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

WEDNESDAY, 7 JULY 1999

ADELAIDE

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

Wednesday, 7 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: Mr Causley, Mr Charles, Ms Julie Bishop, Ms Hall, Mr McClelland and Mr Price

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

BAUER, Mr Peter Richard (Private capacity) 249

COCCHIARO, Dr Tony, Convenor, South Australian Branch, Australian Republican Movement 270

HOWELL, Associate Professor Peter Anthony (Private capacity) 232

KIRK, Ms Linda Jean (Private capacity) 252

SCHULZE, Mrs Marjorie Gay, Deputy State Convenor, South Australian Branch, Australian Republican Movement 270

SELWAY, Mr Bradley Maxwell QC, Solicitor General, South Australian Government 263

SHORT, Mr John (Private capacity) 249

STANLEY, Mr Timothy Laurence (Private capacity) 292

TEAGUE, Dr Baden (Private capacity) 279

Committee met at 10.52 a.m.

CHAIRMAN—I now open this public 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 becoming 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 bill. This week we have held public hearings in Sydney and Melbourne and today, of course, we are in Adelaide. Over the next three weeks the committee will continue to conduct public hearings around Australia and listen to arguments about the proposed laws.

I have said before that I see the committee's job as being threefold: firstly, to ascertain for the parliament that the bills reasonably faithfully represent the intent of the Constitutional Convention; secondly, that if the bills are accepted by the public in referendum they will work as intended; thirdly, to give the public of Australia an opportunity to comment on this most important constitutional legislation before it is voted on in the parliament.

I now remind all witnesses that while witnesses are not to be sworn, nonetheless these committee hearings are the same as hearings of the parliament and warrant the same respect.

HOWELL, Associate Professor Peter Anthony (Private capacity)

CHAIRMAN—Welcome, Professor. Would you start by telling the committee something of your background.

Prof. Howell—Thank you. I am an associate professor in the history department of Flinders University. I am a historian who since 1961 has specialised in constitutional history and in the 1990s I chaired the South Australian Constitutional Advisory Council. I presume that is why I was invited today.

CHAIRMAN—We have received your submission for which we thank you. Would you like to make a brief opening statement before we ask you questions about your submission and perhaps other issues as well.

Prof. Howell—The first thing I would like to say is that I do think that the bill does pretty faithfully represent the outcome of the convention that was held last year and for the most part I do think it serves its purpose. The comments that I made are mainly with a view to not so much clarifying that but preserving what I think are some important features of the present constitutional arrangements, which I think are perhaps threatened by the bill, possibly inadvertently. I could explain that later in response to questions if you wish. For example, on the first point I made, I thought that it should be appropriate to insert 'Acting President' alongside 'President' when one is talking about the qualifications for the office.

When I was chairing the Constitutional Advisory Council, the Premier asked me to travel around all parts of South Australia and speak to the people about the proposed constitutional changes. I had face-to-face contact with more than 1,200 South Australians ranging from the south-east up into the Aboriginal lands on the borders of the Northern Territory and Western Australia, to the west coast—as we call it here—the Riverland, the Eyre Peninsula, the Iron Triangle towns and so on. Everywhere we went there was a very strong feeling in the community that only an Australian born person should be capable of being appointed President of Australia. It is a minority feeling, but a very strong one.

I think at the very least it should be said that an Acting President, like a President proper, at least meets the qualifications for being a member of the House of Representatives. I would not go so far as to say that the person should be Australian born because I do not think that would reflect majority opinion, but I think he or she should not be someone who owes allegiance to a foreign power.

Apart from that introductory comment, if members have had a chance to read my written submission I would be very happy to answer questions about it.

CHAIRMAN—Thank you very much for that, Professor. The issue that you have just discussed, the issue of Acting President, was one that I flagged when I read your submission. I thought that was an issue the committee might well examine. It might solve some of the problems that other respondents to this inquiry have canvassed over the last few days with us in doomsday scenarios. For example, if a state did not become a republic in time for the selection of the first President or subsequently yet the governor of such a state then was placed in a position where he or she was first in line to take up the position of Acting President in the event of the death or illness or some other reason for the President being absent, and if that person was not qualified to be a member of the House of Representatives, then what would we do? You are convinced that changing to the words that you have submitted would solve that problem.

Prof. Howell—I believe so, yes.

CHAIRMAN—Thank you for that. The second thing that I thought was particularly interesting in your submission is where you say in connection with page 5, lines 30 to 33 and page 6, lines 1 to 6 and 12 to 16 of the republic bill:

These paragraphs, together with the passage reading ", or a person exercising powers or functions as the President's deputy," should be deleted in their entirety.

Can you discuss that point in some detail for us? It is not an issue that anyone has brought to our attention, to the best of my knowledge.

Prof. Howell—This is something that the Department of the Prime Minister and Cabinet put into the bill—it had nothing to do with the convention—and I think it is most undesirable. The point is that the Constitution originally provided not just for someone being appointed Administrator of the Commonwealth in the absence of the Governor-General, or illness of the Governor-General, or death of the Governor-General, but also for the appointment of Governor-General's deputies. The idea in the 1890s, when transport was much slower than it is today, was that in each and every state there should be a resident Governor-General's deputy who would represent the Governor-General on important occasions and conduct investitures and so on.

The Colonial Office in London, headed by Joseph Chamberlain, was very keen on this idea because they wanted, for the future, after Federation, to have only one channel of communication to Australia. All communications from the states, as well as from the federal government, were to go via the Governor-General rather than have to maintain correspondence with each of the state governors. Therefore, provision was made in the belief that the office of state governor would wither away after Federation and no longer be important, just as the Lieutenant-Governors of the Canadian provinces are much less significant and effectual than our state governors are.

But once Federation had been achieved, the states unanimously turned against this idea of having a Governor-General's deputy resident in each state. They did not want to downgrade the office of the state governor in any way. They thought to maintain the full ceremonial functions of the state governor in state matters, including holding investitures for the bestowal of honours, was a very important thing, and they wanted the governors to maintain a direct line of communication to London rather than having to send everything through the Governor-General with an opportunity for the Prime Minister to vet it.

So all the textbooks on constitutional law and constitutional history up to about the 1980s say that no Governor-General's deputy has ever been appointed. That means that that clause in the Constitution permitting the appointment of Governor-General's deputies is really defunct, it is obsolete, it is otiose. In the last five years it is possible that a Governor-General's deputy has been appointed, but I am not aware of it. The practice has always been that the longest serving state governor has a dormant commission to automatically step in in the event that our resident head of state is ill or absent or dies. That has worked extremely well for 98 years.

There are six state governors. It is now pretty well established that there will continue to be six state governors. Even in New South Wales, where the Premier a couple of years ago tried to make the office of state governor a part-time one, within a fortnight he had to concede that that was impractical, that the workload involved was too much and it had to be a full-time job.

Mr PRICE—He did something about the residence.

Prof. Howell—That is a different matter. The point is that having all the state governors having a dormant commission to step in and act as Administrator of the Commonwealth has meant that there have been people with experience. Often they only needed to be there for two or three weeks. When Governor-General Lord Dunrossil died there was a longer period until a successor could be appointed, but generally it is a short-term thing. You have got somebody who knows how responsible parliamentary government works and what is the role of the head of state in that system of government. Now that we have come to a situation where it is proposed that the President can be dismissed instantly by the Prime Minister, subject to parliament's confirmation at a later date, we do not want a situation where a Prime Minister can pick and choose who is going to be the Acting President. But that is what you are authorising. It is a radical change to have the Prime Minister appointing a Deputy President.

I think we should stick with our system which I said has worked extremely well, that the longest serving state governor who is available should be appointed. If it happens that that state governor is ill or is on an overseas trip, then the next longest serving one takes the place. And because there are six of them you will always have somebody who is there.

The circumstances in which a Prime Minister is likely to dismiss a President are circumstances of political crisis analogous, say, to the events of November 1975. In that situation I think that if a President were to be dismissed the Prime Minister should not have any choice as to who is to take his place until the months go by and a nominations committee meets, a new nomination is made to parliament, and a new President is appointed.

If a Prime Minister does not like the senior state governor who is acting as Administrator of the government of the Commonwealth and decides to dismiss too, as is provided for in this bill, then the next longest serving state governor automatically takes the place. Again, the Prime Minister does not have a choice. In times of political crisis I think it is most important to keep that situation. As I said, it has worked well. The clause allowing for the appointment of Governor-General's deputies has not been invoked. It is as dead a letter as the clause that says that the Queen can veto bills that have been passed by the Commonwealth parliament and assented to by the Governor-General because it has never been applied. It should not be revived in this way. Otherwise, I think the consequences could be quite serious in a crisis in the future.

CHAIRMAN—Just following on that issue, and then I will give my colleagues a fair go, some have put to us a potential doomsday scenario where the Prime Minister simply goes through the list of state governors during an obvious constitutional or political crisis and one by one dismisses them until there is no-one left available to be President. Any comments to make on such a potential scenario?

Prof. Howell—If a President were to be dismissed and the longest serving state governor came in as Administrator and he were dismissed, I strongly suspect another 30 days would have to pass—at least the House of Representatives would have to ratify what the Prime Minister had done. The convention said—I do not think this is in the bill and perhaps it ought to be—that if the House of Representatives does not confirm the Prime Minister's action, that is a vote of no-confidence in the Prime Minister, he must resign. If he declines to resign, then the Acting President would be entitled to dismiss him and find new ministers who would recommend the calling of a general election. So I think the scenario that has been put to you is not really a realistic one.

You could only go a couple of steps down the track before there would have to be a general election, and if that were done, then I think it would not be a very long time before a new

President were appointed. So I think that the time frame for dismissing seven people in a row would be too long for it to actually happen.

Ms JULIE BISHOP—Professor Howell, as you rightly point out, the Constitutional Convention expressed the desire that if the Prime Minister did not obtain the approval of the House of Representatives then it would constitute a vote of no- confidence. A number of submissions have suggested that perhaps that has been omitted because people do not quite know what a vote of no-confidence means or what should flow from a vote of no-confidence. Do you feel that the proposed section 62, removal of the President, contains sufficient sanctions—in fact, it does not contain any—or that there would be a sufficient sanction against a Prime Minister who did not obtain the approval of the House of Representatives within 30 days? You could go back a step and say that the Prime Minister must do so. It says the Prime Minister must seek the approval of the House of Representatives but then does not provide any sanction if he does not do so. So there are two steps: firstly, if he refuses to seek their approval; and, secondly, if, in seeking their approval, he does not obtain it.

Prof. Howell—Yes. It is a vital convention of parliamentary government that if the leader of a government loses the confidence of the House on a very important question he should either resign or immediately advise the calling of a general election to see whether the people are happy with what has happened. I think it is arguable that that convention is strong enough not to need the implications spelt out in section 62. Yet I believe Professor George Winterton, who I have not been able to contact in recent weeks because he has been very ill, believes that it ought to be spelt out.

Ms JULIE BISHOP—He gave evidence before us on Monday.

Prof. Howell—I think Dr John Hirst agrees with him on this. I certainly would not be opposed to it being included and it may well be said to be a good thing. I do not think it is vital because I think the convention is strong enough on such a vital question that if the Prime Minister is not supported by the House of Representatives then he must resign anyway without having to be told to do so. When Joh Bjelke-Petersen refused to resign after he had lost the confidence of the Queensland parliament, the Governor wielded the big stick and said he, as Governor, would not recommission him.

Ms JULIE BISHOP—So the Acting President will, in fact, be doing that because the President has been dismissed?

Prof. Howell—Yes. I would be quite happy for it to be spelt out. I am just saying I do not think it is vital.

Mr McCLELLAND—On this point raised by Mr Charles: do you think it is necessary to specify in section 62 that, pending approval by the House, the Acting President shall perform the duties of President, or something of that nature? In other words, it could stop this doomsday scenario that Mr Charles referred to of going through the list of sacking of Acting Presidents.

Prof. Howell—Section 63 does say that the longest serving state governor available shall act as President if the office of President falls vacant.

Mr McCLELLAND—Yes, but the concern which has been expressed by other witnesses is that a badly motivated Prime Minister could simply sack the Acting President so appointed and go through the list of the six state governors.

Prof. Howell—Yes.

Mr McCLELLAND—But supposing the Prime Minister had no say. In other words, I suppose some wording such as ‘pending approval by the House, the Acting President chosen in accordance with the Constitution shall perform the duties of President’ may prevent that domino effect.

Mr CAUSLEY—Could it be said that the Acting President serve until a new President is elected?

Mr McCLELLAND—Yes.

Prof. Howell—I think that goes a little too far. I think I prefer Mr McClelland’s suggestion. I think it is a good suggestion.

Mr McCLELLAND—It could be something like ‘pending approval by the House the Acting President, chosen in accordance with this Constitution, shall perform the duties of President’.

Prof. Howell—Yes.

Mr McCLELLAND—Something along those lines.

Prof. Howell—I think the appointment process, as is suggested, is not going to be a speedy thing. You have to advertise and invite people to make nominations. You have to give them time to do so and to consult the nominees to see if the nominee will agree to accept nomination, and so on. Then it has to go to the committee. The committee might get 200 names. They are not going to be able to make a decision about that in 24 hours. They will probably have a lot of correspondence and then they will finally have to meet together to prepare the short list, then put it to the Prime Minister. Parliament might be adjourned for the summer or for the July break. It might be a month or two before parliament is assembled and can consider the nomination. In the meantime, the Prime Minister has to consult with the Leader of the Opposition to see if he is happy about the nomination because he has to second it. It could take three months minimum to appoint a new President when the office is suddenly vacated by dismissal or death.

In that scenario, it is conceivable that the senior state governor administering the government of the Commonwealth could go bonkers, could do something foolish, could turn out to be so hostile to the Prime Minister that it was frustrating the business of government and he, the governor, in turn, may need to be dismissed. But if you have that clause that he cannot be dismissed until parliament has considered and made a decision about the Prime Minister’s dismissal of the President, then I think that meets the problem that you have got someone who is in office for possibly 30 days. Do you see what I am saying?

CHAIRMAN—This just appealed to me while you were answering Robert’s question: you said before about the time delay that once the first governor becomes the Acting President the Prime Minister must go through the process of taking the issue before the House of Representatives. In fact, it seems to me—and I am not a lawyer—that the way the bill is written now, the Prime Minister could literally, serially write dismissal notices for all seven and issue them a second apart and have no President whatsoever and no provision for an acting or deputy or anything.

Ms JULIE BISHOP—Within 30 days?

Prof. Howell—Sign all seven notices on the one day?

CHAIRMAN—He could literally sign all seven, one after the other and have them delivered a second apart.

Prof. Howell—There would be riots in the streets.

CHAIRMAN—Of course there would. We accept that; we know that.

Ms JULIE BISHOP—That is what we are trying to avoid.

CHAIRMAN—I am not a lawyer, but I would have thought we should try and prevent that happening.

Prof. Howell—Yes. The provision for a President's deputy is even worse because then the Prime Minister can pick one of his own men to do the job.

CHAIRMAN—It is a technical question. Do you read the bill the way I read it, that at the moment the way it stands it would be possible for a Prime Minister to dismiss all seven a second apart—in other words, effectively, simultaneously?

Mr PRICE—He would have to appoint them before they were dismissed.

Prof. Howell—I suppose, theoretically, it is possible, yes.

Mr PRICE—Let us take that doomsday scenario. I agree with you, but it is not as though the media would be somehow deaf, dumb and mute while all this is going on. Wouldn't that then leave the Prime Minister without a President and then wouldn't he have to convoke a nominations committee and get a new President appointed, as well as trying to get parliament at the same time to approve what would be seen, I think, by most people as a rather horrific action?

Prof. Howell—Yes, because at the beginning of the bill it says that the executive power of the Commonwealth should be vested in the President. If you do not have one, it brings the executive powers of the Commonwealth to a standstill.

Mr PRICE—To a standstill. You cannot get bills assented to. There is no—

Prof. Howell—You cannot proclaim regulations or anything else.

Ms HALL—This scenario that has been put to you could, in fact, still happen under our current Constitution, couldn't it? At the moment it is a senior governor from each state. In effect, if the Prime Minister wanted to do that now, he could do it at this time. So it has not happened under this Constitution. Could you see any reason why it would happen under a new Constitution?

Prof. Howell—No.

Ms HALL—As my colleague on my left here said, it has to go to the Queen each time. But yesterday even Malcolm Fraser said, in effect, that the Queen just rubber stamps what the Prime Minister says.

Ms JULIE BISHOP—The time differential is important. If the rogue Prime Minister, for example, were to go about now in sacking all state governors, there is still the time delay of having to get the assent from the Queen. In doing it seven times, there would be a delay.

Prof. Howell—Indeed.

Ms HALL—There is nothing to stop the current Prime Minister doing it, simultaneously sending off seven letters at the same time along with the letter relating to the Governor-General. It is quite a ludicrous scenario that has been put to us, I believe.

Prof. Howell—The machinery proposed for the President to be appointed by parliament on the nomination of the Prime Minister, seconded by the Leader of the Opposition, seems to be the best mechanism for ensuring that you will get somebody who is not partisan, who is above politics; somebody who is acceptable to both the big sides in politics—the government and the opposition.

Likewise, I think you will find that the states will follow a similar sort of procedure. Whether it is by popular election at the state level, whether it is by appointment by the Premier in consultation with the Leader of the Opposition or whether it is by two-thirds of parliament, the chances are that you will get somebody who is above politics. In that scenario, it seems almost inconceivable that any Prime Minister would want to sack seven of these people.

Ms HALL—Yes.

CHAIRMAN—What if he was mad?

Ms HALL—We could still have a mad Prime Minister now.

CHAIRMAN—You would have to be mad to do it, wouldn't you; you would have had to have literally lost your marbles. But it is possible that that could happen and we could be left with nothing. Sure, the party would get rid of the Prime Minister and replace the Prime Minister and things would come back to normal. Maybe that is the answer.

Mr McCLELLAND—Accepting the potential is there, if you put in those words we discussed before under the 30-day period and the House approved them, if you added words to this effect or something along these lines, 'Pending approval by the House, the Acting President appointed in accordance with this Constitution shall perform the duties of President', would that be a means of getting over the problem?

Prof. Howell—'Pending the approval of the dismissal of the President by the House'—yes, I think so, because that gives you a time in which to dismiss the lunatic Prime Minister.

Mr McCLELLAND—And that would prevent the Prime Minister getting any benefit from the dismissal in so far as he would not be able to control the person who was coming in as Acting President.

Prof. Howell—Yes.

Ms JULIE BISHOP—It would give the Acting President time to sack the Prime Minister if he had become a rogue Prime Minister as well.

Prof. Howell—Yes.

Mr PRICE—I apologise. We seem to be dwelling a lot on this doomsday scenario, but I am interested in the mechanics. Wouldn't there have to be a Government *Gazette* notice that Prime Minister Smith had appointed his first Acting President after having dismissed the President? Doesn't there have to be a formal gazettal of that?

Prof. Howell—There must be, yes.

Mr PRICE—Wouldn't there have to be a gazettal of his dismissal and then a further gazettal of the appointment of the next one? You could not do that all on one day.

Prof. Howell—No.

Mr PRICE—You cannot dismiss someone who is not properly appointed. In a sense it is not the 30 days, but I would have thought there was some time gap. You could not instantly be firing the six bullets or whatever.

Prof. Howell—No. I am not a lawyer. I am a historian, but I—

Mr PRICE—That is why we value your evidence so much, Professor.

Ms JULIE BISHOP—Cut it out!

Prof. Howell—I would think that a proclamation of that order could really only be issued by the federal Executive Council and that you would have to have a head of state or acting head of state to accept the minister's advice and proclaim it in an official gazette notice.

Mr PRICE—You would actually have to have meetings.

Prof. Howell—Yes.

Mr PRICE—In a sense, although it is not as long as 30 days, if this doomsday scenario was on, you could not be doing it instantly. That was my point.

Prof. Howell—No. The Prime Minister could not sit down in the Lodge and write seven letters. He would have to meet with the Acting President and at least a couple of other ministers.

Mr PRICE—Presumably, there would be a tad of media interest in all these meetings and dismissals.

Prof. Howell—Yes, indeed there would.

Ms JULIE BISHOP—I think we will leave them out of our considerations.

Mr CAUSLEY—Professor, I want to go back to some of the points in the bill on the power between the Prime Minister and the President. Are you quite happy with the bill saying that the Prime Minister can sack a President summarily without any other opinion, without the opinion of parliament or whatever? I know it has to go back to parliament within 30 days, but are you quite happy with that being in the bill?

Prof. Howell—Yes. I think that dismissal is far more important than appointment. I have thought this for years. It is the very reason why, for a long time, I fought against the Australian Republican Movement's early 1990s model for an Australian republic. They wanted parliament to confirm the dismissal. Parliament could be prorogued; it could be dissolved pending a general election. If you have a President who goes bonkers, you must be able to get rid of him quickly because the executive power entrusted to him is so great that it could easily be abused. Or a President might become a bender drinker or become bankrupt. There are all sorts of reasons why you might need to get rid of him.

It would arise very rarely and, again, it is a doomsday scenario. But if it happened, because of the power vested in the office, you would have to get rid of that person quickly. It was not until that emerged in the convention model last year that I became wholly supportive of it. As I said, you can go through all these motions about appointment and consulting people, and that is all very fine and very nice, but it is vital to get rid of such a person quickly if needed. I think that what has come out is a very good and workable model.

Mr CAUSLEY—Are you happy with the unlimited term of the President? In other words, they are appointed for five years and that can be extended?

Prof. Howell—I do not see any objection to that. Sometimes in Australia we have had state governors who have gone on for 10 years or more. People who have been particularly successful have been reappointed and reappointed. Sir Winston Dugan, who was a very successful governor here, went on to become Governor of Victoria for more than 10 years, and Sir Dallas Brooks and others have likewise.

Mr CAUSLEY—Sir Roden Cutler in New South Wales.

Prof. Howell—Yes. Remember that reappointment also involves the consent of the Leader of the Opposition as well as the Prime Minister. I do not think that is likely to be forthcoming unless the person is perceived to be a success.

Mr CAUSLEY—The other point I wanted to raise, and you have already touched on it, is the selection committee. It has been put to us that the Prime Minister and the Leader of the Opposition might not be able to agree on the final five or whatever nominees. I am starting

to think that, even though it might give the people a warm and fuzzy feeling to think they might have some involvement in the nomination of a President, in practical terms it could be difficult. I am just wondering if you have any opinions on that nomination committee?

Prof. Howell—No. My preference is expressed in the first report I wrote for the South Australian Constitutional Advisory Council. It is a book called *South Australia and Proposals for an Australian Republic*. It examines the whole history of the vice-regal office in Australia and options for change. I and the majority of my council suggested that presidents should simply be appointed on the nomination of the Prime Minister, after consultation with the Leader of the Opposition and tendering that advice to the retiring President or Acting President who would then proclaim who the new President would be. I think that is really the closest system to our present system, where since 1930 the monarch has had no option but to accept the Prime Minister's advice. That was shown so clearly in the Isaac Isaacs case, and that has established a precedent ever since.

The popular nomination procedure was devised at the convention as a way of meeting the claims of those who wanted popular participation in the process. I think it goes a good way, because there were some people who changed sides after that was put into the proposal as that met some of their objections.

I am sure that most of the nominations that will be coming forward will be of respected citizens who would have the capacity to command popular support and I do not think the Prime Minister will have trouble finding somebody that the Leader of the Opposition can support from all the names that the committee provides. If it turns out that, in the short list of, say, five, there is not anybody the Leader of the Opposition is happy about, I presume that means it goes back to the nominations committee and they come up with some other names. I do think it is workable.

CHAIRMAN—On another issue that you have discussed, you have confused me a bit. You talked about chapter 1 of the Constitution, part 1, paragraph 4, which says:

The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such person as the Queen may appoint to administer the Government of the Commonwealth . . .

And no such person is entitled to receive salary and all that sort of stuff. If the succession is limited to governors of states, why do we need to reinsert or to leave that section in the existing Constitution?

Prof. Howell—Can you tell me which section it is again, please?

CHAIRMAN—In your submission on page 2, the last item says, 'Page 8, line 12 of the bill'. Page 8, line 12 of the bill says, 'Repeal sections 2, 3 and 4 of part 1, general, chapter 1 of the Constitution.' That paragraph which is proposed to be admitted essentially says that whoever is going to act, whoever is Governor-General or the head of state, or is going to act as one, cannot be an employee of a public body or a judge.

Prof. Howell—Yes.

CHAIRMAN—Aren't we, in effect, saying that anyway, if the line of succession from a duly elected President who has to meet those same qualifications cannot hold office because that is the same as being a member of the House? If the succession goes to state governors and they meet those requirements, doesn't that take care of the problem?

Prof. Howell—Yes. But I still think we need the old section 4 to carry on.

CHAIRMAN—But why?

Prof. Howell—I see, yes. That is contingent upon abolishing the provision for governors' deputies.

CHAIRMAN—I accept that.

Prof. Howell—If you accept that, then, yes, you do not need to keep section 4, because you are not going to have a federal judge or a federal public servant appointed as president's deputy.

On the whole general issue—this is perhaps a side issue, but I would like to share it with you—it has always seemed to me that it would be highly desirable if it were possible for the last Governor-General to become the first President, even if it is only for three months, just to show continuity and that no radical change is taking place. That is something I think you might like to pass on.

Another thing that we found as we went around talking to the people of South Australia was that there are quite a lot of people—perhaps the better educated or more thinking people—who expressed a view that they really would not like the title of Governor-General to change because, if you talk about a presidency, so many people automatically think of the American model and they said, 'Let's keep the title Governor-General in a republic because it will signal that the office is not really changing.' Now the convention considered that and rejected it but the moral to be drawn from it, I think, is that it is important to signal that no great change is taking place and that is why I very much like the form of words for the referendum question that Malcolm Turnbull was reported in yesterday's *Australian* as putting forward, because it does draw attention to the fact that the President would have the same powers as the Governor-General. If you leave out that reference to powers, you really are waving a flag at the American system. Just talking about a President, they will think of the American system. We might one day go to that but not yet. At the moment it seems too radical a change.

Mr McCLELLAND—Just on the qualifications to be nominated, you referred to clause 60 which requires the President to have the same qualifications as a member of the House of Representatives. But if you look at the Presidential Nominations Committee Bill, clause 20 says that, at the time of accepting nomination, a nominee should also include a statement indicating whether the nominee is qualified to be chosen as a President. I suppose my concern is: does the qualification extend too far back in so far as it goes to the start of the nomination process because it may rule out from being nominated people who hold another office of profit under the Crown, such as a judge, professor, academic or a state governor? Do you think the qualification for office should be determined at a later point in time, either at the point where the short list is submitted to the Prime Minister or prior to the assumption of office?

Prof. Howell—If, by qualification, you mean the proposal that the person must be qualified to be elected to the House of Representatives.

Mr McCLELLAND—That is what section 60 says.

Prof. Howell—I think that ought to be in the Constitution rather than just an ordinary piece of legislation.

Mr McCLELLAND—It will be, but do you think we should be looking at the nomination procedure and not require the nominee at the point that they are nominated to be so qualified, but perhaps give an undertaking that, in the event of them being chosen, they would be qualified? In other words, a sitting judge could not accept a nomination under the present arrangements, unless, at the point that someone knocked on their door and said, 'I'd like to nominate you', they resign from office as a judge. I think that is most unfair because you do

not know what the outcome would be. Yet, having such people as potential nominees may well be very valuable.

Prof. Howell—Yes.

Mr PRICE—Sir William Deane would not have been able to accept and Sir Zelman Cowen could not have accepted under this.

Mr CAUSLEY—Many of the governors of New South Wales have—

Mr PRICE—Because they were in the services.

Prof. Howell—McKell was actually still in office as Premier of New South Wales when his appointment as Governor-General was announced. Hasluck had only been retired as foreign minister for two or three days when his appointment was announced.

Mr McCLELLAND—Do you think we should be looking at amending that requirement to provide such a statement, but rather requiring the person to undertake that, in the event of their being so nominated, they would be—

Ms JULIE BISHOP—At what point does it come in? When they are on the short list or when they—

Mr McCLELLAND—Those are the dilemmas, I suppose, either at the point of presentation on the short list or at the point of being chosen and prior to assuming office.

Prof. Howell—Yes. If there is a short list of five, it is a little bit of a gamble. Presumably, if a person did resign from office to let their name go forward to the parliament, you would think it quite likely that they would be reappointed to their former position if the Leader of the Opposition did not agree to support the nomination.

CHAIRMAN—But then there is superannuation and all the kinds of service.

Ms JULIE BISHOP—It is highly undesirable if they are the chief justice.

Mr PRICE—Professor, I believe the point that is being made is that we are excluding a whole raft of people who might otherwise be worthy of consideration for nomination in the way the nominations bill is currently written. We are asking you whether you agree with that or whether all Australians should inherently have an opportunity to be nominated. If that is the case, we then have to look at the impact of what is proposed in the bill and whether it can be delayed to a later point than currently is the situation.

Prof. Howell—I think that several of our best Governors-General have been people who have mastered the whole process of responsible government and honed their skills in high ministerial office. It would be a great shame if such people were excluded from candidature. Likewise your eminent jurist or other distinguished person who may be on the public payroll in some way or another should not be excluded. It may be quite adequate if, as soon as the Leader of the Opposition agrees to second the nomination or the nomination is tabled in parliament, a person is required to resign from any office that might preclude him from acceptance.

Mr McCLELLAND—It may be solvable in that clause 20 of the Presidential Nominations Committee Bill says that the nominee shall provide a written statement in support of the nomination and goes on to say:

. . . including a statement indicating whether the nominee is qualified to be chosen as President;

In that statement they might say, 'I am not presently qualified because I hold an office of profit under the Crown.' We might contemplate adding a clause (d) there that, in circumstances where a person holds an office of profit under the Crown, they should provide an undertaking

that, in the event of being chosen or approved as President, they would forthwith resign from that office.

Prof. Howell—Yes. In a sense, this would put a cat amongst the pigeons, would it not, because the High Court has said that a person, once wrongly elected, cannot resign or renounce a disqualification after the election has taken place?

Mr CAUSLEY—You cannot stand for parliament.

Prof. Howell—That is because of the specific wording of section 44 of the Constitution, though.

CHAIRMAN—Could you solve the problem by simply stating that the appointed or elected President cannot assume office while holding any other office of profit under the Crown or being a bankrupt or any of the other things? The bill causes that to be a qualification.

Ms HALL—At the time that the President would be nominated and seconded within the parliament, the vote would take place within the parliament, so you could say the nomination and the seconding would be the same as at the time when a person nominates for parliament. When they are nominated and seconded before the house of parliament, they should not hold an office under the Crown. It is lining it up with a situation of nominating.

Prof. Howell—I think a person should be prepared to make a decision that they are willing to renounce their other occupation to take on this office. You might say that would preclude somebody under the age of 55 or 60 from making themselves available but, in practical terms, you need somebody with that degree of experience anyway. It is a matter for draftsmen rather than for me to advise you on this.

Mr PRICE—Professor, if we are become a republic, do you feel that the President needs a tax free income to fulfil the office in the way Governors-General have always required a tax free income to successfully fulfil their duties or should an example be set at the highest level of head of state that everyone pays taxes? I understand even the Queen pays taxes now.

Prof. Howell—In Britain. I do not know whether we take withholding tax from her Australian investments.

Mr PRICE—It sounds like a good question on notice to me.

Prof. Howell—I thought that it would no longer be appropriate to maintain the trappings of royalty if we become a republic. For many years, the salary was not awfully good, especially at the state governor level. When Charlie Kingston was premier here in the 1890's, he abolished the £2,500 allowances and cut the salary from £5,000 to £3,000 for the governor and said the governor in future had to pay the salaries of his private secretary, the aides-de-camp, the domestic staff and so on and so forth. He even had to pay the insurance premiums on the contents of Government House. Kingston's strategy was to make the office unattractive so no-one from Britain would accept it and the Queen would have to appoint South Australians as governor.

The trouble was that the salary stayed there until the 1970s. It was only when Sir Mark Oliphant, a university professor who had no savings whatsoever and no private income, was asked if he would accept the appointment, that the government had to bring the salary up to $20,000 a year. But it was tax free. He did not have to pay excise on grog and tobacco and so on for entertaining or other purposes. At the time, $20,000 tax free was worth $35,000 taxable. For a long time it has seemed to me that it is no longer appropriate to get a head of state on the cheap that way. There should be no vice-regal prerogatives and the salary ought to be made sufficient that the President pays like anybody else.

Mr PRICE—And can afford to pay tax. I tend to agree with you strongly, but we will see. The bill seems to be silent on that.

Prof. Howell—Yes. That could be something that was done by legislation. I do not think you have to put it into the Constitution. Just as the present exemption of the Governor-General from excise and customs duty is not put in; his wife can bring in a fur coat duty free. That is not in the Constitution and I do not think it has to be.

Mr PRICE—In my state we have a governor and a lieutenant governor. Is that the practice in the other states? Why haven't we got a Governor-General and a lieutenant governor-general? What is the history of that?

Prof. Howell—We do not have a lieutenant Governor-General.

Mr PRICE—Yes, I know. It seems to me to be odd that we have lieutenant governors, but—

Prof. Howell—As I said, at the federal level, you have the six state governors with dormant commissions to act if required. At the state level, you do not. The original tradition was that either the senior officer commanding the armed forces in the colony or the senior available judge would administer the government in the death or absence of the governor. The senior officer of the armed forces is now an employee of the Commonwealth, so it is no longer appropriate to have such a person administering the government because his first duty is to Canberra, not to the state.

As far as the judges go, we have had a series of chief justices—Way, Murray and Napier—who have had commissions as lieutenant governor. Since the 1960s, most of the judges here have said that they would really rather not administer the government, except in an emergency for a few days only, because they did not want to be in the position of having to make executive orders on things that might subsequently come before them judicially. I think most of the judiciary throughout the country take that view now.

That is why in the last 30 years or so it has become a convention to appoint a senior citizen who is respected in the community—not a judicial person or a military officer but somebody like a retired ambassador, an eminent academic or a public figure—as lieutenant governor to step in automatically when the governor is away. I think that is the difference. In South Australia this has worked very well. I am not so familiar with how it has worked elsewhere but it probably is comparable.

Ms JULIE BISHOP—I have a final point that is on your last page in relation to the proposal to amend section 7 of the Australia Act. Turning to the transitional provisions in the bill, could you just explain what it is that you propose in regard to amending section 7 of the Australia Act?

Prof. Howell—The Australia Acts were really quite unnecessary as far as this particular issue is concerned because section 51, placitum xxxviii of the Constitution proclaimed in 1901, provided a mechanism for varying or repealing any British statute of paramount force that still had application in Australia. Section 51, placitum xxxviii, gave to the federal parliament, on the request and with the consent of all the state parliaments, power to do anything that the United Kingdom parliament could do up to the time of Federation.

That part of section 51 was forgotten for 80 years or more and the Australia Act was passed in 1986 which did almost exactly the same thing. In fact, in the end the Australia Act was passed by our Commonwealth parliament invoking section 51(xxxviii), that they were acting at the request of and with the consent of all the parliaments of the states. But the Australia

Act also made a provision for change to take place by a national referendum. While legally it is possible for a federal referendum to change state constitutions since the federal Constitution says that the state constitutions are subject to the Constitution of the Commonwealth—so you can change the Commonwealth Constitution to force a change to a state constitution—it really would be politically and ideologically undesirable to force a change on a state that way. That is why the request and consent mechanism that is in the Australia Act, and that is already in section 51(xxxviii) of the Constitution, is the way to go.

Ms JULIE BISHOP—It is also inherent in the transitional provisions, item 5 of schedule 3, this statement in respect of the change to a republic.

Prof. Howell—Yes.

Ms JULIE BISHOP—Is it necessary to have that item 5? Essentially, it is implying that the states require the permission of the Commonwealth to retain the integrity of their own constitutions.

Prof. Howell—Can you tell me which page this is on?

Ms JULIE BISHOP—This is the transitional provisions to the constitution alteration act, schedule 3, item 5, headed 'The States.'

Prof. Howell—I think that is a desirable thing. There may be some reason why a particular state has not changed its constitutional arrangements before 1 January 2001, and this does cover that situation. It gives them time without forcing them. Especially among state politicians, there is still a strong feeling about states rights. Their orbit is now so circumscribed that if you take what is left to them away, they might as well shut up shop or give up.

CHAIRMAN—Professor, thank you very much for your submission and for coming and talking to us so frankly today. We appreciate your advice. The committee will table its report on 9 August and we will certainly send you a copy of our report.

Prof. Howell—Thank you very much.

CHAIRMAN—Also, as a result of your consultation with 1,200 South Australians, if there are other issues that were raised, could you communicate those to the secretariat please?

Prof. Howell—Have you seen my report, or are you aware of it? It is available through the AGPS bookshops but if you rang the Department of Premier and Cabinet here and asked to speak to Ms Carmen Huddy I am sure she would be glad to give you copies without any charge, or even post them to you.

CHAIRMAN—Very good, we thank you for that.

Prof. Howell—I do hope you took on board my last point about not using the word 'lottery' in the nominations committee.

CHAIRMAN—No, I have written down 'fair statement'.

Prof. Howell—Thank you.

[11.57 a.m.]

BAUER, Mr Peter Richard (Private capacity)

SHORT, Mr John (Private capacity)

CHAIRMAN—Good morning gentlemen, and thank you for coming along. This is a bit unusual but we try to accommodate everybody to the extent possible. We cannot talk too long, but would you like to tell us what it is you would like to communicate to the committee.

Mr Short—I work as a boilermaker, a tradesperson down at Port Adelaide. I emigrated from the UK in 1981 and what I found about Australia when I first got here was that it was, I believed at that stage, a very fair society and very equal as far as not being based on who your mother and father were and who decided what position you occupied in society. It was clearly based on what you had to offer and what you could give to society. Respect in Australia is based on that, it is not based on heredity claims, on who you are or who your parents were, it is based on what you do for society. I think it is important, from an ex-British standpoint, to express the view that Australia ought to become a republic.

I am a proud Australian, a naturalised Australian, and I found it ridiculous when I became an Australian citizen that I had to give my loyalty to the Queen of England, absolutely ridiculous. I think that people outside this country look at this country and say, 'There is something a little bit strange about Australia. Have they got the confidence to go out on their own?' It is like a person who is maybe 40 or 50 years of age still living with their parents. It seems from the outside a little bit strange. I think it is time for us to go out on our own, leave home and take up our own place in society and make sure that we are leaders of our own destiny.

Even though you talk about leaving home, it does not mean that you forget your ties with your family. Those ties, I am sure, will still be there, but it is about time that we, as a nation, went out on our own. They are some of the things I believe.

I will hand over to Peter who will say his piece. But I think it is time for us to go out on our own. We are a proud society, and it is time the rest of the international community see that we are out on our own. And why not? We should not have to abide by decisions made by somebody 13,000 miles away. I think it is important that we have an Australian head of state. I think it is unusual for people to wonder and to say, 'Who is your head of state? Is it the Prime Minister of Australia or is it the Queen of England? Who is it?' We need somebody we can respect, not somebody we are given—somebody we, as a nation, choose. Respect is earned; it is not given to people. I think that, if we have an Australian President, they should be somebody whom we all respect. Thank you.

CHAIRMAN—Thank you very much for that, John.

Mr Bauer—I do not think my views vary too much from those of John—apart from the fact that my heritage is not one of being English. I was born in Australia and always have been Australian. I come from an Australian mother and a German father. But I am proud to be Australian. I feel that Australia should be seen—and I think this is the crux of the feeling amongst the community, particularly amongst people who feel the way I do—to be standing on its own two feet as a nation. Having a head of the nation who actually lives in the country and understands and believes in the country is important, I think, for people to realise and have.

My concern is that it is being portrayed and seen, in some circumstances, to be an attack on the Queen and the British Empire. I do not see it that way, and I hope other people do not

see it that way, because I do not believe that is what the push is all about. I think the push is really about cutting off the apron strings that are perceived to exist between Australia and the British Empire and about having a head of state who is not answerable to another nation but who is directly answerable to this nation—that is, to Australia.

I have, I suppose, the luxury of being in a position of growing up where the British Empire had a stronghold in the schools. I remember very vividly singing *God save the Queen* every morning in the assembly area at school and seeing the pictures of the Queen on the walls of the school. Even at that very young age I remember feeling very bemused about why there were pictures on the school walls of someone who lived thousands of miles away and why we were singing a song with respect to that particular person when we, even at that stage, seemed to be a country that could look after its own interests.

Over the years, I have seen a gradual shift from that, I suppose, through the changing of the anthem and the removal of the Queen's pictures from schools. I do not think there would be many schools now that would have them in every classroom—maybe in the foyers but not in every classroom. So I think there is a maturity that has developed gradually over the years anyway, and I do not see this as a radical change. I see this as part of the gradual change that has occurred anyway, to the degree now where the gradual change has culminated in a need to change the Constitution and a need to develop an identity as a head of state.

I believe that we should maintain strong links with Britain, I believe that we should continue to belong to the Commonwealth and I believe that we should recognise and teach our heritage and our British links. I believe that this is an ideal opportunity to continue maturing, as has occurred over the last few years, particularly with the new millennium we are entering, and it is an ideal opportunity to move to having a head of state of Australia.

Also, I will not hide the fact that I have very similar philosophical beliefs to John's. That is, I believe that the head of state should be chosen through a democratic process, or at least a process which enables people who are eminent in society, or who have proven their worth to society, to be considered for recognition as the head of state. It should not be because of heritage or of being born into the right family.

More importantly, I think this is a move that Australia needs and wants to have so that we can be seen to be independent. We are a very independent country. We have very independent sports, a very independent heritage and very independent songs and cultures. I think this is a time when we can show that by having an independent head of state. Those are my views.

CHAIRMAN—I thank both of you for very eloquent statements on why the case should be put forward and proceeded with. You have now appeared formally before the select committee. We will table our report on 9 August, and we will send you a copy of it. Thank you very much.

[12.08 p.m.]

KIRK, Ms Linda Jean (Private capacity)

CHAIRMAN—I welcome Ms Linda Kirk. I understand that you gave us your submission this morning, and the committee has agreed that it be published. Would you like to make an opening statement since we have obviously not had time to come to grips with your submission yet.

Ms Kirk—Thank you for the opportunity to make this submission. I thought I would speak to the written submission just to outline the contents. The written submission I have prepared is limited to the provisions of the Constitution Alteration (Establishment of Republic) Bill 1999 and in particular those provisions which relate to the removal of the President and also Acting President and deputies.

Generally speaking, I am of the view that the bill, if approved at November's referendum, will provide a constitutionally sound model for a republican government in Australia. However, as presently drafted, I believe that the bill, in particular the removal procedure, has the potential to cause confusion, disruption or even crisis if amendments are not made to it.

These amendments, I believe, can be made without departing from the spirit of the discussions at the Constitutional Convention. So my submission addresses removal of the President; it also makes a suggestion that perhaps consideration be given to the creation of the office of Vice-President. This office would replace those provisions which relate to the Acting President and deputies in section 63 of the bill.

For reasons that I will outline shortly, I believe that the creation of this office would provide a neater and more efficient solution to the situation where the President is unable to fulfil his or her duties. But I will first address my remarks to section 62 of the bill which provides for removal of the President. The procedure for removal of the President received only scant attention by the delegates, of which I was one, to the Constitutional Convention. The primary focus of delegates was on the procedure for appointment of the President and the need for public participation in this process. For this reason, I would submit that the committee should attach less weight to the recommendations of the convention in relation to removal.

Although a removal procedure in a constitution will only be infrequently invoked, it is significant in that it colours perceptions of the presidential office. The removal procedure in section 62 of the bill is inconsistent, I believe, with the purpose of a removal mechanism and incompatible with the status of the head of state.

The removal procedure recommended by the Constitutional Convention has been described by Professor George Winterton as the convention model's most unsatisfactory feature. It has been the subject of extensive criticism from constitutional scholars in a recent addition of the *University of New South Wales Law Journal* by such scholars as Professor Winterton, Professor Cheryl Saunders and Sir Harry Gibbs. However, I believe that a few minor amendments to the removal procedure will in fact address many of the criticisms that have been made and will not dramatically depart from the spirit of the Constitutional Convention communique.

As you will know, section 62 at the moment provides for immediate removal of the President by an instrument signed by the Prime Minister. The Prime Minister's action must be approved by the House of Representatives within 30 days of the removal. The failure of the House to approve the removal will not cause the President to be reinstated to office. The removal procedure as it now exists effectively gives unrestricted and unqualified power to the Prime Minister to summarily dismiss the President without providing any reasons for the dismissal.

There are two points I would like to make about the removal procedure. The first is a minor point and the second is of more significance. Firstly, section 62, as it is presently drafted, provides no indication of the majority which must be achieved in the House of Representatives in order to constitute approval. The bill only speaks about approval by the House of Representatives—there is no majority specified.

The Constitutional Convention communique refers to ratification of the Prime Minister's action by the House of Representatives and says that a failure to ratify will amount to a vote of no-confidence in the Prime Minister. Well, if this is the intention of the bill, I believe it should specify that a simple majority of the House must be achieved for approval of the Prime Minister's action to remove a President. So that is the minor point.

The second point I think is more significant in that, in my view, unless an amendment is made to the removal procedure, the bill will be constitutionally flawed. The removal procedure in section 62 has the potential to be misused by a Prime Minister who seeks to remove a President who fails to act on the advice of the Federal Executive Council and/or who indicates an intention to exercise the reserve power.

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

The removal procedure essentially relies on the political consequences of such an action to restrain a Prime Minister from so acting. The purpose of the removal procedure in a republican Constitution is to enable the removal of a President who has shown himself or herself to be unable or unwilling to properly execute the functions of the office.

The removal mechanism should be designed to fulfil this purpose. An analogy can be drawn with the provision in the Constitution to remove High Court judges. Section 72(ii) limits the grounds for removal to proved misbehaviour or incapacity. As it now stands, the removal procedure in the bill has the potential to be misused by a Prime Minister in circumstances analogous to those which gave rise to the constitutional crisis of 1975. A Prime Minister who is faced with a situation where supply is blocked in the Senate could remove a President who threatened to exercise the reserve power to dismiss the government.

In other words, the Prime Minister could make a pre-emptive strike against the President. This differs from the existing situation in that the Prime Minister at the moment cannot secure the immediate dismissal of a Governor-General. The Prime Minister must advise the Queen of the intention to remove the Governor-General. The Queen would be entitled to request from the Prime Minister written advice and may even insist on a reasonable time in which to consider it. She may even seek the Governor-General's response to any allegations. So the difference there is that you have a third party somewhat in the role of an adjudicator to actually bring some judgment to bear on the action of the Prime Minister. But under the removal procedure in this bill, the Prime Minister can immediately dismiss the President without consulting any other person. He or she could be confident that his or her action would be ratified by the House of Representatives where he or she held a majority.

In accordance with section 63 of the bill, a President who is dismissed by the Prime Minister would be replaced by an Acting President who would be the longest serving state governor. The Acting President would fulfil the duties of the President until such time as a new President is appointed in accordance with the appointment process under the Presidential Nominations Committee Bill or whatever legislation happens to be in place at the time.

Following the preparation of the committee's report, the Prime Minister will be required, in accordance with section 60, to present a single nomination to a joint sitting of the parliament for its approval. Now at a time of constitutional crisis such as circumstances where there are suggestions that the President was removed by a Prime Minister in order to prevent the dismissal of a government, it may be difficult, if not impossible, to obtain bipartisan support for the new President and the required two-thirds majority under section 60. The government may be satisfied to retain an Acting President who refuses to exercise the reserve power to dismiss the government; if so, it could delay the appointment of the new President. The opposition, in turn, may not agree to a candidate proposed by the Prime Minister who it believes is unlikely to exercise the reserve power when installed as President. So the deadlock in the Senate would remain unresolved.

This undesirable scenario may be alleviated by a minor amendment to section 62. Removal of a President should only be able to be effected by the Prime Minister on specified grounds. For example, in Ireland, a President is removable for misbehaviour which renders the President unfit to continue in office.

CHAIRMAN—Ms Kirk, I hesitate to interrupt you but I think the committee would like to ask you some questions and you are just reading your submission. We are going to run out of time very quickly. We will wind up with no questions and no spontaneity and we already have your report.

Ms Kirk—I did not think you had had time to read it; that is why I wanted to run through it.

Mr CAUSLEY—I think we have got the gist of it. We had evidence from former Prime Minister Fraser yesterday who indicated that he believed that in fact once the Prime Minister at the present time, under the present Constitution, indicated that he wanted the Governor-General removed, that Governor-General would cease to be effective. Do you disagree in law with that point of view?

Ms Kirk—When you say 'cease to be effective', you are saying if it was communicated to the Governor-General.

Mr CAUSLEY—Correct me if I have got this wrong, but my understanding was that he said that once it was indicated that the Prime Minister was moving to remove the Governor-General, that Governor-General would be ineffective in any moves that they might make.

Mr PRICE—By way of a more accurate quote, he said that, even though the Queen might seek written advice to confirm the telephone conversation, the Governor-General from the point of the initial communique would cease to be an effective Governor-General.

Ms Kirk—That might be the case but I do not see why the Governor-General could still not exercise the powers.

Mr CAUSLEY—That is the point. Legally, could they still exercise the power?

Ms Kirk—Legally I do not see why not because he or she has not been removed at that point, even though the advice has been communicated.

CHAIRMAN—The point he made was that by convention, which is what we will be relying on in these issues anyway, the Governor-General would cease to act.

Ms Kirk—By convention?

CHAIRMAN—Yes, because he or she would consider himself or herself sacked.

Ms Kirk—Perhaps, although if the Governor-General thought that he or she was in the right then I do not see why he or she could not then act to dismiss a government in those circumstances, that is, to exercise the reserve powers. He or she might believe that the Queen would not accept the advice of the Prime Minister and if there was a true crisis situation then he or she could still act as the Governor-General did in 1975 to dismiss a government.

Ms HALL—Could you give me an example of the Queen not accepting the advice of the Prime Minister?

Ms Kirk—I do not think there are any examples.

Ms HALL—That is right. So you believe that even though the Queen has never acted in that way, she would now act that way. Is that correct?

Ms Kirk—Under a new Constitution?

Ms HALL—No, under a new Constitution she will not be there. Do you believe that the Queen, even though she has never done that, would act that way?

Ms Kirk—The Queen does retain reserve powers of her own in order to not accept the advice of a Prime Minister in circumstances where it might undermine the democratic process, for example. The Queen does still retain the power. It has been said by numerous scholars that the Queen still does retain the discretion not to accept the advice of a Prime Minister.

Ms HALL—Malcolm Fraser said yesterday that she virtually rubber stamped anything that the Prime Minister said to her and that it would be a total break with convention and what has happened historically since our Constitution has been in operation.

Ms Kirk—I am sure that is right. Malcolm Fraser has the benefit of practical experience. However, the legal view of constitutional scholars is that she still does retain that discretion, in exceptional circumstances, not to accept the advice of a Prime Minister.

Mr CAUSLEY—If it has been tested in 1975 it might have been interesting.

Ms Kirk—That is right, it was not tested, but it could have been interesting.

Mr PRICE—No-one is arguing that she does not have the right, but Malcolm Fraser, given that he was the second longest serving Liberal Prime Minister, said that absolutely there is no way the Queen would interfere in such a way in Australia. We are not disputing whether she has the right to interfere, everyone agrees with you on that, but it is the practicality. I think Jill was getting to that in her question. The feeling is that we have survived it for 100 years so why suddenly would we have a Queen wanting to change the trend?

Ms Kirk—I accept that, but in a sense I am making a different point here. The central point I am trying to make is that it would be much more desirable if there were stated grounds set out for the dismissal of a President so that it was not just left up in the air, so that there was uncertainty as to the circumstances. If you were to state specified grounds then there would be less room there for the potential misuse by the Prime Minister.

Mr PRICE—But there are no grounds now and no Governor-General has been dismissed, fairly or unfairly.

Ms Kirk—You are quite right, but we are talking about what may or may not happen. When we are designing a new Constitution for the new century, perhaps we should give consideration at least to thinking about specifying grounds so that it is consistent with the purpose of a removal mechanism.

Ms JULIE BISHOP—Ms Kirk, I want to explore that area with you. We are talking about a situation where the Prime Minister must dismiss with cause. You have referred already to

the removal of High Court justices. Section 72(ii) of the Constitution states that the removal is done on the ground of proved misbehaviour or incapacity. I am rather interested in this concept of proved misbehaviour. Would we be envisaging a situation where there was a kind of trial, an impeachment process, because they are talking about proved misbehaviour, but proved to what standard? I would be interested to hear your views on how this would come about. Would it be a motion by the Prime Minister in the House with debate? Would it be a quasi impeachment process? What do you have in mind?

Ms Kirk—I actually left out the word 'proved' when I referred to it because I think that all of those things you refer to are going to draw out the process far too much. I would still like to see the Prime Minister have the final say. In other words, I would like the Prime Minister to still be able to make that effective decision to remove, yet to only be able to do so on grounds which can be sustained, such as misbehaviour or incapacity.

Ms JULIE BISHOP—Sustained at whose—

Ms Kirk—At his discretion.

Ms JULIE BISHOP—Would it encourage High Court intervention, that his grounds were not sustainable?

Ms Kirk—Whether or not it would make it justiciable is a difficult question. At the moment these things are not seen to be justiciable. I doubt that the High Court would want to adjudicate upon that question. That would be my legal view.

That is why I left out the word 'proved,' because I thought about whether or not it would be desirable to have the inquiry, to have the impeachment, in the way that you described. I think that then takes too much power away from the Prime Minister. I guess I am just trying to find a balance there.

At the moment it is far too easy, the Prime Minister needs to give absolutely no reasons whatsoever, and what you suggest is kind of extreme. I am trying to find a middle ground. At least the Prime Minister can say, 'There has clearly been misbehaviour. There's incapacity. He's lost his mind and therefore I am going to exercise the power of removal.'

Ms JULIE BISHOP—Misbehaviour conjures up interesting interpretations, does it not?

Ms Kirk—It does. It has, just recently.

CHAIRMAN—I am not a lawyer but I do know that we have a very unusual Constitution. That is, our parliamentary democratic system is different from any other democracy. By the nature of it, the Prime Minister is unelected and not even mentioned in the Constitution. It seems to me that if you do not give the Prime Minister an unfettered right to dismiss the President regardless of reason—and the President is by one means or another elected—then the majority of Australians would see the Constitution as flawed and insupportable because there would be no mechanism to resolve a crisis.

Ms Kirk—There is; there is still the ability to dismiss. I am not taking that away. I would like to see full power in the Prime Minister to dismiss. All I am proposing is that there be some consideration given to grounds for dismissal. What other reasons would you be wanting to remove a President for other than for misconduct, misbehaviour, or failure to fulfil the duties of office?

CHAIRMAN—I can think of very good political reasons. What about where a President became obstructionist and refused to do what the Executive Council recommended and was, in effect, stopping the machinery of government and there was some disagreement between the two houses of parliament which needed to be resolved?

Ms Kirk—I agree with you, that is a view to take. I was not going to discuss the presidential nominations process but I suppose many people would take the view that since there is that public participation in the choice of the President that perhaps the Prime Minister should not have the ability just to say, 'I don't like the way you are acting. I am going to get rid of you,' given that there has been that public participation. It is changing the nature of the role of the Governor-General, the head of state, in some sense.

I think that is why there is such a lengthy and involved process, the public participation element, in making the choice of the President. It does alter it slightly in that regard. A lot of Australians might think, 'How can this Prime Minister just intervene and sack a person who we had some public participation in choosing?'

Mr McCLELLAND—We have had evidence before the committee that the power of dismissal is essential in determining the nature of the office. Hence, it is extremely difficult to remove a judge. That is for a good reason—we want the judiciary to be independent of the parliament. However, we do not want the executive to be independent of the parliament under our system of responsible democracy. Therefore, there is the argument that you do not want to give the President that feeling that he can act quite separately from the will of the elected executive of the day.

Ms Kirk—Yes, I agree with that.

Mr McCLELLAND—What are your feelings on that point?

Ms Kirk—Well, if you took misbehaviour to constitute acting not in accordance with the Prime Minister's and the cabinet's wishes, then that would be grounds for removal.

Mr McCLELLAND—So you think misbehaviour could be as subjectively determined by the Prime Minister?

Ms Kirk—By the Prime Minister, yes. I guess it just focuses the mind somewhat more as to the actual grounds—misbehaviour, incapacity.

Mr McCLELLAND—Would there be a safeguard if the Prime Minister got no advantage from the dismissal in the sense that, after removing the President, automatically the next in line state governor came and fulfilled that role and it was determined that, pending the approval of the parliament, that state governor fulfilled the role of President? In other words, the Prime Minister would not gain the advantage of getting one of his or her cronies—

Ms Kirk—That is right, he or she would not. However, there is an issue which I raise later in the paper about just how long that most senior state governor might be in the role, given also that the process for finding a new President is quite drawn out, to put it nicely. You could be looking at three to four months, and I do have some concerns about the fact that would be taking away that state governor from his or her role in the state. That is part of the reason that I proposed the idea of the office of Vice-President, which is later in my paper.

Mr PRICE—Just to add to Robert's question, the new President and indeed the Governor-General is largely a ceremonial role. He acts on the advice of ministers in council and has some reserve powers, whereas the judiciary argue that they are completely independent of the executive of parliament and need some protection in that independence—that is, if you did not have quite a severe process of dismissal, their very independence is compromised, hence there has only been one attempted impeachment of a High Court judge. Why would you want to mix these two concepts? I do not understand that.

Ms Kirk—Once again, as I said, I would not want to see that requirement for it to be proved. I think that should be removed for the reasons you have just stated because it should

be at the discretion of the Prime Minister to make a decision as to whether or not a President is acting such that his or her behaviour constitutes misbehaviour or incapacity. I suppose I am just trying to say that focuses the mind on the circumstances in which a person ought to be removed. After all, that is why you have a removal mechanism, as I said at the outset, to remove people who are showing themselves to be unfit for the office, and that it is left to the discretion of the Prime Minister to make that decision. I am just trying to avoid that sort of politically motivated dismissal. I believe the model shifts the power too much to the Prime Minister under this bill. So, really it is a minor amendment in the sense that I am suggesting stating grounds for dismissal similar to those for High Court justices or that the onus will not be nearly so difficult.

Mr PRICE—Okay. Would you accept then that the Prime Minister has more power today in relation to dismissing a Governor-General than he would have under your model for a President?

Ms Kirk—I think under this model it is closer to what it is now. I made the submission earlier that I believe that the Queen still does have this residual role to refuse to accept the Prime Minister's advice. Committee members—

Ms JULIE BISHOP—Or delay.

Ms Kirk—or delay, that is right—ask for a reasonable time in which to consider the advice. That is in place there at the moment. Committee members seem to think that perhaps that was not the case in practice, but in legal theory that does exist. So I suppose at least this way, by specifying the grounds for removal, perhaps it then caters for the role that the Queen might play as an independent arbiter, looking at it and saying, 'Does this actually justify grounds for removal?'

Mr PRICE—I think we are on an important point. Under the current situation, it is fair enough to say that the Prime Minister can phone the Queen and she can demand some reasons which do not necessarily become public. I think there is a reasonable degree of consensus that she would not decline the Prime Minister's request. So there is an initial time delay between the phone call and the provision of reasons. But ultimately the Governor-General would go, although we have had no practice or precedent to rely on. Here we are saying that, to dismiss the President, not only does a Prime Minister have to get a majority of the House of Representatives to support his action, which he does not currently, but also he has to fit the formula that you have provided in terms of reasons and make those public.

Ms Kirk—Yes.

Mr PRICE—Is it not then fair enough to conclude that you are requiring a much tougher set of circumstances to dismiss a President than the current Governor-General?

Ms Kirk—I guess it is somewhat tougher.

Mr PRICE—The consequence of that is an alteration of the power relationship between a Prime Minister and a President.

Ms Kirk—To a certain extent, although I also come back to what I said before—the way the President is now going to be chosen also represents somewhat of a shift.

Mr PRICE—Absolutely.

Ms Kirk—So perhaps it then makes it comparable as well.

Mr PRICE—Given that there is no accepted process now for selecting a Governor-General.

Ms Kirk—That is right.

Mr PRICE—I did not understand the point about the simple majority. My recollection of standing orders is that there are some things that specify absolute majorities and, in this bill, we specify a two-thirds majority for the vote to approve the President. I still do not understand the simple majority.

Ms Kirk—The only point I was trying to make is that, at the moment, the bill just talks about approval. It does not say that it should be any particular majority. I think it is left up in the air.

Mr CAUSLEY—It would be a simple majority.

Ms Kirk—It would be a simple majority, so that is all I was trying to say. Perhaps you could just write in a simple majority if that is what is meant.

Mr PRICE—If there is any ambiguity that clears it up.

Ms Kirk—Yes. It is as simple as that.

CHAIRMAN—We need to make this last bit very fast or we are going to run out of time.

Ms HALL—My concern goes to your statement about the Prime Minister and referring to section 72 and the misbehaviour. I believe that misbehaviour is a very broad term and something that in itself would have to be defined. If the Prime Minister has to justify his decision, in what form or venue do you see him justifying this? Do you see that he should have to make a statement to the parliament or do you believe that it should be something that does not have to become public? How do you see this?

Ms Kirk—To be honest, I did not really think it would need to be made public, although given that you have that second stage in the bill whereby the Prime Minister has to seek the approval of the parliament, perhaps then there would be a statement made in the parliament as to the grounds.

Ms HALL—What is the purpose of it, though, if no-one ever knows about it? You said that you did not think it would become public.

Ms Kirk—This is only just a focus of mine. Clearly, people are going to be talking about what was the reason for the dismissal. I suppose, if it was thought to be politically motivated. In other words, in the example I gave, to stop a President from dismissing the government by focusing the mind on the fact 'does it amount to misbehaviour or incapacity?' then there is an issue there. As you suggest, perhaps it would most likely be put by the Prime Minister to the parliament when he or she was seeking approval of the House of Representatives.

Ms HALL—Were you initially thinking of a guideline that the Prime Minister would look at if he was considering—

Ms Kirk—No.

Mr PRICE—Presidential guidelines?

Ms HALL—Yes, that is what I am thinking.

Ms Kirk—Like you, I think misbehaviour.

Ms HALL—So it is going to be something more substantial. As you have thought it through, you see that it is something that needs to be public that people other than the Prime Minister would know about.

Ms Kirk—I think that would be desirable to have that openness and accountability.

Ms HALL—But on the other hand, you do not see that once that happens this could lead to a situation where the Prime Minister may find himself in court having to justify his decision.

Ms Kirk—As I said before, I doubt very much if the High Court would consider this matter to be justiciable. I do not think they would consider it as something they would want to examine.

Mr CAUSLEY—In the interest of time, I will let my question pass.

CHAIRMAN—Thank you very much for your submission and for coming and talking to us today. We will table our report on 9 August and we will certainly send you a copy. Thank you for being part of the process.

[12.41 p.m.]

SELWAY, Mr Bradley Maxwell QC, Solicitor General, South Australian Government

CHAIRMAN—Welcome. We have not received a submission from you. Are there issues you would like to bring to the committee's attention?

Mr Selway—Chairman, it may be of some use to explain in broad terms what South Australia's position has been in relation to a referendum over many years. Long term, South Australia has been concerned that the proposal for a referendum has had a Commonwealth centre. Our concern has related to the fact that the Queen is head of the Commonwealth and of the states and, in that role, performs a unifying function within the constitutional structure. A proposal to remove the Queen from some part of the structure seemed to us to have potential constitutional significance. It may be not now but in 50 years time. That did not seem to be addressed in any of the relevant proposals.

An example of the concern we would have is the proposal which I understand from the *Australian* Mr Turnbull put to the committee on Monday. It was that the question that should be asked was whether the Queen should be replaced by a President. With respect, we would say that is not the right question. The Queen is not going to be replaced by the President except for the Commonwealth government. There is no suggestion that the passing of this referendum is going to remove the Queen from the state constitutions. There is no suggestion that it is going to change the relationship at state level between the governor and the Queen. To say that it is replacing the Queen with the President is to misunderstand it. It is a Commonwealth proposal. It is more likely to say that you are replacing the Governor-General with the President. Even that, to an extent, is misleading.

When South Australia raised these issues initially, they were not adopted by the Turnbull report. The Premier raised them in the Constitutional Convention, and they were not dealt with there. We think a problem still needs to be addressed. It is addressed to an extent—and I might say South Australia would accept the blame for it—in schedule 3, clause 6 on the unified federal scheme, which says:

> The alterations of this Constitution made by the *Constitution Alteration (Establishment of Republic) 1999* do not affect the continuity of the federal system, including the unified system of law, under this Constitution.

Our particular problem is that the analysis by the early High Court of the Constitution has rested at least since the 1920s on a principle that the states are not to have much of a protected position under the Constitution as against the US constitution at that time. That was because the unifying role of the Queen meant that there was no reason to protect a particular government and its powers from a fair reading of the Constitution. Our concern would be that somehow or other that principle would go out the window, maybe with an increase in state powers, without any discussion in the context of a change to the position of the Governor-General. In terms of the consultation—

CHAIRMAN—Are you saying that section 6 is not satisfactory.

Mr Selway—What we would say is that it probably is—

Ms HALL—What about section 5?

Mr Selway—Section 5 is the one that preserves the state's position to remain with the Crown.

Ms HALL—Yes, that is right.

Mr Selway—Section 5 had to be there because there was an argument that, if you took the Crown out at the federal level, that change to the Constitution was so dramatic that it must go out everywhere else. To make sure that does not happen, clause 5 goes in. Clause 6 goes in as the corollary, or the other side of the coin, to make sure that having done so we are not ending up with significant changes to the federal structure and trying to preserve the status quo.

The problem is: does clause 6 work? Who knows? It is the best we could get. At least we will be able to say in due course that is what it is there for. But we will have to wait and see whether it is effective or not. The problem is that we might have to wait and see not for five years or 10 years but maybe for 50 years or 100 years before we find out what effect some of these clauses have.

The states were consulted on the actual drafting of the Constitution Alteration (Establishment of Republic) 1999 and the other bills. It would probably be fair to say that we were not particularly pleased with the consultation before the draft issues report was released, but we have been pleased with the consultation that has occurred since. In general terms, I would have said that the Commonwealth government has taken a good deal of notice of the comments that have been made and the concerns that have been raised. Most of those are reflected now in the draft or in the explanatory memorandum that accompanies it. That is all I had to say by way of introduction, Mr Chairman.

CHAIRMAN—Considering what you said about the Crown, are you happy with the long title of the bill?

Mr Selway—I think so. It is to establish a republic. You could be more specific and say establishment of a republic for the Commonwealth, but I do not know that it adds very much to the Commonwealth act.

CHAIRMAN—It says Commonwealth of Australia.

Mr Selway—Yes. To give you an example of how the Commonwealth has taken note of our sensitivities in this area: in the draft report, the oaths that were to be taken by the President were to Australia. We expressed concerns about that on the basis that, so far as we could see, once this change was made Australia no longer had an existence domestically in a political sense. There were seven governments. Consequently, the change has now been made that the President will be loyal to the Commonwealth of Australia and to the Australian people, which we have no problem with at all.

Ms JULIE BISHOP—Mr Selway, in relation to the transitional provisions, in item 5 you say that has been inserted so that there is no confusion about the position of the states and the constitutions of the states. If we look 50 years down the track, do you think that this provision is necessary? It may at some later stage be interpreted as being the source of the constitutional authority of the states' executive institutions? Is it necessary to have this?

Mr Selway—I would have said opinions are split about fifty-fifty on that question, which is why it is probably necessary to have it. My own view is that it is necessary. To take the Crown out at the Commonwealth level would necessarily take it out at the state level but for some provisions keeping it in.

Ms JULIE BISHOP—But does it imply that the states require the permission of the Commonwealth to retain the integrity of their own constitutions? Could it be read that way?

Mr Selway—It could, but at the end of the day this is a referendum. So it is the Australian people that are doing it rather than the Commonwealth government. We have been particularly concerned in that regard with clause 7.

Ms JULIE BISHOP—Yes.

Mr Selway—I think all of the states have now passed legislation under section 15(1) of the Australia Act.

Ms JULIE BISHOP—And that should be the only mechanism?

Mr Selway—That should be the only mechanism. The Prime Minister has written to the South Australian Premier accepting that, if all the states have got their legislation through in time, the Commonwealth will amend clause 7 so that there will not be reliance upon the procedure there.

Ms JULIE BISHOP—Could I just ask you about item 6 then. It is obviously not the intention of the bill to imply that Australia has or should have uniformity between Commonwealth and state legislation. Do you feel the use of the word 'unified' could cause concerns in that regard?

Mr Selway—South Australia asked for it to be a unified federal system and a unified system of law. Other states thought that was much too chummy. So we ended up with 'continuity' of federal system. What is unified is the system of law and that is reflected in the process by which one goes from Supreme Court to the High Court in appeals and so forth. In a case a couple of years ago called Kable, the High Court acknowledged that as a unified system of law. I would say, though, that the clause says it does not affect it. If there is not a unified system of law, it is not affected. All that has happened is that we have not affected anything. The status quo is maintained.

Ms JULIE BISHOP—Obviously we want to avoid having ambiguous or emotive words in the Constitution.

Mr Selway—Sure.

Ms JULIE BISHOP—Would a better word be 'coordinated', if we talk about our federal system being a 'coordinate' system rather than a 'unified' system?

Mr Selway—In terms of our system of law, the law is a much more of a unified system than the legislative and executive powers are—if I could describe it like that. I have no problem myself with a unified system of law. I am not at all certain that it was under much threat by these changes, but I am not at all concerned about those words.

Ms JULIE BISHOP—Thank you.

Mr CAUSLEY—Mr Selway, I do not pretend to understand this entirely. On the point of removing the Crown, you said that it was a sensitive issue to the states. If the referendum was carried and the removal of the Crown meant the removal of the Crown within the states as well, would that not be, ideally, the best way to go or are you suggesting that would be seen as a unilateral move by the federal government and therefore there would be mutiny amongst the states?

Mr Selway—I think it fair to say that, at the Constitution Convention, the Premiers of South Australia and I think New South Wales, Victoria and probably Tasmania all put a proposal that the relevant provision should be one-in all-in. The difficulty with that was it required a lot more work. If you were going to do that, you would have to work out how it would all work. The constitutional amendment would then have to make provision for how all that would

work. I am not certain whether it could be done in the time. But that was a much more complicated matter.

Mr CAUSLEY—So it became too hard?

Mr Selway—Not necessarily. Western Australia and Queensland said that their electors deserved to have the final decision about the nature of their structure and that they should have the right to remain monarchies if they wished to. For whatever reason, the Constitutional Convention adopted that position—that everyone in the states should have the right to choose—and it is the position which is reflected in this proposal.

Ms JULIE BISHOP—I think the position of the Premier of Western Australia was that section 73 of the Constitution of Western Australia insists that a state referendum be held to approve any alteration in the constitutional position of state governor.

Mr Selway—Certainly, and we have the same provision. But you can overcome that provision, using the Commonwealth Constitution, by a referendum. It could have been done.

Ms JULIE BISHOP—Under section 128?

Mr Selway—Under 128. You could amend state constitutions. The question was: did you want to try or not? The answer was no.

Mr McCLELLAND—Can you elaborate on that. Does the mechanism of requesting the Commonwealth to amend the Australia Act under section 15(1)—as I understand your evidence, all states have passed similar legislation to that effect now—

Mr Selway—Yes.

Mr McCLELLAND—Will that overcome the need for South Australia to have a referendum?

Mr Selway—No. We will still need a referendum. The purpose of that legislation is in effect to permit us to have a referendum. The Australia Act is imposed on us either by virtue of a scheme under the Commonwealth Constitution or by imperial legislation—depending on which you choose. Either way, the state cannot amend it by its own act. We have to get that amended and out of the way so that we can then proceed under our own state constitutions to have a referendum to remove the Crown. What I am saying is that you could have—in principle, at least—amended the state constitutions by using the Australia Act procedure plus a referendum vote.

Mr McCLELLAND—But the states would not have been happy with that; they would prefer to be masters of their own destiny?

Mr Selway—Western Australia and Queensland would not have been happy.

Mr PRICE—In your opinion, how would a situation be resolved where, if we carried the referendum nationally, a state wished to maintain a monarchical system? Do you believe that the Queen would be happy with a republic at the federal level but her being the Queen of a particular state? How would you handle her declining to continue to be Queen of the state?

Mr Selway—I am completely unable to answer the question. I would have absolutely no idea. There have been a number of commentators who have suggested that, in that circumstance, the Queen may well decline. I could see very good reasons why she might. On the other hand, she may take the view that, if the people of a particular state have asked her to carry out that function, she should attempt to do so. I must say I think it would be a very difficult position. How the function is to be exercised and what role you would play and—

Ms JULIE BISHOP—Could she refuse to be the sovereign? Could she refuse us at her call?

Mr Selway—It must be her call at one level. She must be able to say, ‘All right, you can send me a note saying you want Joe Bloggs appointed Governor but don’t expect me to reply.’ At one level she must be able to refuse. But the question is: to what extent would she see herself as having flexibility? That is the thing I just do not know.

Mr PRICE—If we assume Christmas Island had territory statehood and the referendum failed to pass in that hypothetical territory but was carried nationally, and a referendum was then put at Christmas Island to have a republican territorial constitution and that was not voted for, what would be the position if the Queen decided she would not have this mixed set up?

Mr Selway—If we assume Christmas Island had a constitution the same as most of the states, you would still need a referendum to change it, but that referendum would then be voted on against the understanding that there really was no option because the Queen was not going to carry out her constitutional responsibility.

Ms JULIE BISHOP—It would be futile.

Mr Selway—Yes. If the people in that circumstance said, ‘Well, we don’t care,’ somehow or other you would have to deal with the problem when you next came to appoint a Governor.

Mr McCLELLAND—Earlier, you indicated your concerns with variations proposed on the long title, including a variation by the Australian Republican Movement to provide for an Australian citizen to replace the Queen as Australia’s head of state. Would your concerns be allayed if that was amended, for instance, to provide for an Australian citizen to replace the Queen as head of state of the Commonwealth of Australia?

Mr Selway—To a great extent, yes. But my concern is that there is enormous confusion amongst the public that the President is going to be the President of Australia. The President is not going to be the President of Australia; he is going to be the President of the Commonwealth government. It is a Governor-General replacement. The problem is that confusion. I agree the change you suggest is a more accurate change.

CHAIRMAN—That argument falls down, does it not, if you examine the United States where there is a President of the United States and there are governors of each of the 52 states?

Mr Selway—But the United States government is the United States.

CHAIRMAN—But the Commonwealth of Australia is the Commonwealth of Australia and the President will be the President of the Commonwealth of Australia?

Mr Selway—Yes, and I have no problem with that. My problem is it being called the President of Australia. I know Commonwealth officials on occasion call themselves this or that ‘of Australia’. You could understand why they might do it, certainly if they were dealing outside of Australia. But, within the Australian domestic framework, the President will have no role in relation to the government of the states.

CHAIRMAN—Nor does the President of the United States have any role with respect to the administration of any state.

Mr Selway—True. All I say is that the United States—

CHAIRMAN—We took that part of our model from them anyway.

Mr Selway—True. All I am saying is that, in the United States, the President of the United States is the President of the United States. The United States government is what he is President of. No-one describes him as the President of America.

CHAIRMAN—But frequently as American President, I would have thought.

Mr Selway—Maybe. All I am saying is that it is an inaccurate description. If you were an American state, I suspect you would be a little sensitive about it, particularly if people are telling you that this is a minimalist change and it is not going to affect you.

Mr PRICE—If I could ask about the American system: is the American system referred to as a Commonwealth?

Mr Selway—No.

Mr PRICE—Some of the states refer to themselves as being a Commonwealth, do they not?

Mr Selway—Yes. One of the significant differences between the US Constitution and the Australian Constitution is that because of the way the US Constitution was formed all of the states claim sovereignty, as does the US government. There are all sovereign within their spheres. You often hear states claiming they are sovereign within the Australian Constitution and all sorts of other things. It is actually untrue. None of the Australian governments are sovereign—or at least have not been up until now. The sovereignty has rested in the Queen or in the people or something. One of the effects of this may well be to move the Australian Constitution closer to the US constitutional model, which may have some effects on its interpretation. But those effects have not been debated.

CHAIRMAN—Are we all done? Thank you very much, Mr Selway. As I have said to other respondents to our inquiry, we will table on 9 August and we will certainly be delighted to send you a copy of our report. Thank you for your contribution.

Mr Selway—Thank you.

Sitting suspended from 1.02 p.m. to 2.08 p.m.

COCCHIARO, Dr Tony, Convenor, South Australian Branch, Australian Republican Movement

SCHULZE, Mrs Marjorie Gay, Deputy State Convenor, South Australian Branch, Australian Republican Movement

CHAIRMAN—I welcome representatives of the Australian Republican Movement to today's hearing. I understand from the secretariat that you have given us a brief submission. Would you like to make an opening statement before we ask you some of our penetrating questions.

Dr Cocchiaro—Basically, our submission in South Australia would mirror very closely the general ARM submission in Sydney, but there are a couple of points specific to a smaller state such as South Australia that we would like to focus on. The first one is the criteria for membership of the Presidential Nominations Committee. We have noticed that section 1.14 of the draft bill mentions that the composition of the committee should take into account, so far as practicable, considerations of federalism, gender, age and cultural diversity, which is, to my recollection—and I was fortunate to be one of the members of the Constitutional Convention—what was decided by the convention. But section 1.20 of the draft bill states:

The Convention also recommended that the composition of a Presidential Nominations Committee should take into account so far as practicable considerations of gender, age and cultural diversity.

We are not sure if it is a typing error, but the word 'federalism' has been left off that section. The South Australian branch of the Republican Movement recommends that geographical diversity of the committee members be explicitly set out in the Presidential Nominations Committee Bill.

The Commonwealth of Australia is a federation of states. There should be a clear expression in the Presidential Nominations Committee Bill that the community members be spread as equally as possible across all states and territories. That is the first point that we would like to make, Mr Chairman.

Mr McCLELLAND—What about the concept of federalism—

Dr Cocchiaro—At the convention, federalism was understood by most members to mean that the states would get fairly equal representation. The fact that it has been left off—I am not sure what that means. Secondly, I think it should be made clear that the Commonwealth of Australia is a federation of states and the Presidential Nominations Committee should reflect that.

Mr CAUSLEY—If you start to raise this particular issue, so that you are going to prescribe what the committee is going to be like, could it not be equally argued that in fact in a true democracy the majority of the representatives should come from the most populous states?

Dr Cocchiaro—It could be argued but I think it would be wrong in the context of Australia, because we are a federation of states and we are not voting as one. You look at the Senate: the Senate reflects the federation of states and I think this should reflect the same thing.

Mr CAUSLEY—But already there is provision in the bill that the states be represented. They have their nominations.

Dr Cocchiaro—Yes. They have one nomination for a politician.

Mr CAUSLEY—Instead of trying to prescribe these things, would it not be best to leave it to the commonsense of the Prime Minister?

Dr Cocchiaro—I do not doubt that the commonsense of the Prime Minister would be best, as long as he or she has the guiding principles of what was mentioned at the Constitutional Convention: federalism, gender, age and cultural diversity. In making up the community members of the Presidential Nominations Committee, we believe very strongly that not only age, cultural diversity and gender should be considered, but also the states, and we should make sure that all the states are fairly equally represented.

Mrs Schulze—The point we are trying to make is that clause 1.14 actually refers to federalism and yet in clause 1.20, which appears to reflect 1.14, the word 'federalism' has been omitted. It just reads, 'gender, age and cultural diversity'.

CHAIRMAN—You have totally confused us. We do not know what you are quoting from.

Dr Cocchiaro—We referred to both the draft bills. This is the Presidential Nominations Committee Bill, section 1.14.

CHAIRMAN—There is no such section. The bill only goes to section 28. I think you are referring to the explanatory memorandum. Anyhow, we thank you for that point concerning federalism. I now understand it. You said you were talking about the bill, but in fact what you are talking about is the explanatory memorandum. The bill itself is silent on those issues. The bill to go before parliament will be silent on those issues. Please advise me if I am wrong, constitutional lawyers, but as I understand it one would expect a Prime Minister to take into account the explanatory memorandum when dealing with his prerogatives under that section of the bill. But the bill itself is silent on those issues.

Ms JULIE BISHOP—And the explanatory memoranda does not contain the word 'federalism.'

CHAIRMAN—You are correct, the explanatory memorandum leaves out the word, and our secretariat will make note of that.

Dr Cocchiaro—Thank you. I will be very careful because I have used only the explanatory memorandum for that point. Our other point concerns the long title of the bill. As you know, the Australian Republican Movement is concerned about that. There are three things in that long title which I would like to focus on. Firstly, we believe that it fails to mention a crucial element of the bipartisan model adopted by the convention, namely, the nomination process. When we discussed this at the Constitutional Convention, the Presidential Nominations Committee was an important factor in the presidential nominating process. The Constitutional Convention, after substantial deliberation and negotiation, arrived at a process which involved extensive consultation of the whole Australian community. A nominations committee was to be set up to reflect federalism, gender, age and cultural diversity, and to vet nominations to end up with the best person for the job. We believe that the long title should reflect that as much as possible.

Secondly, the long title does not indicate the key element in the change, namely, the replacement of the Queen as head of state with an Australian citizen. If the long title of the bill is going to be used on the ballot paper, then it is the collective responsibility of legislators to make sure that the Australian people clearly understand what they are voting yes or no for. The key element of change is removing the Queen as head of state and replacing her with an Australian citizen by the bipartisan model of a presidential appointment. That process involves consideration of nominations submitted by the people, one citizen being moved by the Prime Minister and seconded by the Leader of the Opposition, and then the person being approved by more than two-thirds of members of both houses of parliament. Again, we believe very

strongly that that must be reflected in the long title if that is going to be the structure of the question at the referendum.

Thirdly, we are concerned by the use of the word 'chosen' in the long title of the constitution alteration bill. The words 'chosen by a two-thirds majority of the members of the Commonwealth Parliament' are clearly misleading to the Australian voter. The President is short-listed by the Presidential Nominations Committee with one person then being moved by the Prime Minister and seconded by the Leader of the Opposition. Members of both houses of parliament may be consulted but they certainly do not choose the presidential candidate. Section 60 of the draft bill uses the word 'affirmed' whereas the long title says 'chosen.' I will read the particular section for you. It is headed 'The President'. Skip the first paragraph. Then it states:

If the Prime Minister's motion is seconded by the leader of the Opposition in the House of Representatives, and affirmed by a two-thirds majority of the total number of members of the Senate and the House of Representatives, the named Australian citizen is chosen as President.

Ms JULIE BISHOP—Did you notice that if the Prime Minister's motion is agreed to 'the named Australian citizen is chosen as the President'? The paragraph before the one to which you refer states:

. . . the Prime Minister may, in a joint sitting of the members of the Senate and the House of Representatives, move that a named Australian citizen be chosen as the President.

I believe that that is where the drafters got this word 'chosen' from.

Dr Cocchiaro—They may have. We strongly disagree with that. I think that misleads the Australian voter into clearly believing that two-thirds of both houses of parliament will choose the President.

Ms JULIE BISHOP—It might be theoretically correct that the Prime Minister has moved that this person be chosen and then they all approve that motion, which might mean that he or she has been chosen, but you are saying that from a public understanding of what they are voting for the word should not be 'chosen'?

Dr Cocchiaro—I believe the meaning of the word 'chosen' in this context will mislead people into thinking that only the parliamentarians in both houses of parliament will choose the President.

CHAIRMAN—But section 60 says:

If the Prime Minister's motion is seconded by the leader of the Opposition . . . and affirmed by a two-thirds majority of the total number of the members of the Senate and the House of Representatives, the named Australian citizen is chosen as the President.

Can you comment further?

Dr Cocchiaro—That is the paragraph that I was focusing on, for the reason that there they used the words 'affirmed by a two-thirds majority' of both houses of parliament. The word 'chosen' in that context means chosen by the whole process, in my understanding, rather than being chosen by simply a two-thirds majority of both houses of parliament.

CHAIRMAN—We hear your argument.

Mr McCLELLAND—On that point, and to make matters more confusing, I think the resolution of the Constitutional Convention was that parliament 'approved' rather than 'affirmed.'

Dr Cocchiaro—Yes.

Mr McCLELLAND—It certainly was not that the parliament 'choose'.

Dr Cocchiaro—Most certainly the Constitutional Convention used the word 'approved'. I would strongly suggest—and I think we mentioned that in our submission—that that word should be—

Mr McCLELLAND—The drafters have selected the word 'chosen'. Do you think 'approved'—

Dr Cocchiaro—The word 'approved' would be very much more appropriate.

Ms JULIE BISHOP—It might well be, though, that if you were to amend the long title to include the nomination process you could end up with the word 'chosen' at the end, as I believe the drafters and perhaps the Attorney had in mind. The ultimate act is 'choosing', but if the steps along the way were included in the long title that could overcome your problem with the word 'chosen'. Do you see what I mean?

Dr Cocchiaro—Yes, I see what you mean, but it would not overcome my objection to it because to me, and I think to most people, 'choose' means you have a clear choice of yes or no. From my understanding, if a presidential nominations committee is coming up with a short list and the Prime Minister is moving and the Leader of the Opposition is seconding, the minimum of two-thirds of both houses of parliament are approving. They do not actually have a choice in the person. They may have a choice in saying yes or no. The word 'chosen' in that sense would give a misleading indication of what the bipartisan model is all about.

Ms JULIE BISHOP—In other words, the joint sitting cannot then go and select someone of their choosing.

Dr Cocchiaro—No.

Ms JULIE BISHOP—They can say yes or no, but they cannot go off and select someone else.

Dr Cocchiaro—Exactly. Somebody reading that would think that they may be able to do so. The other point that I wanted to bring up is the dismissal procedure. I notice that Ms Linda Kirk, who was also at the Constitutional Convention, has put in a submission and mentioned that the dismissal procedure received very little attention at the Constitutional Convention. I must say that was not my recollection. I think it did receive quite adequate attention.

The decision by the majority of the Constitutional Convention is of written dismissal by the Prime Minister, effective immediately, and then approved by the House of Representatives within 30 days. Such a major step by a Prime Minister, with subsequent discussion by the House of Representatives, would give the whole process very wide public scrutiny. The Prime Minister would do this only if he or she was on very safe ground. That was discussed very widely at the Convention. If that was not the case, obviously the government would immediately lose the confidence of the people and pay the severe price at an election. I clearly recollect that as the majority decision at the Constitutional Convention. It was felt that it was more than an adequate safeguard for having the Prime Minister write a letter of dismissal to the President.

On the current situation, I notice in the submission that the monarch, to my understanding, must accept the advice of her ministers. She may diddle and daddle about it, but at the end of the day she must accept the advice. I think it is first in best served. That is exactly what we at the Constitutional Convention, proposed It is not to change that system.

CHAIRMAN—Are you satisfied the bill reflects the will of the Constitutional Convention?

Dr Cocchiaro—Yes, I am. The last point is that the Republican Movement in South Australia strongly supports the exclusion of the nomination of politicians in the bill and of

members of political parties in the bill. The reason for that is contrary to claims made by some monarchists that this is the politicians' republic; the bipartisan appointed model will in practice exclude politicians. This is because it is unlikely that a politician will gain bipartisan support of the parliament. Further, in accordance with the Constitutional Convention resolution, the bills categorically ensure that politicians and current members of political parties should be unable to accept nomination and cannot be chosen as President. We notice that this is explicitly stated in schedule 1 of the Constitutional Alteration (Establishment of Republic) 1999 Bill which states:

(ii) the person must not be a member of the Commonwealth Parliament or a State Parliament or Territory legislature, or a member of a political party.

I reaffirm that we strongly support that.

Ms JULIE BISHOP—I take great exception to that.

Mr CAUSLEY—How do you find someone who is really suitable?

Dr Cocchiaro—Yes. I think that clearly means a serving parliamentarian or a member of a political party. My clear recollection at the Constitutional Convention was that this was a very desirable thing to do.

Ms JULIE BISHOP—I probably agreed until October last year. Now I do not agree.

Dr Cocchiaro—Every politician that I have ever met is a fantastic person. But I think the will of the people, and that of the greatest majority of the members of the Constitutional Convention and any persons that I speak to, is this strong feeling that a politician should not be involved in the presidential process.

Ms JULIE BISHOP—I am concerned that, for some reason, we seem to think it is a very desirable outcome to ensure that no politician becomes head of state, whereas in the past we have had some highly desirable Governors-General who happen to have been very high profile politicians or parliamentarians. I would not want us to exclude from consideration those sorts of people, whether they be Bill Hayden, Paul Hasluck and the like. Would the composition of the nominations committee not ensure that the best person came forward? The person's political allegiance or ability to act in a non-partisan way would be considered by the committee. Wouldn't it be better to leave to the nominating committee the question of a person's ability to fulfil the role rather than prescribe that anyone who has been a politician, or a member of a political party, could not accept a nomination? We are talking about accepting a nomination at the stage when their name goes into the nominating committee. It would exclude a lot of people with a public profile.

Dr Cocchiaro—I do not read that as anybody who has been a politician. I read that as somebody who is currently a politician or a member of a political party.

Ms JULIE BISHOP—Yes, but we are talking about the stage where their name goes forward to a committee. An extraordinarily popular and dignified Minister for Foreign Affairs, for example, who happens to be coming to the end of his/her term might be the ideal person, yet under this scenario they would not even be able to be nominated.

Dr Cocchiaro—I am sure you would remember that this was also discussed at the Constitutional Convention. The points were made that a person nominated who was currently a member of a political party or parliament may (a) have unfair influence on the nomination committee and (b) be influenced by that party. I take it that, if a person is interested in being nominated for President and signs the acceptance form, that person would resign from his political party and also as a current member of parliament.

Ms JULIE BISHOP—It is a big call, isn't it, if there are a couple of hundred nominations?

Dr Cocchiaro—Yes. It is a big call, but what we are looking for here is a person who unites all Australians, a person who must be seen to be clearly above politics. Clearly that is a great and strong concern of the Australian public.

CHAIRMAN—I am a member of the Liberal Party, and when Bill Hayden was chosen by Bob Hawke to be Governor-General I was quite frankly appalled. My view today is the antithesis of that. I think he was a fantastic Governor-General. Not only do I think he was, but I also learned something—

Ms JULIE BISHOP—Don't go overboard here.

CHAIRMAN—I am sorry, but that is my view. I also strongly hold the view that there is a key in this that relates to the conventions that surround the current office of Governor-General. My view is that the office itself changed the man rather than the man changing the office. He became an excellent Governor-General because he allowed the office and the history and the conventions to change him, subsume him and make him a real Governor-General.

Dr Cocchiaro—I do not have any doubt, especially with Bill Hayden. He changed substantially. Some of his views did a complete somersault. But the point that I would like to make is that he would not be the sort of person who would unite Australians. You saw the reaction of your own panel when you mentioned that you thought that he was a good Governor-General. If we are looking for a person who, as the President of this country, has to—and I think that is also specified in the bill—unite the country and have the support of all Australians, then it is unfair for politicians to be discriminated against. But, to my reading, it does not say that a politician cannot at some stage become President; it just says that at the time of nomination he or she must resign from that job and from the party.

Mr PRICE—Doesn't that provision really preclude all public servants, vice-chancellors and professors of universities and High Court judges from being nominated unless they are prepared to resign their position at the point of nomination or after being nominated?

Dr Cocchiaro—I cannot express an opinion on that. That is out of my competency. My understanding is that it was only politicians that were excluded and certainly not—

Mr PRICE—No. Because you have got to be qualified the same as a member of parliament, you cannot hold an office of profit, and all those things are considered to be an office of profit. In other words, when we put forward the nomination of mythical High Court judge X for President, it would appear at the moment that he would have to resign once he has been nominated, otherwise he does not meet the qualification that a member of parliament would. It is one thing to discriminate against politicians—and that may enjoy some public favour—but I think it is altogether another thing to preclude whole slabs of the Australian community, particularly some from which significant numbers of Australian Governors-General have come.

Dr Cocchiaro—I can only say this: again, going back to the convention, the clear wish of the convention was to exclude only politicians and certainly not judges or any other public servants. So that deal must obviously reflect that.

Mr PRICE—If that is the case, you would be suggesting we should try to rectify that?

Dr Cocchiaro—Yes. The reason for that, of course, was the obvious enjoyment that politicians have on the scale of professionalism!

Ms JULIE BISHOP—That prevents lawyers becoming one!

Dr Cocchiaro—Being serious, this position must be seen, without any doubt whatsoever, to be above the hurly-burly of party politics.

Mr PRICE—Could I just ask one other question, perhaps a little bit obtuse. The point of my question is that I presumed that you would wish that we should be completely open with the Australian people in these changes. In the consequential amendments to the constitution, we have section 64. Section 64 talks about ministers of state. It has been the practice of both Labor and Coalition governments, for some time now, to have parliamentary secretaries. What is your view about the omission of parliamentary secretaries from the legislation?

Dr Cocchiaro—I do not have a view on that. If you like, I can take it on notice and give you my personal opinion, but I certainly do not have a view today.

Mr PRICE—I guess I would make the point that, given that not only ministers of state but also parliamentary secretaries are appointed to the executive council, if we are making changes in 1999 then they should reflect the current practice and we should not omit parliamentary secretaries. I think that is quite—maybe unintentionally—deceitful.

Ms JULIE BISHOP—You will not have to worry about it for a few years yet, Roger.

Mr PRICE—I am trying to look after your lot.

Dr Cocchiaro—As I said, that is not within my scope.

Mr PRICE—Anyway, I would be happy to have a view at a later date.

Dr Cocchiaro—Yes, thank you. I will do that.

CHAIRMAN—Any more questions? Thank you very much for coming and for your submission. We will report and table our report to the parliament on 9 August, which is not very far away, and we will certainly send you a copy of our report. Thank you for sharing your views with us today.

Dr Cocchiaro—Thank you to all of you.

Proceedings suspended from 2.37 p.m. to 2.47 p.m.

TEAGUE, Dr Baden (Private capacity)

CHAIRMAN—Baden, welcome. Thank you for joining us for the entirety of today's session. For the purposes of the *Hansard*—you know the drill—would you please state your full name and the capacity in which you appear. You have not given us a submission, but I assume there are issues that you would like to bring before the committee. I invite you to make a brief opening statement.

Dr Teague—Thank you very much, Mr Chairman. It is a real pleasure to be here today and I really look forward to this next three-quarters of an hour. I have sat where you are for about 300 parliamentary inquiries and in the chair of many of them, and this is the very first time that I have been on the other side.

I have very strong personal commitments. Even though I am here in a personal capacity, I was elected as the first republican to represent South Australia at the Constitutional Convention. Before that, as a senator, I argued throughout the 1990s for a model of constitutional reform to achieve an Australian head of state, which in the main is exactly what the Constitutional Convention has endorsed. So I have no complaints.

I have been involved in this process for some years. I mention briefly three dates: a notice of motion in the Senate of 5 May 1993; my first speech on the republic on 29 August 1994 in the Senate—it happened to be the first speech on the republic by anybody—and a major speech to the Senate lecture series on 31 March 1995 which foreshadowed the Leader of the Opposition responding to the Prime Minister's exchanges in parliament two or three months later. Also, in my final week in the parliament, on 25 June 1996, I moved a private member's bill which was entirely to change the Constitution in every word to achieve the model that I was advocating. That has been lying on the *Notice Paper* for the last three years. I must say, in the light of all that has happened, the bills that are before us are superior to mine. I put mine down only to show it could be done and I asked colleagues in parliament to improve upon it. I believe that you have.

I have served as chairman of the ARM here, even before I left parliament. I was convenor here for a while and I am now patron of the ARM. I am definitely in favour of these bills and the referendum. I therefore want to declare my personal interest.

I have 15 brief things to say. Firstly, your terms of reference as a committee have regard to two questions: do the bills accurately translate the Constitutional Convention? And is the referendum bill constitutionally sound? It is my submission that the answer to both of those questions is overwhelmingly yes. Therefore, the other 14 things that I will refer to briefly are minor suggestions for improvement. I certainly support the structure and the main substance of the bills that you have in this inquiry.

My first particular point is that, in regard to the President being Commander-in-Chief of the defence forces, I believe the two words 'in Council' should be added in section 68 so that, just as in section 67 of the new form, we would be referring to the President in Council being the Commander-in-Chief of the defence forces. I believe there was a specific omission of these words 'in Council' in 1901 because I believe it was the intention of the UK parliament, who passed the covering clauses of our Constitution, that the Governor-General would be able to be uniquely advised by the Queen—who would be advised by the UK government—to declare war or not to declare war and that there was to be a unitary defence system for the Empire. This is the reason why we do not have the words 'in Council' relating to the Governor-General in section 68. I believe it is a monarchical or UK hang-up. If we are going to remove such

matters from our Constitution in its new form, I believe we should make explicit that the President is Commander-in-Chief of our defence forces on the advice only of the executive council of his ministers.

Point No. 3: I do not support reference or inclusion in this bill to 'Deputy Presidents'. It was certainly not the finding of the Constitutional Convention and I believe that it opens up all manner of difficulty, such as was referred to by Peter Howell very admirably—and I support all that he said on that—this morning. I do not believe we should have a vice-president. Certainly that was not the finding of the Constitutional Convention, for very similar reasons. At the very least, if it is to be persisted with, any deputy must meet the same qualifications for office as the President and I believe have the same method of appointment as the President. There should be no backdoor way in which a Prime Minister or anyone else can unilaterally, without reference to the normal appointment process, see any deputy in office. But I would actually prefer that there be no deputies. It was the exact finding of the Constitutional Convention—it happens to be a matter I have argued around the country too for some years—that the current system should continue, of there being an acting head of state through the most senior governor, the longest appointed governor.

The fourth point is that, with regard to the Acting President, who would be the senior state governor, I believe that that person should be appointed only if they meet the same qualifications as for President. If that person is, say, not an Australian citizen, they should be passed by, and we should go to the next senior governor available.

The fifth point relates to the long title of the bill. Certainly, I believe that the word 'chosen' should be removed because it is in fact inaccurate in the ordinary context of the long title. I am aware of what was said earlier today, and I acknowledge points on both sides. I understand that 'approved', 'appointed' and 'chosen' could be argued for in certain contexts, but I would think it best to leave out the word 'chosen' and have something else.

Malcolm Turnbull's suggestion is better than what you have at the moment in the bill, and I certainly support his intentions. However, the safest way ahead would be to remove the last 15 words of the long title altogether and have only the first 18 words. In that case the long title would be 'A Bill for an Act to alter the Constitution to establish the Commonwealth of Australia as a republic'. All of the detail would be in the yes and no cases in the copy of the bill that will go to every elector and in everything that is ever said during the campaign period.

I say that it is safe because you are not taking one aspect of the definition of the items involved in the change and giving it priority over the other 15 or 20 aspects involved in the change. I do not want to labour the point; I would be happy to clarify it if needed.

The sixth point is that if the House of Representatives does not ratify the Prime Minister's dismissal of the President, the Constitutional Convention determined that it would be a vote of no-confidence in the Prime Minister—and I would make that consequence clear. That is, the Prime Minister would automatically be dismissed. I think the committee will find its own way of making that explicit. I do not have a form of words in front of me, but I believe that it would be scandalous if there were a vote by the House of Representatives that did not support the Prime Minister's dismissal and the Prime Minister stayed in office.

Ms JULIE BISHOP—Dr Teague, are you suggesting that the Prime Minister cease to hold office? You are not suggesting that an election must be called—in other words, the party whence the Prime Minister comes would choose another Prime Minister?

Dr Teague—That is what I suggest. For example, one scenario is that there is a rogue Prime Minister and that that Prime Minister is acting without the advice of his colleagues in the

Executive Council, in cabinet or in a party room. It is not inconceivable that there could be a rogue Prime Minister. It would be cleared up immediately, it would seem to me, when the House of Representatives met and it was understood that it would not be approved by the House of Representatives and so on. I do not believe that that in itself would cause an election, but rather it would cause the party room involved to determine a new Prime Minister. All I am saying is that I so strongly hold to the Constitutional Convention's finding that this would be a vote of no-confidence in the Prime Minister that something more explicit than is currently in place, rather than just leaving it to a convention, could be a recommendation from this committee.

Moving on quickly, I believe that the first President should be the then serving Governor-General, and I expect that person, on 1 January 2001, would be Sir William Deane. I believe that the committee should check that the bills before us—both the nomination process and the referendum bill—be checked to ensure that the consideration of this possibility is not excluded inadvertently. By the way, in my own private member's bill, I made it quite explicit in transitional clauses that the Governor-General would become the first President, even if it was for a matter of a few months. I think the continuity demonstrated by that succession would be good for our constitutional practice and convention.

The next point I wish to make is with regard to serial dismissals of the President and then one or more Acting Presidents. I would ensure that ratification by the House of Representatives is assented to before there can be any second dismissal; therefore, you at least have the advantage of time. The only possible bad consequence of there having to be a Reps ratification of the first dismissal before any second dismissal is that you may have some inadequate decision or action by the Acting President, but that can very easily be coped with for a matter of up to 30 days, in my view. That is better than some other alternatives. So I would avoid the doomsday scenario that has been discussed by ensuring that the Reps ratified any first dismissal before there could be any proceeding to a second dismissal. The problem of a rogue President is then dealt with—that is the main reason for the instant dismissal by the Prime Minister—and I support all that is in the Constitutional Convention's finding and in the bill with regard to dismissal by a declaration of the Prime Minister in all those terms.

The problem of a rogue Prime Minister that went on to doomsday is dealt with by what I have suggested, I believe. In any event, these problems will be dealt with politically by the way the House of Representatives behaves and ultimately at the next election by the way the people vote. I believe that we are overlooking some of the checks and balances if we do not state plainly that there are political checks and balances envisaged as a part of this constitutional process. I have no apology about the dismissal process envisaged in the bill. I support it. I think that there are sufficient balances if we just make sure that there must be a ratification by the Reps of any first dismissal before there can be any subsequent one.

With regard to the covering clauses at the beginning of the current Constitution—those nine clauses that were passed by the UK parliament—they should no longer be printed as an introduction to the Constitution of Australia. They will be completely out of date if the referendum is passed. I would just want to make it quite explicit that I do not believe anyone at the Constitutional Convention envisaged that they would continue to appear at the beginning of the printing of the Constitution of Australia.

The tenth point is that I believe the referendum bill stands alone. It is too late—7 July today—for there to be a preamble, even if it is put as a second referendum question—that is, as a second referendum bill. I believe it is too late. It will not have been examined in the same detail as this. There will not have been a March version, a June version, a parliamentary

inquiry, a continuing parliamentary debate and so on in good time for the public education process in September and then the vote on 6 November. I believe that the preamble is now too late and ought not to be proceeded with in the parliament—or at least the versions that are about can be deferred. I just say for the record though that I do support reference to custodianship in any preamble that emerges in the coming years. I think it would be in the next few years. I would see the preamble as entirely a priority as soon as this referendum is dealt with.

I also draw attention to a point that I do not think others have yet observed. In the communique arising from the convention with regard to the discussion about the preamble, there is an omission of the words 'in the event of Australia becoming a republic'. If you go to day 10, Friday, 13 February, and look at the *Hansard* account of what was decided, you will find that there is a resolution that sets out the dot points of what should be in a preamble. It has the introductory phrase, which I was very conscious of at the time, 'in the event of Australia becoming a republic'. In other words, it is at least ambiguous; you have the preamble if the referendum is successful. The preamble, then, is only called into place by the fact that it is a republican constitution. I think it is ironic that my good friend and colleague the Prime Minister has taken such initiative to try to get a preamble when any such preamble is seen by all of us as being in the context of a republic.

About the office of profit, I believe that any Australian citizen who is qualified should be able to be nominated to the nominations committee. They can be nominated—even if they have an office of profit or, frankly, even if they are a politician—as long as they, at the time of agreeing to the nomination, sign an undertaking to resign from any office of profit or office that would preclude them taking up the position eventually. I would prefer that this resignation be made by the day before the joint sitting of the parliament.

Point 12: I believe that the President's income should not be tax free. It is important that the head of state of Australia pay tax in the same way as all other Australians, and the level of remuneration should be increased to allow for this.

Point 13: section 5 includes a power for the proroguing of the parliament. In the new section in the bill, there is no substantial change to this matter. Section 5 only has the substitution of the word 'President' for 'Governor-General'. I believe that the notion of proroguing parliament is a monarchic hang-up. That is, it has only ever been used—and then very rarely—to artificially close down the parliament so that the monarch, on visiting Australia, can open it again. Whenever you have had a monarch here opening parliament, with all the splendid and colourful ceremony that is involved, it has been quite artificial. The parliament is going along in its normal sessions; it is prorogued so there can be a splendid, monarchic opening of the parliament. This is no longer relevant and I, in my private member's bill, left out the power to prorogue parliament. You must keep, of course, 'dissolving' the House of Reps.

I just put this idea to the committee. I think it would be an improvement. I am not going to die in a ditch over this, because I do not believe it would ever be acted upon anyway. So I leave it to your judgment. But, for the record, I believe it to be a monarchic hang-up and believe it should go, along with other such references.

Mr McCLELLAND—A royal visit costs about $5 million per visit, too, doesn't it?

Dr Teague—Yes, that is right.

Mr PRICE—You mentioned dissolving the House of Representatives. Also the Senate?

Dr Teague—No. That clause only refers to dissolving the House of Representatives. There are other deadlock provisions for a double dissolution at another point in the Constitution. Otherwise senators stay on, of course, for six years in the way that we are familiar with.

My last two points: with regard to dismissal, I do not support the spelling out of any grounds or the requirement of any grounds. It is sufficient that the Prime Minister dismisses the President. No grounds—certainly not justiciable. It is immediate and absolute—subject, of course, to ratification by the House of Representatives in the way that we have always understood it.

Mr CAUSLEY—If you are going to have it ratified by the House of Representatives, there is going to be an ensuing debate. Surely, the Prime Minister is going to have to spell out some reasons for the dismissal.

Dr Teague—I believe that is right, Mr Causley, but that is not circumscribed by the Constitution. If the Prime Minister either does not state his grounds or gives grounds that are unconvincing to the representatives of the people, he will not get it endorsed—he will not get it ratified. It will be a vote of no-confidence in what I would call a rogue Prime Minister.

The only real reason for dismissing the President is in the event, which has never happened with the Governor-General in these 99 years, that the President starts to act contrary to the Constitution or contrary to the conventions around the Constitution. If a President became arrogant to the point of saying, ‘I will not sign any of these kinds of laws,’ then that is contrary to the spirit of our Constitution and to the priority of the elected government, being from the parliament. The President should never interfere with policy. He can ask questions which come under the normal constitutional textbook definitions of the relationship between a governor or Governor-General or a President with the executive government, but cannot act outside of the Constitution or outside of conventions.

It is in that circumstance that there would be a dismissal. If the Prime Minister were to try and pre-empt the President dismissing the Prime Minister, it would be so political that there would be checks and balances either in the House of Representatives or, at least ultimately, at the next federal election. I believe that if any Prime Minister were to abuse this power of immediate dismissal of a President, he would be going into waters which would be totally stormy and totally counterproductive. There are enough checks and balances. I disagree with those constitutional lawyers around the country who believe that the dismissal procedure coming out of the Constitutional Convention is flawed in any way. I support it, as it was decided by the Constitutional Convention.

Finally, I urge this committee to evaluate the costs of the resources that will be needed for the public education program in September 1999. I like the arrangements that have been put in place for it, but I believe that you ought to, as part of your findings, keep the government honest and make sure that there is sufficient financial provision for that education program to be effective, and for that effectiveness to be maximised. Certainly, that was the view of the Constitutional Convention.

All of these dozen or so submissions that I put to you for improvement are relatively minor compared to my overall and general view that the June 1999 bills are sound and are an accurate translation of the Constitutional Convention outcomes. I highlight these dozen improvements because you are in a position to recommend such improvements that would come before the parliament and be adopted.

CHAIRMAN—That was quite comprehensive. I have to say there are one or two items that you have brought to our attention that have not been brought to our attention before. We thank you for that.

I am particularly interested in your proposal that we recommend that the long title of the bill be amended to omit all words after ‘republic’. However, as a former politician, wouldn’t you think that this committee’s practical political ability to change the long title has been totally compromised following our public hearings on Monday and the press that has ensued since?

Dr Teague—I understand where you are coming from, Mr Chairman. However, any parliamentary committee and any parliament can never be compromised or gazumped by whatever submission you receive. You are sovereign. You are able to back your own judgment as to what you recommend to the parliament. Therefore, although there have been some unfortunate—from my point of view—outcomes from the submission on Monday because of the way the media has taken it up, I believe you as a committee can still amend the long title and back your judgment, your actual views.

CHAIRMAN—But you would admit that it has made that course of action more difficult than it might have been otherwise?

Dr Teague—All parliamentarians face difficulties, and you should always come up with the wisdom to see your way through!

CHAIRMAN—What a wimp-out, Baden!

Ms HALL—Most committees, when they are considering legislation, have to contend with public comment, commentary from the media, and suggestions that can adversely or otherwise affect the deliberations of the committee. Despite that, it is still the role of government and parliamentarians to make the right decision as far as that legislation is concerned. Would you agree with that?

Dr Teague—Jill, I have not met you before today but I agree with every word you have just said.

Ms HALL—Thank you.

Mr McCLELLAND—It was put to us in evidence in Melbourne yesterday that the trouble with a simple reference to a republic is that it begs the question: what sort of republic? It was put to us that people have in their own minds a preconception, whether it be the American style of republic, the Irish style, the French style—

CHAIRMAN—The Ugandan.

Mr McCLELLAND—or whatever it may be. It was put to us further that given the limited extent to which the public pays attention to affairs of state, it is unlikely that they will fully understand these issues until they get into the polling booth. Therefore, it was put to us that it was desirable to be as open as possible in setting out what sort of republic we are talking about. What do you think of that argument?

Dr Teague—That is very true with regard to about 20 per cent of voters who have not thought about or read anything or heard anything and all they know is they are going to have to turn up at the polling booth. Certainly the long title is very important in the circumstances of that person having to vote when they are the only words that are on the paper.

I have already said that I support the intention of the suggestion made to you on Monday to give a more accurate and fuller description of the intent of this referendum proposal by

going beyond these words—the long title as it is currently in the draft legislation—if you are wanting to give that full description. But if you do that you are going to have to include half a dozen ideas, and at least the four or five that Malcolm Turnbull referred to. I think he was open to inclusion of additional words such as reference to the Prime Minister and the Leader of the Opposition.

I am saying that I prefer Malcolm Turnbull's suggestion to what you currently have in the draft bill but however much you go into this description, spelling out some of the facets of what will be in the new arrangements for the Constitution, you will leave something out. A summary is always a summary. Therefore, I just put it to you that if there cannot be agreement about what is to go into that summary in the long title then it is safe, s-a-f-e, to stop it at the word 'republic', that is, only include the first 18 words.

Mr CAUSLEY—On that point, surely the education campaign is going to have to be in the advertising because people are not going to read the long title. You are not going to educate them with a long title. Even if you suggest that they are going to read the long title when they go to vote, I think you have given them a lot more credit than I would expect. The education has to be before that in the advertising campaign if you are worried about them misunderstanding what type of republic it is.

Dr Teague—That is certainly true, and that is why I want people to be as informed as possible, to have as much dialogue as possible, to know as much about this proposal beforehand. But about 20 per cent of voters say, when they go to vote in federal elections, that they did not have a clue about what they were going to do until they actually got into the polling booth. At that point they look at the ballot paper and see that one of the names on it is 'Roger Price'. They say, 'Price, I used to live next door to a Price once. I will vote for Roger Price,' or whatever.

I am only trying to respond to Robert McClelland's accurate statement that there is, unfortunately, despite all the education, going to be a minority who probably go in fairly clueless to the polling booth. That is why this long title is important. If you use the word 'chosen'—

Mr CAUSLEY—Do you think those people who do not have a clue are going to read the long title?

Dr Teague—Who knows, but if they do it should be accurate. That is why the word 'chosen' should not be part of the long title. I believe that this long title that is in the draft bill is only referring to a two-thirds majority of members of the Commonwealth parliament because that was a distinguishing element of the model that got up at the Constitutional Convention. But, frankly, the changes that are involved are more accurately summarised by the Malcolm Turnbull suggestion and they could be more accurately summarised if you included half a dozen of the features of the referendum bill.

CHAIRMAN—I will make one minor correction. This is no longer a draft bill, it is a bill before both houses of parliament.

Mr PRICE—Would it be fair to say that we do not prescribe the process by which people arrive at their decision—that would be a dictatorship—but that we ought to facilitate that decision in any way we can? Therefore, the long title is important in our democracy in allowing people to record their decision.

Dr Teague—If this committee can achieve leadership on this matter by agreeing, preferably unanimously, on a summary of the distinctive features of this referendum bill and include that

as your recommended long title—and it must be accurate, which means the word 'chosen' does not get there—then that would be quite compelling with the government and the parliament as a whole. It would have to be a factually correct and fair summary of half a dozen features of the referendum bill. I am only saying to you—partly tongue in cheek—that it will be safe for you all if you just have the proposed long title up to the word 'republic', and it certainly would be more accurate, and left out the final 15 words because those 15 words are only one aspect of the bill.

Ms JULIE BISHOP—For example, Dr Teague, one submission before us has suggested that one of the most important features of this model is the dismissal procedure in terms of the shift or otherwise from our current situation. If we were to be as expansive as possible so that everybody who looked at the ballot paper had an understanding of what we were presenting, you would have to include the dismissal procedure, and that is when it becomes quite difficult.

Dr Teague—I think that, if you cannot agree on a summary in a revised long title, you fall back on my safety net, which is only 18 words. If you can agree on a summary that is fair to the legislation, that kind of leadership from this parliamentary committee will be invaluable to the parliament. Mr Chairman, although I understand, as you say, that this is in fact the bill introduced into the parliament—it certainly was by the Attorney-General earlier in June—your report must clearly be able to give recommendations on all of the matters we have discussed that will engage with that timetable so that the parliament will be able to embrace amendments.

Ms JULIE BISHOP—Dr Teague, this is something you have not addressed, but in the last couple of days it has been the subject of quite a number of submissions from perhaps constitutional lawyers, if I can put it that way. The third paragraph of section 59 of the bill—the executive power—has commanded much attention, because there is a concern that confusion will arise. It will arise, firstly, because it is the first time in the Constitution that there will have been reference to the Prime Minister or another minister of state, and that could cause confusion about the correct source of advice; secondly, because it refers to the reserve power without there being any definition elsewhere as to what a reserve power is; and, thirdly, it refers to the constitutional conventions, that it could make them justiciable and that also it might well freeze the conventions as at the date of the enactment. Do you have any comments in relation to that? It has been suggested that if we deleted that paragraph altogether we would be none the worse off.

Dr Teague—I believe that you raise very important questions. Not only is the Prime Minister mentioned in the Constitution for the first time but, in section 60, political parties are mentioned for the first time. In my copy in front of me I have circled both of those words because they are brand new and we need to be cautious about such innovation and use the words only if they are really necessary. I have concluded that they are necessary in these two cases. My personal preference is that in the transition clauses there be no reference to the Crown at all, but that is unavoidable. In terms of schedule 3, I think it is proposed sections 5, 6 and 7. I regard them as transitional clauses and we will clean them all up in 20 or 30 years, and then there will not be any reference to the Crown needed in the Constitution.

With regard to freezing the reserve powers as they are in 2001, it would be most unfortunate, and I do not believe these words freeze the powers. Rather, I believe that there is a direct acknowledgment that the conventions that have been established over the last 99 years around the Constitution are all important and are all taken into account and regarded as an ongoing body of convention.

It is my view that the Constitutional Convention believed that the interpretations of the Constitution by the High Court, the conventions around the Constitution over this last century, are all ongoing, and unless there is some explicit change—clearly President for the Governor-General, President for the Crown or whatever—they all continue and they all flow on. There was no view at the Constitutional Convention that we freeze anything as of 2001. In other words, there ought to be an ability for the reserve powers to evolve slowly, for the conventions to evolve slowly. I think there is a possible danger in what you are saying—that once you have mentioned reserve powers in this innovation, you are making them newly justiciable, newly frozen or something that has not been there in the past that must be avoided. I would hope—and I would leave it to those of you who are constitutional lawyers to be able to affirm—that they are not frozen, that there will not be any interference with the facts of the conventions of the last 100 years in the mind of any future High Court. I think we are living a bit with that with some minor risk, but I have not been persuaded, by my reading of the third paragraph of section 59, that it should be changed in any way.

CHAIRMAN—Following on from what Julie said, one of the concerns expressed more than once about that third paragraph of section 59 is the fact that it is mentioned that:

The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State . . .

They argue—rightly or wrongly, I do not know; I have no idea—that another minister might in fact have a different view on a particular issue from the Prime Minister or the Executive Council and carry a political argument from the cabinet room to the Executive Council and to the President. Do you have a view on that—that by using those words you set up that possible scenario?

Dr Teague—I think it is unlikely. Any wise President who even got an inkling that an individual minister was giving advice that was contrary to or in any way varying from the cabinet as a whole or the Executive Council formally constituted would at least defer the matter until there had been a meeting of the Executive Council or there had been some ability to make sure it was clarified. But I am not going to die in a ditch for that paragraph. I think that there is nothing wrong with the intention of including that third paragraph. If it is regarded as constitutionally safe to exclude the third paragraph, by all means do so, because I actually think that it is implicit already that all of that happens. The actual conventions around the Executive Council, the conventions around the Constitution and the actual existence of reserve powers are all a fact of political life in this country.

CHAIRMAN—So you think the reserve powers as conventions will survive, notwithstanding that there are words in the Constitution to indicate their survival?

Dr Teague—They must.

Ms JULIE BISHOP—They are our conventions.

Dr Teague—By the way, the convention—and it is spelt out in the communique—said that, with regard to the powers of the President, they should be continuous with those of the Governor-General and the Crown generally. They should be spelt out insofar as they are on the advice of ministers, that is, the Executive Council—and I think—and I would need to be reminded—the third element in the finding was that, with regard to the reserve powers, they cannot be spelt out.

Ms JULIE BISHOP—That they were avoiding codifying the reserve powers.

Dr Teague—There was a big debate because there were at least two or three pushes for codifying everything. I was part of the group that argued that you do not codify everything because, firstly, you have the danger of freezing it at that point in time and, secondly, there was the danger that the High Court could come in with some sound or fanciful interpretation of what the words so codified actually mean. I am quite conservative in this respect: I am quite happy with the present process of slow evolution according to good reason for the conventions and for the exercise of reserve powers.

CHAIRMAN—You have recommended that the nominating procedure requiring an individual to give up any current office of profit under the Crown, or any of those other things that would preclude such a person from assuming office, should take effect from the time a person is selected rather than when a person nominated. But we are not proposing to change the Constitution with respect to members standing as members or senators for election—

Mr CAUSLEY—I happen to disagree with that procedure too.

CHAIRMAN—That matter has been the subject, as you well know, of numerous parliamentary inquiries and recommendations by committees of procedure, yet on and on it goes and still there those rules sit. The Hill case just determined by the High Court brings it back into focus once again. Do you really think it fair and reasonable that we have a different set of procedures relating to this individual called the President than we do for ordinary members and senators of parliament?

Dr Teague—I do not see them as different because section 44 of the Constitution that relates to the qualifications to be a member of the House of Representatives is currently subject to recommendation for change that would be an improvement. I think the Attorney-General, or at least the government, has said that the government will proceed with this if a referendum was going to be supported by all parties. That is the key term. Therefore, I hope that that agreement might be soon in place and that section 44 can be tidied up. However, with regard to the President, the President needs to have qualifications that are defined by the revised section 44.

Apart from that, it is just a question of when do you regard the nomination as being a nomination. If you regard nomination as the time when the Prime Minister moves and the Leader of the Opposition seconds in the joint sitting rather than at the earlier stage of the nomination from a member of the public to the nominations committee—and I prefer the former stage—then without any special pleading the President must conform with the qualifications of office the day before the joint sitting that would approve that person being appointed President. I would leave it to the latest stage. I would argue that the Prime Minister's nomination at the joint sitting of the parliament is the time when that must be all clear.

The only other element was the one which I mentioned where everyone who is nominated to the nominations committee sign that they are agreeing to the nomination being made and signing that they undertake to resign any office that would otherwise disqualify them under section 44, old form or new form.

CHAIRMAN—I have no problem with what you argue and I think it should be the same for members and senators, but it is not. I do see some difficulty in having one procedure for one and another procedure for the other.

Dr Teague—Without repeating all that, I would just say I would take the word 'nomination' as meaning the Prime Minister's nomination to the joint sitting.

CHAIRMAN—Has anyone got anything else?

Dr Teague—There is one personal point. I am an Australian citizen who does not stand upon ceremony, but before I went to parliament I was referred to as Dr Baden Teague and since I retired from parliament that has been the way I am referred to. So if you wish to call me Baden Teague, that's fine, and Dr Baden Teague is also fine.

Ms JULIE BISHOP—I will call you Dr Teague!

Mr PRICE—I want to thank you for raising the issue of emoluments for the President. I think it is an important point that you made. You are the first witness to actually raise that, although I was not here on Monday. Thank you for that.

Could I ask you the same question about section 64 concerning the current practice of both governments to have parliamentary secretaries, positions that were not there at the beginning of Federation. Wouldn't it be desirable that we do not hide anything from the Australian people and mention the office of parliamentary secretaries under sections 64 and 66?

Dr Teague—Roger, although I am a person who has been your friend on so many parliamentary committees, I have to disagree with you. I think there has been a genuine attempt by the Constitutional Convention and by the Attorney-General to keep changes to the Constitution to a minimum, to those that are actually required to implement the Constitutional Convention's findings. There are all manner of other changes that could be made and that you could incorporate. For instance, my private members bill of June 1996 made gender inclusive throughout. I am in favour of that but I have not raised it today because—

Mr PRICE—Why not?

Dr Teague—Well, on the principle of minimum change. Secondly, there are a number of obsolete words in the current Constitution and the Attorney-General has not knocked out all of them. If I had time I could find a number that are knocked out and so on.

With regard to parliamentary secretaries, I think you may well be right but I do not think this is the time to do it. That is not being dishonest. It is not even being unrealistic. At the moment we have parliamentary secretaries and it works pretty well. It is clear to the public. We are not hiding anything if we do not refer to parliamentary secretaries in this current bill. There can be a cleanup sometime. A future Attorney-General can work out the time that would address all manner of these matters.

Mr McCLELLAND—I accept your argument. The Legal and Constitutional Affairs Committee looked at section 44 last year. We recommended that there be a further inquiry in respect of the pecuniary interest criterion of section 44 in conjunction with the operation of this section 64. We submitted that as a recommendation to the Attorney as something to look at down the track.

Dr Teague—I will leave that in your good hands.

Mr PRICE—Baden, you made an important point and thank you for picking me up on it, but could I take issue with you on one point. Ministers of state and parliamentary secretaries constitute the federal Executive Council and the omission of one part of that seems to me to be incorrect. But I take your overall point that we should be only changing those things that are necessary to implement a republic.

Dr Teague—In practice, any Prime Minister would be wise to insist that the parliamentary secretaries meet the standards that are explicitly required of ministers.

CHAIRMAN—Anyhow, I call you Baden because we were colleagues together in the party room for many years, so I think I can get away with that. Thanks once again. We will report on 9 August and we will, as with all of our respondents, send you a copy of our report.

Dr Teague—Thank you very much.

[3.50 p.m.]

STANLEY, Mr Timothy Laurence (Private capacity)

CHAIRMAN—Mr Stanley, thank you very much for coming to talk to us. In what capacity do you appear today?

Mr Stanley—While I am a member of the South Australian Bar and a member of the ARM, I am appearing before the committee today in a personal capacity.

CHAIRMAN—Thank you very much for that. You have not given us a submission. Would you like to outline briefly to the committee the issues that are of concern to you?

Mr Stanley—Certainly. Can I just commence by apologising to the committee for the failure to submit a written statement. I understand that I am the last witness before the committee in its sittings today. I do not propose to detain the committee for very long. I wanted to address specifically two matters: firstly, the terms of the question to appear on the ballot paper and, secondly, the question of the removal of the President.

In relation to the first matter, I support submissions that I understand have already been put to the committee in relation to the terms of the question which is to appear on the ballot paper. In my view it is important that the terms of the question on the ballot paper make clear that what has been voted upon, pursuant to section 128, is the Convention model which proposes the presentation of the nominee for President by the Prime Minister for ratification by a two-thirds majority of a joint sitting of the parliament from candidates that are nominated by the Australian people.

The committee is well aware of the history of referenda in this country and the conspicuous lack of success on all but eight of the 42 occasions upon which a referendum has been put to the people. There are obviously a number of preconditions for the success of any referendum, and probably the most critical is bipartisan support. But one of the important, if lesser, matters is that the issue that is before the people is clearly understood.

It is an undoubted fact that a number of people, when they come to vote—whether it is for parliamentary elections or for referenda—often really only direct their minds to what they are voting on only as they enter the polling booth. In those circumstances the importance of having the proposition clearly stated on the ballot paper is critical. I do not want to say a lot about that issue because I am aware that the committee has already heard a number of submissions, both here and in other places, in the course of this week and, in my experience, repetition rarely makes the argument sound any better.

The second point I wanted to address, at slightly greater length, is the concern that some people entertain about the provisions in the Convention model for the removal of the President, as found in section 62 of the constitution alteration bill. In my submission, the provisions of section 62 do provide adequate safeguards for the stability of our democratic system of government. Moreover, the procedure established by section 62 is most closely consonant with the existing procedures for the removal of a Governor-General, albeit with the additional proviso that the removal must subsequently be put to a sitting of the House of Representatives within 30 days of the fact of the removal.

I am aware that some academic commentators have argued that there is a potential for abuse of power by an incumbent Prime Minister confronted with circumstances that are analogous to those which occurred in the constitutional crisis of 1975, because of the apparent ease by which the President could be removed in accordance with the provisions of section 62. In my

view, those concerns are more apparent than real, when one has regard to the consequences of a removal of a President by the Prime Minister.

The further point that I wanted to make in relation to that, before I develop that argument, is that proposals that have been advanced for specifying the grounds upon which a President can be removed, so as to limit in some way the capacity of a Prime Minister to act in that way, bristle with considerable difficulties, both legally and politically. In due course, I want to say a little bit about why that is so.

As I understand them, the arguments that various academic commentators have mounted against the operation of section 62 are that, faced with a situation where supply is blocked in the Senate, a Prime Minister could remove a President who threatened to dismiss the government, in the nature of a pre-emptive strike, and that this places the Prime Minister in a stronger position under the proposed section 62 than currently exists—where the Prime Minister wishing to remove a Governor-General must advise the Queen, who would be entitled to request written advice from the Prime Minister and may insist on time in which to consider it. Further, she might even, in accordance with the dictates of natural justice, afford the Governor-General an opportunity to answer any reasons advanced by the Prime Minister to justify the removal of the Governor-General.

While accepting—at least for the purpose of the argument—that all of those things may occur in the event that a Prime Minister were to put to the Queen, under our existing Constitution, that a Governor-General should be dismissed, the fact remains that, under the Westminster system of government, the Queen must act on the advice of her responsible ministers. To the extent that there can have been any doubt about it, the judgment of the High Court in Sue v. Hill now makes plain that those responsible ministers must be the Queen's Australian ministers. In those circumstances, it is my submission that the situation which would exist under the proposed section 62 is really no different from the existing situation, which is that the Prime Minister is able to remove the Governor-General, effectively at will and, if that is so in the case of a President under section 62, then it really represents very little change from the existing situation—subject to, of course, the requirement under the proposed section 62 that the Prime Minister must go to the House of Representatives within 30 days of the removal of the President and submit that decision to the House for its approval, which, if not granted, obviously leaves the Prime Minister in an untenable position.

The further point to be made about the operation of the proposed sections 62 and 63 is that the Prime Minister, who would remove or dismiss a President, would find that the President would be immediately replaced by an Acting President; moreover, the Acting President would not be an executive chosen by the Prime Minister of the day. The Acting President would be the most senior of the existing state governors—somebody whose selection would almost certainly be beyond the gift of the Prime Minister of the day. That, in my submission, is a very serious restraint upon any Prime Minister acting precipitately, impulsively or for overtly partisan advantage, because the Prime Minister who does remove a President is then confronted by a replacement over whom the Prime Minister more likely than not has even less sway. That must be a very sobering prospect for any Prime Minister who would contemplate the undoubtedly serious step of seeking the removal of the President of the day.

In circumstances where there is a concern that such a step might be taken to avoid an exercise by the President of one of the reserve powers, the Prime Minister could have no confidence that, if that prospect lies in wait legitimately, the Acting President would not feel impelled to act in precisely the same way as the Prime Minister feared the President pro tem was intending to act. The Prime Minister could hardly be comforted by the prospect of some

sort of domino effect where, if there were a legitimate concern about the exercising by the President of the reserve powers, it could not be avoided just by dismissing the President, if the Acting President, who is the most senior state governor, were also likely to act in the same way by replacing the next President with the next Acting President and so on down the line. It is a prospect that just does not bear contemplation and clearly would not bear contemplation by the Prime Minister of the day. For that reason, I say that the concerns about the proposed system are misplaced, and the fears are more apparent than real because they are unlikely to ever eventuate.

The second point relates to those who say that the answer to this apparent problem is to amend section 62 to limit the grounds upon which the Prime Minister might remove a President so that they are analogous to the provisions in the Constitution as it presently exists relating to judges of the High Court, so that grants might be limited, for example, to proved misbehaviour or demonstrated incapacity. In my submission that is also undesirable for a different reason—namely, that once you introduce provisions of that kind into section 62, it begs the question: how effective a protection is such a measure against the mischief it is seeking to address? If the mischief you are seeking to address is the abuse of the power of dismissal by the Prime Minister, the only way this can presumably be an effective remedy is if someone is going to arbitrate on the issue of whether or not proved misbehaviour or incapacity has been demonstrated. Presumably, that will be arbitrated upon by the High Court.

If you make the issue of the dismissal of the President justiciable by the High Court, in my view you create terrible tension within our existing system of government, and the potential for constitutional and political gridlock while the issue of the dismissal of the President is litigated in the High Court—a process which, even allowing for the urgency with which the High Court would treat the matter, would still take at least a matter of weeks if not longer and, in the meantime, the position of the Prime Minister and the President would be left in very grave doubt and the ordinary constitutional and governmental processes would have the potential to grind to a halt whilst the question of the authority of each office was seriously in doubt.

Ms JULIE BISHOP—Wouldn't there be a caretaker Prime Minister perhaps and an acting President, though? Life would go on.

Mr Stanley—That was the next point I was going to make. In any event, even assuming that the issue was justiciable by the High Court, once the President had been removed that would be effective unless the High Court granted some sort of stay—which is always, I suppose, potentially possible. Just to contemplate the prospect of that is almost mind boggling. Assuming for the moment that no stay was granted, the Acting President would exercise the powers of the President in the meantime and you would go back to the earlier scenario that I was painting. In my submission, all that you are doing is creating problems where none really exist and which are not only unnecessary but potentially dangerous. Those are my submissions, briefly.

CHAIRMAN—Thank you very much for that. Considering the second of your two issues first, it has been put to us that perhaps some uncertainty in the system—this doomsday scenario of the domino effect—could be resolved by altering section 62 to require the House of Representatives to deliberate on the issue before a Prime Minister could invoke the dismissal procedures for an Acting President. What would your views be on such a procedure?

Mr Stanley—I have not given that any consideration until now. Allowing for all of that, while not wishing to dismiss that prospect out of hand, the thought that occurs to me is that

there is a certain advantage in the 30-day delay that is contemplated. The advantage is that it allows the political process a certain time to work—and the political process in itself can bring pressure to bear on the Prime Minister and the government—and it allows the opportunity for the people, to a degree, to exercise a judgment and express a view, however divided that would undoubtedly be and however amorphously it might be expressed. But obviously the question of the removal of a President in almost any circumstances would generate tremendous political heat and passion, and governments and oppositions are sensitive to that.

I would expect that that process, whilst clearly having the potential for negative as well as positive consequences, is on balance probably more likely to have a positive impact upon the parliament and more particularly upon the government which ultimately has to make these decisions—given that the Prime Minister only exercises that office by dint of the fact that he commands a majority in the House which has to deliberate on it. Again, just expressing my very preliminary view on all of that, I would think that there are benefits to the 30-day delay. I am not sure that they would be overwhelmed by the alternative proposition that has been suggested.

CHAIRMAN—I must admit that I myself find it very difficult to conceive of circumstances where a Prime Minister would create the leapfrog effect or the domino effect, other than the Prime Minister being completely mentally unstable, and I cannot conceive of circumstances where the Prime Minister's political party would not bring the Prime Minister to judgment themselves—and fairly immediately—except perhaps in the case where it was a winter or a summer recess and no-one from that political party, other than the rogue Prime Minister himself or herself, had power to call a meeting of the party to resolve the issue. So I guess it is put to us that the 30-day delay, by preventing the Prime Minister from doing the domino business for at least the 30 days or at least the time until the House itself resolves the issue, takes that huge uncertainty out of the equation. I appreciate that we have just put it to you. Perhaps you might like to reflect on that and, given time to think about it, advise the committee in writing if you have further views.

Mr Stanley—Certainly; I would be happy to do that.

Ms JULIE BISHOP—In relation to that, Mr Chairman, the 30 days might not help us at all. He has to seek the approval within 30 days. He could seek approval the following day, so you do not actually get the 30 days, unless you are suggesting there be a prescribed 30 days?

CHAIRMAN—No. But if he sought approval and got approval the following day, then he is free to sack the next one.

Mr PRICE—No, he has still got to explain.

CHAIRMAN—Except he has then got to put in process the process to select a new President.

Mr PRICE—But he has got to present his reasons for both the appointments and dismissals.

CHAIRMAN—It is nightmare stuff.

Mr McCLELLAND—Mr Stanley, we have considered another alternative to avoid that possible domino effect, as unlikely as it may be, which would be to put another paragraph in section 62, after referring to the approval process of the parliament, to the effect of—taking these words as an example only—'Pending approval of the dismissal by the House, the Acting

President appointed in accordance with the Constitution shall perform the duties of the President.'

CHAIRMAN—The successor. That is what I put to him.

Mr McCLELLAND—Yes. Do you think that may give people cause for comfort?

Mr Stanley—Yes. I think that is implicit in the existing proposition. But, in any event, it is always better to make what is implicit explicit.

Mr CAUSLEY—On the dismissal powers, I heard what you said your position was. You mentioned 1975. If we go back to 1975, the Senate had denied supply, the country was crippled and could not pay its way. Obviously, the Prime Minister disagreed with the Governor-General, because it is my understanding that the Governor-General asked the Prime Minister to hold an election and he refused. Under this proposal we have in the bill before us, which gives the instant dismissal, if the Prime Minister had sacked the Governor-General, where would it have left the country—because we did not even have any money to hold an election?

Mr Stanley—As I understand the question of supply, supply had not run out on 11 November and supply was not going to run out for a matter of some weeks. It seems to me that the position in relation to the constitutionality of the dismissal in 1975 is really no longer doubted: Sir John Kerr, as the Governor-General, did have the power to do as he in fact did. The arguments, it seems to me now in academic circles, really revolve around the question of his timing rather than his capacity to do as he did and whether or not he intervened, with the undoubted damage that did to the political fabric of the country, prematurely. And if time had been left to run for maybe another few days or a week, a week and a half, or whatever, the political process itself may have resolved the impasse without the need for the intervention of the Governor-General.

Mr CAUSLEY—If we still had the impasse, surely the greatest protection of any democracy is, in those sorts of circumstances, to go back to the people.

Mr Stanley—I accept that.

Mr CAUSLEY—That is what we have got to try to ensure that we get in place.

Mr Stanley—Yes; I do not have any difficulty with that.

Ms HALL—Mr Stanley, the current legislation—the legislation that is before us here today—would not prevent that happening, though, would it?

Mr Stanley—No, I do not think so. The question is always going to be: how does the Prime Minister resolve the particular dispute that exists? And ultimately, a Prime Minister can only survive if the Prime Minister can continue to maintain the political support that is necessary, firstly, to hold his or her position within their own party room and, secondly, the government's position within the country. You are the politicians. I do not have to explain to you the considerations that brings to bear on the Prime Minister and the senior members of the government and the backbench. They are all very sensitive to those questions and ultimately there has to be a political resolution of those disputes.

Ms HALL—Thank you.

Mr McCLELLAND—To take Mr Causley's point, if you go back to 1975 and assume that Prime Minister Whitlam had dismissed Sir John Kerr, then, according to convention, the most senior state Governor would have stepped into the shoes. I do not know whether Mr Whitlam considered the possibility, but that state Governor, stepping into the role of Acting Governor-

General, may have taken the same course as Sir John Kerr. It would seem, wouldn't it that, if there was a locking mechanism whereby the next senior Governor acted as President, pending consideration by the parliament, a rogue Prime Minister would run that same risk? For instance, if he or she were imposing martial law, the acting Governor could act in precisely the way the Prime Minister anticipated the dismissed President would have acted.

Mr Stanley—That is as I understand the position at present and that is why I say that the proposal is most closely consonant with the existing system of government, except that you have the added safeguard of forcing the Prime Minister back to the House for subsequent ratification of his or her actions.

Ms JULIE BISHOP—I guess the only difference with the current situation is that, under this proposal, the Prime Minister does not have to consult anyone. I am not suggesting it makes any dramatic difference but, under this current system, he does not have to consult anyone. Whether it be just a matter of form or substance, the Prime Minister has to consult the Queen. So that is, in my mind, the only difference, and whether or not that amounts to a great deal or nothing is a matter of conjecture.

Mr Stanley—I just come back to my earlier point, Ms Bishop, that, in the end, it is not so much a question of consultation with Her Majesty. Under the existing Constitution, the Prime Minister is dependent upon Her Majesty giving her imprimatur to the Prime Minister's demands. But it is beyond contemplation that that would not occur.

Ms JULIE BISHOP—It might just come down to a question of timing, whether she asks for reasons or time or whatever.

Mr Stanley—That is right.

CHAIRMAN—Any further questions?

Mr PRICE—Are you aware of what happened in Fiji with the coup there?

Mr Stanley—The first thing I would say is that I was on my honeymoon when the coup occurred in Fiji. I was not paying a great deal of attention to it!

Mr PRICE—But you came to this committee with a very high reputation!

Mr Stanley—I understand that there was no communication with the palace. Colonel Rabuka was not really concerned about the constitutional niceties at the time.

CHAIRMAN—Okay. I thank everyone for their attendance. Thank you, Hansard, colleagues, and Mr Stanley. I now declare the meeting of the committee closed.

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

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

Committee adjourned at 4.20 p.m.