, would not exercise her powers mischievously, but if there were a crisis in Australia there is no guarantee that she would do precisely what an Australian Prime Minister, who might well be out of control, would want her to do.

Your other question is essentially saying to me, 'Look, we're going to give the Prime Minister this vast power but, of course, he won't exercise it; he'll behave sensibly.' I would suggest to you, with respect, that we think again about 1975, and we think what the two men in the hot seat did in 1975. The Prime Minister was setting in process ways in which he could rule without supply—something which has not happened since the Stuart kings. There was going to be a rule by credit.

The Leader of the Opposition, instead of waiting for the normal course of elections, was desperate to take power, and both of them were prepared to put the country into a serious constitutional crisis and force the Governor-General to act. They both behaved extraordinarily and not in the way that the founding fathers expected, because this question was raised in the Constitutional Convention. It was said, 'Section 58, which allows for the double dissolution, might not be available.' It was only by chance, it was fortuitous, that it was available in 1975. You could get the 1975 situation again without the Governor-General being able to send the Senate to an election—only being able to, for example, send the House to an election.

Even in the Constitution which we have, which I think is a magnificent document, they thought, 'The political players will behave reasonably.' They did for 75 years and then in 1975, for some reason or other, both of them were prepared to lead this country to the very brink of constitutional chaos.

Ms JULIE BISHOP—Professor Flint, in relation to the reserve powers and the proposed section 59, you have made a couple of suggestions as to how it could be worded in relation to advice—for example, omitting reference to the Prime Minister or the Minister of State. What troubles me is that it was the intention of the Constitutional Convention that the reserve powers remain and the conventions remain non-legally binding—in other words, as the position is now—yet the drafting of that third paragraph of section 59, to me, seems to contradict itself. Others have told me it does not, but perhaps you could consider this: is it contradictory to require the President to act constitutionally with regard to a reserve power in accordance with the conventions, but then have conventions that are in fact not legally binding?

Prof. Flint—My reading of what has been put before us is that the conventions will be justiciable. That is how we read new section 59.

Ms JULIE BISHOP—Which was not the intention of the ConCon, because I recall—I do not know whether it ended up in the communique—a great deal of discussion about them not having the force of law.

Prof. Flint—Yes, and they were to be preserved. We think this present drafting does in fact make them justiciable, which some people—

Ms JULIE BISHOP—Think is wonderful and others are horrified by the thought.

Prof. Flint—Yes, I think one of my colleagues in the room thinks that justiciability is a good thing—to have judicial review is a good thing. I think that only drags it out. The case study to look at is Pakistan, where the President's powers were found to be justiciable. Instead of having a discrete constitutional crisis, you drag it out for months. On one occasion the Supreme Court of Pakistan actually reversed the President's decision, and that I found is an astounding proposition.

Ms JULIE BISHOP—I think it would be fair to say then that section 59 as it is currently drafted is open to interpretation as to whether or not it makes the conventions justiciable.

Prof. Flint—Yes, we read it that way.

Ms JULIE BISHOP—But obviously the Attorney-General does not.

Senator PAYNE—It argued that it establishes the situation as it is now.

Prof. Flint—We discussed it among a group of lawyers, including a judge, and our view is that it is justiciable. In the ultimate analysis, it means it could go to the High Court, which would determine whether it is justiciable or not.

Senator PAYNE—Three lawyers and four opinions, Professor Flint?

Ms JULIE BISHOP—This is a concern because 5.17 of the explanatory memorandum says:

It is not intended to make justiciable decisions of the President in relation to the exercise of the reserve that would not have been justiciable if made by the Governor-General.

So that clearly is the intention, but it is very much open to interpretation, as it currently stands.

Prof. Flint—That is how we read it. I do not think we did that to put a level of interpretation on it; it is how we read the section.

Ms JULIE BISHOP—I think a number of people have read it that way, so it leaves it open.

Senator PAYNE—Professor Flint, in relation to proposed section 70A 'continuation of prerogative', I wonder whether you have turned your attention to that and whether you have a view on its adequacy in terms of the transitional processes.

Prof. Flint—I cannot put my finger on it, but I have read it. We found no difficulty with that continuation. We expressed a reservation of the definition of 'states', which we thought would preclude the unlikely event of New Zealand deciding it wished to join the Commonwealth, and joining without having to change the Constitution.

Mr CAUSLEY—That is fairly unlikely.

Senator ABETZ—Professor Flint and Kerry Jones, as I understand it, if all your suggestions were to be adopted by this committee and then reflected in the legislation, you would still be arguing the 'no' case.

Mrs Jones—Absolutely.

Senator ABETZ—I suppose it might be a cynical mind at work, but that then raises the question: do you think your task of arguing the 'no' case would be enhanced or weakened by the adoption of the suggestions that you are putting to us?

Mrs Jones—In our minds, the suggestions are only on issues that go beyond what was decided at the Constitutional Convention. We are really here to say we will stick to what was agreed to within those terms. These issues go beyond it. But the major issue involved is the question that will be asked on the ballot paper.

Senator ABETZ—That is the next question I want to get to.

Mrs Jones—I am sure you have seen from the many submissions from republicans as well as antirepublicans that one of the critical questions is the dismissal. That is why we argue so strongly that the dismissal of the President by the Prime Minister, at any time without notice and with immediate effect, should be pointed out as being substantially different from the way our current constitutional arrangements work, and it should be added to the question.

Senator ABETZ—I suppose I did smile to myself when I saw the republican proposal, with the Australian Republican Movement desperately not wanting to mention the terms 'republic' or 'President' in the question. Undoubtedly, that is for purposes that they would perceive would make it less likely to be carried with the populace at large. I cannot help think that reference to removal by the Prime Minister at any time by a signed notice with immediate effect is, from your quarters, designed to effect a certain outcome. As the republicans would argue, why not refer to the fact that there would be a nomination committee—why shouldn't that be included in the question?—or the fact that the Prime Minister and Leader of the Opposition would have to move and second the proposal, et cetera?

Prof. Flint—The nomination process, we would argue, is pointless. It is purely cosmetic, and it was designed to attract the support of those who wish to have a popular election for a President. It is meaningless because the Prime Minister can ignore it. If there were a wish to insert the provision that there was a need for both the Prime Minister and the Leader of the Opposition to move and second the motion, we would have no difficulty with that. The key to all this, the very core of this model, we believe, is that it attacks; that it is a knife at the

very concept of checks and balances. It goes to the very heart of the Westminster system. It goes to all we have learnt in 300 years in both the Westminster countries and the United States about checks and balances on par. We think that that is the most important thing to go in.

Yes, I am sure it would help our case, but we could have equally said at the end of the convention, 'You've chosen a model which helps our case.' Because it is such an appalling model, it was very hard to believe that the Australian people, properly informed, could possibly bring themselves to vote for such a model. But we shall see.

Senator ABETZ—It is a pity you did not support the McGarvie model, but that is another issue. Thank you.

ACTING CHAIR—Professor Flint, in terms of your previous position that the Constitution should address the unlikely, is it not the case now, under our current Constitution, that under section 59, if the monarch became mentally unstable—he or she, as the case may be—that they could actually disallow any law that had been passed within the past 12 months? What check or balance would exist against such a decision of the monarch?

Prof. Flint—The present system is not just the written Constitution; it is all those conventions by which we have agreed to have been governed accumulated over a long period of experience.

ACTING CHAIR—But do you say those conventions, unwritten, would override the terms of section 59 of the Constitution?

Prof. Flint—The conventions, which as you see in the High Court judgment have led to Australia being independent. There has been no statute which has said that the Crown will suddenly become divisible into several Crowns. That followed the Royal Titles Act in 1953. It followed well after a separate Crown had emerged. What happened in the Balfour Declaration in the Commonwealth conferences was part of that evolving convention. We know that, were a sovereign to move away from the role of a constitutional monarch, as we saw in 1936, when the Australian Prime Minister was the principal mover in persuading the government—

ACTING CHAIR—Do you say that, as a result of convention, section 59 has become redundant or anachronistic?

Prof. Flint—I suppose it would always be open to an Australian government where there was an erroneous piece of legislation to advise the sovereign to use section 59. It seems most unlikely, but if—

ACTING CHAIR—Coming back to my question, do you say that section 59 has become redundant or anachronistic?

Prof. Flint—Section 59 seems to be rather strange in the Constitution today. If it were to be used, it would not be used for the original purpose. But that would apply to other provisions in the Constitution. Your question was about a sovereign losing his or her mind. I

am saying that section 59 could be used by a sovereign acting on the advice of the Australian minister.

ACTING CHAIR—And it could also be used by a sovereign who had lost his or her mind?

Prof. Flint—It would not be used for long, because the conventions would ensure that that sovereign was declared to be incompetent.

ACTING CHAIR—Who would have that power to declare the sovereign incompetent?

Prof. Flint—The Statute of Westminster gives a clue there in saying that the changes in the succession are matters of all of the dominion and British parliaments. That would mean all of the realms would have to agree on what measures to take.

ACTING CHAIR—And if they did not, we were stuck with the decision by the person who had lost their mind.

Prof. Flint—I would rather have that, than having the President holding office at the whim of the Prime Minister.

Mrs Jones—Absolutely.

ACTING CHAIR—It certainly would not be anything on which the Australian people could guarantee an outcome.

Prof. Flint—I am sure we could guarantee an outcome because we saw that in 1936. The Crown acts on advice except where the Crown is validly using those powers.

ACTING CHAIR—In that sense, doesn't the monarch, the Queen of Australia, have greater powers over the Australian parliament than the Queen of England does over the House of Commons, in the sense that the conventions are not codified in the United Kingdom? However, sections such as sections 58, 59 and 60 give specific powers to the monarch which are not so codified in the United Kingdom.

Prof. Flint—The powers of the Queen of the United Kingdom are different. There is no power of disallowance, for example, because the Constitution, such as it is in the United Kingdom, does not give that power, and case law specifically denies any power. Neither did the Stuart kings: no British king or queen has had a power to disallow. But we have one in our Constitution, which we can change. There is no reason why the members of parliament could not put in, if you wished, another referendum on 6 November if that is your wish.

ACTING CHAIR—Nonetheless, is it the case that the Queen of Australia has greater power over the Australian parliament by virtue of the Constitution, a written document, than the Queen of England does over the United Kingdom parliament?

Prof. Flint—No, she does not, because most of her powers, vis-a-vis the Australian parliament, are not delegated to; they are, by the Constitution, invested directly in the Governor-General. She has very few powers in relation to the Australian parliament.

ACTING CHAIR—What about sections 58, 59, 60 and specifically 59—the power to disallow any law made within the past 12 months? That is certainly a power which the Queen of England would not have over the United Kingdom parliament, isn't it?

Prof. Flint—True. It is a power which has never been exercised and which can be removed. If the parliament so wished they could add it to the referendum. It may well be something that this committee might wish to recommend—that you remove that.

ACTING CHAIR—Thanks very much for your time and for coming along this afternoon.

Prof. Flint—Thank you.

Resolved (on motion by **Ms Julie Bishop)**:

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

Committee adjourned at 4.48 p.m.