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JOINT SELECT COMMITTEE ON THE REPUBLIC REFERENDUM

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JOINT SELECT COMMITTEE ON THE REPUBLIC REFERENDUM

Thursday, 8 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: Senator Abetz and Ms Julie Bishop, Mr Causley, Mr Charles, Ms Hall, Mr McClelland, Mr Price and Ms Roxon

Terms of reference for the inquiry:

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

WITNESSES

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Committee met at 10.08 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 the Attorney-General's Department. The committee also heard arguments from other witnesses about some perceived weaknesses in the bill. Since that time we have held public hearings in Sydney, Melbourne and Adelaide, and reconvene today in Perth.

As I have said on other occasions, I view the task of the committee being threefold: firstly, to determine that the bills themselves reasonably and faithfully replicate the will of the Constitutional Convention; secondly, if the Australian public elects to vote for the bills in the referendum in November, that the provisions in the bill will work as intended; and thirdly, to give the Australian public an opportunity to comment on this important constitutional legislation. Over the next three weeks the committee will continue to conduct public hearings around Australia to listen to arguments about the proposed laws.

CRAVEN, Professor Gregory, Foundation Dean and Professor of Law, University of Notre Dame Australia

CHAIRMAN—I now call Professor Greg Craven to give evidence before the committee. We have not received a submission from you, but have you any points that you would like to make regarding these issues?

Prof. Craven—Yes, if I could, I would like to do that. May I first indicate that, having said that I appear as Dean of Law at the University of Notre Dame Australia, I in fact suspect that I appear in a series of other embarrassing capacities: as member of the National Yes Committee, appointed by the Prime Minister; as a member of the National Executive Committee for Conservatives for an Australian Head of State; and as a member of the executive of the Yes Coalition for Western Australia. I would make those affiliations clear at the outset.

By way of opening, I would appreciate the committee's indulgence simply to make four brief points which I think might be of assistance. The first point comes particularly from my perspective as a professor of constitutional law. May I put it to the committee that the bill is well drafted, as a matter of technique—which is an important point—and both the Attorney-General and his department are to be congratulated on the technical quality of the bill. That comes to me as a matter of surprise frankly because, when I first thought about what a big change would be involved, I was rather worried about what would come out. On reading the bill I was impressed by its drafting style—it is very much in the style of the original Constitution. If it becomes part of the Constitution, there will be no embarrassing jumps, inconsistencies or jarring changes of style or terminology.

The second point is that I believe that in general the bill faithfully reflects the outcomes of the Convention. Overwhelmingly, I think the bill reflects the views of the Constitutional Convention as I understood them as a member of that Convention. There is one respect where the bill picks up a suggestion made at the Convention which I believe was in the mind of the Convention but had been left to the draftsmen, that is, the provision of acting presidents by accessing the pool of state governors. I think that is a very significant improvement. It was something that was discussed at the Convention and indeed it resolved probably my own single greatest concern on a technical basis about the bill. So I think that is a significant improvement.

I note one other change: that the removal of the President under clause 62 is not explicitly made a matter of confidence before the House of Representatives. That specific matter of confidence was proposed by the Convention. Probably, for myself, I would have preferred that to be in the bill as it went, but I understand the argument against it, which is really a matter of drafting elegance—you do not put basic principles of responsible government convention in a substantive enactment of the Constitution. At the end of the day, I do not think it makes any practical difference, for the simple reason that the removal of a President is always going to be a fundamental matter of confidence. However, I express my personal preference that the matter was in fact in the bill.

The third point is that I am confident the bill represents a republican version of our existing system. That is obviously something that is important. It is particularly important to

someone like me who makes no bones about the fact that they are a constitutional conservative. I would never agree to support this bill unless I thought it faithfully reflected our existing system; it does. It is not a radical departure from the system; it is simply an encapsulation of our constitutional order in a republican form. That means that our governmental system will continue after the bill becomes part of the Constitution—if it does—with the sole exception that the monarchy will be replaced by equivalent institutions which will continue to operate according to the same laws and conventions as apply to our existing constitutional institutions. In that context, this contrasts sharply with any model for direct election advanced at the Convention or after the Convention which would involve the substantive destruction of our constitutional system. That is why I will support this bill.

Finally, I turn to the long title of the bill—a matter which has obviously received the most attention in the media so far. Let me flatly state that in its present form the long title of the bill is inappropriate. I say that not as a matter of republican strategy but as a matter of simple constitutional and legal principle. I reached that view when I first read the title. The second view I reached was that probably the matter should not have been raised because it would be misinterpreted and distorted, which I think is exactly what has happened. However, the matter having been raised, I just take the committee through the concerns that I have with this bill.

As you understand, and as we all understand, the title of the bill is important because it forms the stem for the referendum question. I think it is enormously important for this committee and every other body in Australia to understand that it is absolutely imperative that the question at this referendum be accurate. It would be a constitutional disaster of epic proportions, were a large proportion of the Australian population to believe, were this referendum to win or to lose, that it had been done by a trick or a ruse. That would be something extraordinarily damaging to the stability of the Constitution. It would be something in the order of the type of controversy that one had after the dismissal of the Whitlam government—whatever view one took of that; whether it was good or bad—and we really cannot afford that.

This bill does many things, but it does three basic things which are clearly more important than any other: it removes the Queen as head of state, institutes an Australian head of state and provides a means for the appointment of that new Australian head of state. The one thing that I think is therefore beyond all question is that the long title should accurately reflect those three elements in a form sufficiently brief as to not provoke confusion. The first point here, I think, is that the long title leaves crucial elements out. The first thing it leaves out is any reference to the Queen. It is little short of bizarre that, in a bill that will replace the Queen with an Australian head of state, we do not refer to the Queen. That is distortive of the contents of the bill. Frankly, it is a gross insult to Her Majesty that she is considered so negligible in this exercise that she does not appear in the question. As a matter of principle, I do not consider that it is even open to dispute that there should be a reference to the replacement of the Queen in the question.

The second thing left out is any mention of the nomination process for President; there is just the reference to appointment by a two-thirds joint sitting. Whatever view one may have taken at whatever point in relation to the nomination process, this is highly significant and it should appear, given that the other part of the appointment process appears in the question. I

note that the present long title, most unusually, includes a term which does not appear in the bill. I have been through the proposed amendments to the Constitution a few times—I am not noted for my capacity to hold long attention to detail—and I cannot find the word 'republic' anywhere as will be inserted into the Constitution. It will not appear except to the extent that it appears in the long title. It is most unusual that we are going to have a word in the Constitution title that, as far as I can tell, is not actually going into the Constitution. I would direct the committee's attention to that. As I say, maybe, if it is there, it is there so prominently that in two careful runs I have not been able to find it. That is odd.

I understand that the position that has come forward—I think from the Yes Committee or possibly from the Australian Republican Movement—is that the word 'republic' may indeed now go in. On that I make no comment. I will obviously fall in line with the general view on this matter. But, as a matter of constitutional principle, I am suggesting that it is potentially misleading. Why? Because 'republic' is a generic term. When we say 'a republic', do we mean the People's Republic of China, do we mean the Republic of Czechoslovakia? What does the term 'republic' add to the proper description in the long title? Ms Bishop may recall that this is a point of principle I have taken before. I refuse to vote for the general notion that Australia should become a republic because the term 'a republic' does not mean anything. What does mean something is the description of the particular republic, and that particular republic is the replacement of the Queen by an elected head of state, appointed by a particular mechanism. That was what should be as a matter of principle rather than politics, in the long title.

The final point to be made, I suppose, concerns the other word that it appears is now conceded should go in the title, that is, the word 'President'. 'President', of course, is a word that has almost no significance in this bill. As anyone who attended the Constitutional Convention will know, it could have been President, Governor-General—for which I voted—Emperor or Pooh-Bah. It merely is the descriptor of an Australian head of state. Again, as a matter of principle rather than politics, I believe that that term should go in.

That said, and conceding the events today about which one can read in the newspaper, it seems that what really emerges in relation to this question is the extraordinary omission of the Queen. Where is the Queen? This is a referendum as much about the Queen—her replacement—as about the republic, its institution. Where is it? If the view is taken that the word 'republic' must be in the question, which it seems to be, where is its opposite number, the Queen? It would be extraordinary if the Queen were not to get a guernsey in her own removal from the Constitution.

Senator ABETZ—Why not the term 'constitutional monarchy' as opposed to the term 'the Queen', because we are talking about a system, aren't we, rather than Queen Elizabeth II?

Prof. Craven—I think the term 'constitutional monarchy' is a possibility that one could insert, although I think that what you are trying to do with the stem question is make matters as clear as possible—you are trying to address many millions of Australians. When many millions of Australians talk about the monarchy, they do not use queer expressions like the ones I use—'constitutional monarchy', 'Her Majesty' and so on—they use the term 'the Queen'. So if I were inclined to do it, I would be inclined to say 'the Queen'.

Ms HALL—In the Constitution, it refers to 'the Queen', not to the 'constitutional monarchy'.

Prof. Craven—Of course the phrase 'constitutional monarchy' is an abstraction. The word in the Constitution, as Ms Hall so rightly points out, is 'the Queen' or 'Her Majesty'. They are the two expressions constantly referred to: 'the Queen and her successors at law' and 'Her Majesty'. The constitutional monarchy is really the abstraction from that.

Senator ABETZ—But won't the President be referred to all the time in the new Constitution? So shouldn't the term 'the President' be in the question as well, because you cannot have it both ways?

Prof. Craven—The problem with the term 'the President'—and this is an interesting question of how one frames it; I think one has to keep in mind what one is trying to do: to inform the public and have the public inform us back—is that it carries connotations in that question which may well be confusing. As much as I would love to believe that most Australians will take this bill and the report of this committee as standard bedside reading and go through it for a few weeks before the referendum, they will not. The term 'President' is quite likely to connote the question of an executive presidency, as in the United States system, which is why I voted against the term at the Constitutional Convention. The concept that you really want to get across is that the ultimate ceremonial figure under the Australian Constitution will be this Australian head of state. That is why I would prefer this term. There is no doubt that changing the question in the way that I am suggesting would strategically assist the republican cause. I make that quite clear.

Senator ABETZ—That is what I was thinking.

Prof. Craven—That is not why I am saying it. I reached this conclusion independently of that decision—if what you are trying to do is to inform the Australian public.

Senator ABETZ—Sorry, I interrupted you.

Prof. Craven—You didn't really; I was just about at the end. As I said, I think that where we have got to is the real question about this issue, which really comes down to two things. Firstly, are you going to put the Queen in? I think it is very much the case that that should be done. Secondly, given that the Commonwealth government has described half of the appointment process, what is to be gained by not describing the other? If you are going to have a person who is nominated, in almost any process such as this you have two stages—nomination and appointment- so surely you should have both in as a matter of technical constitutional principle.

Ms JULIE BISHOP—Do you have the middle step: the involvement of the Prime Minister and the Leader of the Opposition? It is a three-step process, loosely speaking.

Prof. Craven—I suppose that is a question that turns on the issue of how formal you regard that process. It is a little like the question in relation to the confidence matter. There one is moving particularly into the area of convention and the internal workings of parliament. I have not thought about it; I would probably be inclined not to. As you know,

the nomination process was not something that particularly endeared itself to me at the Convention. It does, however, seem to me to be an essential part of the process and a statutory part of the process.

Senator ABETZ—Why when it could be—

CHAIRMAN—Hang on. Let Professor Craven finish his submission.

Prof. Craven—That is why.

Ms JULIE BISHOP—We knew he'd finished.

Senator ABETZ—We can read his mind.

CHAIRMAN—Can we come back to the long title? I want to address something that others have put to us and which I think is important that we do address. Some constitutional lawyers have maintained a doomsday scenario where the Prime Minister dismisses the President and serially dismisses all of the Governors-General as replacement Presidents, just straight down the line. Obviously, you would have to be mad but it is theoretically possible. It has been put to us that perhaps a check against such a remote possibility would be to insert a requirement that the Prime Minister, in seeking the approval of the House of Representatives for the dismissal, must proceed with that procedure before he can dismiss an Acting President.

Prof. Craven—Before he dismisses an Acting President?

CHAIRMAN—Do you have a view on that issue?

Prof. Craven—I suppose it divides into two parts. With regard to the first part, which is the plausibility of a Prime Minister dismissing the President and proceeding to dismiss all six state governors: I am all in favour of comedy routines, and I approve of anything that makes the referendum debate funny, but that is the most ludicrous suggestion I have ever heard in my life. It is based on a fundamental misunderstanding of how constitutions work. Some people read constitutions, look at the rules on paper, and they think that is the only thing that actually makes the constitution run. What really makes the constitution run is the rules on paper and the constitutional psychology developed over 100 years—or, if you want to look at it another way, 200 or 300 years. It is utterly inconceivable that a Prime Minister could do that or would do that. If a Prime Minister ever took it into his head to do that, there is no rule on the Constitution that is going to make any difference. I think we clearly are utterly tilting at windmills with this.

Mr CAUSLEY—What about Hitler in 1936? What would he have done?

Prof. Craven—The first thing is that Hitler was never Prime Minister of Australia; the second thing is that he would never have been elected.

Mr CAUSLEY—I am talking about the constitutional—

Prof. Craven—So am I. He would never have been elected as Prime Minister of Australia because his policies would never have been acceptable. The constitution of the Weimar Republic was completely different from the constitution of Australia. What I am saying is that when you try to assess—

Mr CAUSLEY—With respect, you are not answering the question.

Prof. Craven—With respect, you don't like the answer. The answer is that there is nothing in common between Hitler and the Weimar Republic, and John Howard and the Commonwealth of Australia—or any likely successor to John Howard.

Mr CAUSLEY—There could be some lunatic in the future.

Prof. Craven—When you assess a constitution, you have to assess it realistically. The other thing is that when you are assessing two options, if you are going to assess one option unrealistically, you have to assess the other option unrealistically. Let us take the monarchy. What is there, under the Australian Constitution, to stop the Queen from appointing Prince Charles as Governor-General and then ordering him as commander-in-chief of the Army to execute a coup to stop a republic?

Mr CAUSLEY—It would not be recommended by the Prime Minister to start with.

Prof. Craven—It does not have to be recommended. She breaches constitutional convention. What is to stop her on the Constitution?

Mr CAUSLEY—She could probably do that.

Prof. Craven—She could. That is the point. What I am saying, with respect, is that you cannot take an extreme scenario on one and not on another, because what makes constitutions work is the underlying constitutional psychology, and that is the most important thing. It is part of our Constitution, and it means that, no matter what the technical rules are, they tend to operate within a range of accepted outcomes. What I am saying is that dismissal of six state governors serially is not in that range.

CHAIRMAN—Okay. If we accepted your view, then why do you support codifying what is in effect a convention, and that is the testing of a Prime Minister's position before the House of Representatives in a vote or a vote of no confidence?

Prof. Craven—To be honest, because it was recommended by the Convention. My feeling is that wherever possible, unless there is some obvious mistake or something that has not been considered, and the acting state governors is an example, one should conform with the Convention model. I feel that, because that was put forward, it should be there. I do not think it has any effect, as I said. I think it has a purely symbolic effect, if it has any, because the reality of the Constitutional Convention is that that is always going to be a confidence matter.

CHAIRMAN—Isn't that the point, that there really is no necessity for the words? In a sense, if the Prime Minister must take the issue to the House of Representatives, it is ipso facto a vote of confidence or no confidence.

Prof. Craven—That is why my submission was so diffident on this point, but I am happy to record added diffidence. It is really, as I say, more about keeping faith with the proposal of the Convention, and the Convention was quite explicit on that. I cannot recall what position I took on it. The question you have got to ask is: if the Prime Minister were to sack the head of state, what would happen? It would be a confidence matter.

CHAIRMAN—Okay.

Ms ROXON—A number of witnesses have suggested to us that the long title, if it is going to properly reflect the system that people will be voting on, should include a reference to—and I think this is the proposal that is being put to us—'the unfettered discretion of the Prime Minister to dismiss the President.' Could you give us your views on whether you think that is appropriate or inappropriate?

Prof. Craven—There are a couple of principles here. What you are trying to do is to come up with a title that accurately describes the contents of the bill but is not so long that the bill itself becomes the title. That is one issue. The second issue is that you are trying to conform to some extent with precedent and, if you look at the titles of constitution alteration bills in the past, they are not 50 pages long.

I think it would be quite wrong to have the suggestion that you pass on there. One reason is because the notion of unfettered discretion is not actually a descriptor of the discretion; it is in a sense a judgment on the discretion. And I have never ever in the history of the Commonwealth of Australia, seen a referendum bill which contains such a descriptor. But if you did that, you would get into all sorts of other extraordinary questions. For instance, presumably you would have to say, 'with an unfettered discretion to dismiss the head of state, just like the practically unfettered discretion of the Prime Minister to dismiss the head of state now.' If what you are trying to do is to accurately compare the two situations, you are going to have to write a mini-essay comparing the position that would exist under the Constitution now with what is there. It would be utterly impractical and quite inappropriate because the two positions are the same effectively.

Ms JULIE BISHOP—I want to take you to section 59—do you have a copy—

Prof. Craven—I have not got a copy.

Ms JULIE BISHOP—Okay. I will take a little time over this—and it is not just a matter of huge interest to constitutional lawyers; it is the ramifications that I am concerned with. If you look at the third paragraph of the proposed section 59, we have heard evidence from a number of people—and it is fair to say that I am talking of the likes of David Jackson QC, Gavan Griffiths and Professor Winterton, in relation to the third paragraph. You will note that, for the first time, it refers to the requirement that the head of state act on advice from sources other than Executive Council. It refers to the Prime Minister for the first

time, and another minister of state. That is the first point. Secondly, it refers for the first time to reserve power, and, thirdly, to the associated conventions.

A number of experts have said they would rather not see that paragraph there at all because, firstly, there will be confusion about the sources of advice—is this a disjunctive requirement; what if there are conflicting sources of advice? Secondly, because it mentions the reserve powers, and does not define or codify them, does it make them justiciable? Thirdly, there is the issue of the conventions: if one refers to the conventions, will it freeze the conventions as of the date of enactment?

So there have been three general concerns expressed about that paragraph. Gavan Griffith and David Jackson suggested that we just delete it and all will be well because they are our conventions and our reserve powers—if you lop off the monarch, it does not matter because they will survive. Whereas, it would be fair to say that Professor Winterton took the contrary view and said that the Constitution must expressly refer to the reserve powers and the conventions to ensure that they pop up again after 1 January 2001. Could you comment on those three issues?

Prof. Craven—Yes. This obviously is not a party line matter—it is a pure question of constitutional drafting.

Ms JULIE BISHOP—Precisely, and the ramifications thereafter.

Prof. Craven—Your attitude to a clause like that really depends on general attitude to codification of powers. At the convention there were three groups: there were people who desperately wanted to codify everything in great detail—and most of the direct election supporters were like that. There were then people who were prepared to go to some minimal degree of reference—and that might refer to the mainstream of the ARM. And then there were people who were very disinclined to codify anything. In fact, I would have said that both you and I fell into that category. I suppose that what this represents is the lowest possible form—not of codification but of reference. In other words, my view of that paragraph is that it does not codify the conventions. It does not come anywhere near codifying them—it just slightly touches upon them on the way through.

Ms JULIE BISHOP—Does it make them justiciable?

Prof. Craven—No, I do not think it makes them justiciable. I read that; it was one of those provisions you read and you think, ‘Does this actually coincide with my constitutional ego?’. In a sense it does not, because I am not a codifier. To answer the questions that you asked, it seems to me that where it says ‘Federal Executive Council, Prime Minister, or other Minister of State’, what it is saying is very much the same as if you inserted the words before the semi-colon, as the case may be. The truth is that His Excellency the Governor-General does indeed sometimes act on the advice of the Federal Executive Council collectively, sometimes on the advice of the Prime Minister, and sometimes on the advice of the minister.

Ms JULIE BISHOP—Is it an improvement to put the Prime Minister and the ministers in?

Prof. Craven—I do not think it is harmful or that there is any danger in it. Are they justiciable? Clearly not. I have absolutely no doubt of it. Those clauses do not become justiciable.

Ms JULIE BISHOP—Do speak to Professor Winterton about this.

Prof. Craven—Yes. I was about to say that there is quite a lot of learned writing by Professor Winterton on the question of whether the existing conventions are justiciable. I do not think that they are. The High Court, whatever its sense on other matters, has more than enough good sense not to get involved in adjudicating on questions of responsible government. That is not a problem. In regard to freezing the conventions of the Governor-General, the answer, presumably, is yes.

Ms JULIE BISHOP—Could I take you to schedule 3, item 8, 'Constitutional conventions'. I am not quite sure what it means. What do you think of that?

Prof. Craven—Can you record a shrug in *Hansard*? It is hard to predict exactly what that would mean. The reason it is hard—I am not saying it is a deficiency in the bill—is because you are actually trying to achieve two opposite things. In one sense you do want them to freeze—you want them to freeze exactly where they are and continue to operate. On the other hand, we are all mindful of the terrible hash that Dr Evatt—one of the most brilliant constitutional lawyers in Australia's history—made trying to codify the conventions. If you look at them now, they are a joke. I would have said that, in a sense, those two things are in apposition to each other.

Ms JULIE BISHOP—On balance, would you leave the third paragraph in the bill?

Prof. Craven—It really comes down to the question of what you think the creation of a President elected in this way does to the system of responsible government. If you think it endows him or her with extra power, you might want a provision like that—ex abundanti cautela. If you do not, you might choose to dispense with it. My honest view is that it is so harmless, it is such a low level of codification, it does no harm and it might well do some good. It may well serve as a signpost: 'Stop, we are continuing everything as it is.' I think that might be useful, not only for the Constitution but for the referendum, and that is what this bill is trying to do. It is trying to keep everything as it is in a republican idiom. On balance, I would be inclined to keep it in.

Mr CAUSLEY—I want to continue on with the conventions if you do not mind. We are relying a lot on the conventions and we have just said they are not codified. In fact, we are rolling the conventions over to the President and there is a bit of argument as to whether that does give the President more power or not. But my question, I suppose, comes down to the interpretation of conventions. There was some debate in 1975, or some indecision in 1975, when Sir John Kerr apparently consulted with Sir Garfield Barwick about the conventions. Who or what group do we rely on to interpret the conventions?

Prof. Craven—This is the 'how long is a piece of string' thing? The answer really is you and everybody. Conventions are not rules of law; they are rules of political morality and practice. They are developed over time by the actions of constitutional players, which means

primarily members of parliament. They exist as the sort of collective morality of the Constitution. That means they are fluid. They are sometimes hard to identify but nevertheless they work. When I was talking about a system of constitutional psychology, it is a bit like that. I will give you a practical example. One of the most famous questions in English constitutional law is: what is there to stop parliament passing a law which ordains the slaughter of all blue-eyed babies? The answer is, in law, nothing. You could all do it tomorrow. The fact is you never will. Why? Because your collective constitutional psychology tells you that you do not do that sort of thing. Conventions are the same.

Mr CAUSLEY—But this is where the President has to make a judgment, isn't it? If they are uncertain, who do they rely on for advice?

Prof. Craven—The question of who you get advice from on a question of convention is difficult. My own view is that, if you are talking about the reserve powers which I think you are—the Governor-General and the President—this is an extraordinarily lonely point. I think a Governor-General, in relation to the exercise of the reserve power, probably gets advice from himself or herself. I think there are dangers consulting the courts. One of the reasons there is a danger consulting the courts is that conventions are not creatures of law. Sir David Smith has a different view. Sir David Smith will tell you that Sir John Kerr was right to consult Sir Garfield Barwick. My view is that Sir John Kerr was wrong to consult Sir Garfield Barwick. But saying that about conventions does not mean you try and codify them. Codifying conventions is a fool's errand, for two reasons, partly because you will never be able to actually do it because they are fluid—they are a psychology—and the other is that it is impossible to agree on what the conventions are for the purpose of codifying them. For example, if we were to codify one of the basic conventions of the reserve powers, you would have to decide firstly whether the Senate can reject supply and, on that point, we are never going to get anything like a referendum consensus.

Mr CAUSLEY—I am ignorant in this area and maybe in a lot of other areas but, given they are not codified, is there a practice that has been passed down over centuries about this?

Prof. Craven—There are plenty of books on this. If you go off and you read what George Winterton wrote, if you go and read what Dicey has written and what Evatt has written, there is no great difficulty with what the broad conventions of the Constitution are. The trick is applying them to situations which are always, by definition, different from the situations that have come before. Our constitutional system is in fact magnificent because it is fluid. It can cope with different systems, and you do not want to crunch it down into a mould that will work in 1999 but in 2026 will fall apart.

Mr McCLELLAND—Just two points, if I may, Professor Craven. With respect to the issue raised by Julie Bishop, it has been put to us that because on 1 January 2001 there will be a President—assuming the referendum was passed—as opposed to a Queen, there could be an argument that the concept of reserve powers, crown prerogative, and conventions could die with the removal of the Queen—hence the argument put to us by Prime Minister and Cabinet that these concepts have specifically been referred to. Is there merit in that argument?

Prof. Craven—I think there probably is merit in the argument of Prime Minister and Cabinet, although in relation to the first argument that the prerogative is suddenly going to wave goodbye and head back to England—I mean, we are back into comedy country here—that is not going to happen. You have to assume with this bill that it is being enacted, or would be enacted, against a whole background of convention, of a constitutionally rich system and in front of a set of courts that do understand something about how the system is meant to operate. There is no way the prerogative is going to disappear. I can understand why you would, out of an abundance of caution, put a provision in like that. As I say, it comes back to what I said—it is like a little flag. I would see paragraph 3 of 59 as simply a little marker—'Note, nothing has changed.'

Mr McCLELLAND—Yes. I think section 74—you do not need to look at that now—relates to prerogative as well.

Prof. Craven—That is right. They have gone out of their way to make it clear that the power is retained. The real question about this is not whether the powers of the President and the Governor-General are translated but whether you are somehow or other equipping the President with new and awful powers that would undermine responsible government. It clearly does not do that.

Mr McCLELLAND—Thanks for that. With reference to the possibility of a Prime Minister of the day sacking, in serial form, all state governors, or acting on the advice of the Governor-General—

Prof. Craven—The vice-regal chainsaw massacre!

Mr McCLELLAND—Is there a need for abundant caution to put in a proviso that, in the event of dismissal of the President, the next senior governor, as is already provided for in section 63, will fill the role and that he or she shall remain and perform the duties of the President during that 30-day period? Is there any need for that or is that an overkill?

Prof. Craven—I think it is overkill.

Senator ABETZ—Is that an automatic appointment that would take effect immediately? If the President is sacked, would the senior state presiding officer—governor or President—automatically become Acting President of the Commonwealth?

Prof. Craven—That is my understanding, yes.

Senator ABETZ—I think it was Malcolm Fraser who was not sure that the provision in section 63 made that perfectly clear.

Prof. Craven—It says, 'The longest serving state governor available shall act as President if the office of President falls vacant.' The way I would read that is that the moment the office of President falls vacant that would automatically fall in. There is no other interpretation for that.

Ms JULIE BISHOP—So the moment the removal takes effect, for example?

Prof. Craven—That is right. It comes back to the general principle of constitutional design. If you were to try to take account of every single thing that could go wrong in any constitution, including the present one, it would be the size of a telephone book. Each time you resolve one situation you would create three more problems with that clause. When you are going from a sound system to the same sound system with a slight change—which is what this is—you assume the soundness of the system. You assume the conventions keep going, provided you are careful in what you are doing.

CHAIRMAN—We had it put to us yesterday that reference to the term 'deputy' ought to be removed because there had in fact never been a deputy, that it was an anachronism and could in fact become confusing in the event of a constitutional crisis or disagreement. We could simply get rid of the deputies. There is a view around that we need to tidy up the provision of the Acting President having to fulfil the same requirements constitutionally as the President in order to assume the position. That is because you could still have a state that for some foreseeable time remained a constitutional monarchy, and you could have an individual as governor of that state who was not a citizen of Australia and could not meet the requirements of these amendments.

Prof. Craven—On the question of whether it is a problem having the governor of the monarchical states being Acting President, I am totally relaxed about that. It does not matter.

CHAIRMAN—That is not the problem.

Prof. Craven—I understand the different point. I have not gone through that provision from that point of view, microscopically. You want two things. You want a provision which allows you to have an Acting President the moment the President falls under a bus, is sacked or anything like that. They have to come in immediately and they have to be subject to the same sorts of provisions as the President. That is easy enough. The second thing you have to do is provide for what you might call an Acting President where the President hasn't fallen under a bus, where he is overseas or something like that. That has to be there. With regard to references to deputies, I have always found that slightly odd. I have to tell you it doesn't excite me. What is a Deputy President? What do they do? Who cares?

Ms ROXON—They swear us into parliament. That is a very important function!

Prof. Craven—It is a vital function.

CHAIRMAN—We have a great interest in deputies.

Ms ROXON—You have been sworn in more times than me, Bob.

CHAIRMAN—Fair enough.

Mr PRICE—You may have been improperly sworn!

Prof. Craven—This is obviously a very useful function that a committee like this performs—drafting functions, picking up the drafting, seeing if there is a gap. I do not think there is a major gap here. I do not think there is some horrific problem with the concept of

an Acting President being serially sacked. There may well be—and I am quite happy to have a look at it—some technical lacunae in there that can be fixed up by minor amendment.

CHAIRMAN—One of our concerns was that the acting person meet the same constitutional requirements as the real person in the first place, that they be an Australian citizen, they not be a bankrupt and all that stuff.

Prof. Craven—I think that is a perfectly reasonable position.

CHAIRMAN—I think it is probably pretty valid too.

Prof. Craven—If it is important that the head of state be Australian—which I believe it is—then the acting head of state should be an Australian too.

CHAIRMAN—It just seems to make sense.

Mr McCLELLAND—There have been two suggestions: one is that when you refer to the qualifications of a person who may be chosen as President, you refer to 'may be chosen as President or acting President.' The other alternative is in reference to the longest-serving state governor available, that you define that term to mean the governor available must be a person who is qualified in accordance with section 60 of the Constitution.

Prof. Craven—I think both of those are quite elegant, both of those would discharge the difficulty.

Ms JULIE BISHOP—I want to go to section 62, the removal of the President. Again, there have been disparate views on this. You will see in the second paragraph it says, 'A Prime Minister who removes a President must seek the approval of the House.' It does not prescribe how the Prime Minister will do that. It may be by a motion, it may be with reasons. There may be debate. We have not gone through the scenario. But a number of people have suggested that, given the dignity of the office of President and what we are trying to achieve here, the pre-emptory dismissal by a Prime Minister and then 30 days later him wandering along and saying to his colleagues in the House, 'Pass this motion', is not sufficient. It has been suggested that there should be some sort of removal with cause. Some have drawn an analogy with section 72 of the Constitution in relation to removing a judge of the High Court, that there should be something along those lines but not necessarily proved misbehaviour, because that would then lead us into an impeachment scenario. Do you feel there ought to be reasons given, that the President ought to have a right of reply? Do we need to go further in this removal process?

Prof. Craven—I would be utterly opposed to any of those things being done. The reason I would be opposed is that the central theme of the entire Constitutional Convention was an attempt to come up with a proposal that would exactly mirror our system of responsible government. Our mirror of responsible government places legitimacy in the hands of Her Majesty and His Excellency but power in the hands of the Prime Minister. That is called democracy. The point upon which the whole system pivots is the fact that the Prime Minister may remove the Governor-General. The Governor-General may not effectively exercise

power contrary to our wider constitutional system, because he or she knows absolutely that he or she is easily or automatically removed by the Prime Minister.

Ms JULIE BISHOP—After consulting the palace?

Prof. Craven—I think this is a very important point that needs to be understood: not after consulting the palace; after telling the palace. The Queen on this matter is an automaton. To remove the Governor-General, the Prime Minister picks up the phone and says, 'I want the Governor-General removed.' The Queen might then say, 'Prime Minister, I would like to think about it.'

Ms JULIE BISHOP—Or, 'Give me reasons.'

Prof. Craven—If the Prime Minister then said, 'My reason is, ma'am, that he is an idiot, and my advice is that you remove him now while I am on the phone,' my understanding of constitutional convention—and the only understanding of constitutional convention that is conventional in that sense—is that the Queen must immediately remove him.

Ms JULIE BISHOP—We have never put it to the test.

Prof. Craven—We never will, because we have a system that works. If she does not, she is acting fundamentally in breach of the entire constitutional system.

Ms JULIE BISHOP—A number of people have acknowledged that it might come down to a question of timing—for example, if she is not at home when he rings. Is it the mere expression of the desire to remove that causes the removal, or is it the conveying and the receiving of the notice? These are all constitutional niceties, but at least there is a step that must be taken, whereas here the Prime Minister need consult, speak to or advise no-one.

Prof. Craven—There may be time elements. Of course, nobody ever talks about what would happen if the Prime Minister were to ring the Queen and say, 'I want you to give me an instrument of dismissal which I can hand to him at an appropriate point in the future if he does that.' I see no reason why that would not be constitutionally valid. If a Prime Minister did that, he would be perfectly capable of dismissing the Governor-General. In fact, I often thought that if I were Prime Minister, I might have one made out—

Ms JULIE BISHOP—Undated in the bottom drawer.

Prof. Craven—and simply have it sitting in my back pocket and wield it out for fun.

CHAIRMAN—Is that like the baton in the knapsack?

Prof. Craven—Absolutely. Exactly like that.

Mr CAUSLEY—Given that you believe so strongly in that issue, maybe our present system is not as good as we think it is. If in 1975 Prime Minister Whitlam had asked the Queen to remove Sir John Kerr, given that the parliament did not have supply, what sort of constitutional mess would we have been in then?

Prof. Craven—There are many constitutional systems in the world, and many of them look better than ours on paper. The great advantage of our constitutional system is that it works. The reason that it works is that it has a whole series of subtle aspects. I am totally relaxed about what some people call 'constitutional chicken'—the mutual dismissability of the head of state or head of government. I think that is wonderful; that is exactly what you want. You want the Prime Minister sitting there thinking, 'Gee, I'd like to get that person, but I'd better not because he might go mad himself,' and the Governor-General thinking, 'That little squirt. I'd really like to get him too but, gee, he can sack me.' That is what is called a balance of powers in the text books. It is a very good thing.

Mr CAUSLEY—High noon.

Prof. Craven—That is not high noon. That is the whole point: in 100 years we have had one high noon. That is a success rate, as I understand it from university marking, of 99 out of 100. That is a clear pass. On the question of changing it, it seems to me there is a misapprehension about that provision—and it is a misapprehension that I am sure members of this committee, being parliamentarians, do not share—that is common with academics and journalists. Academics and journalists have this theory that Prime Ministers have such absolute control of the House of Representatives that parliament is a complete joke. What does this mean? We all know perfectly well that if a Prime Minister were to sack a President, hysterics would break out. Within 30 days you would have the first presidential sacking sessions of the House of Representatives. You would have banks of television cameras and every journalist in the country around there. No-one who knows anything about parliament can say that it is not real. It is real.

Ms JULIE BISHOP—So you do not need to expand on it at all? You are happy with it?

Prof. Craven—I am exactly happy with that provision. The moment you confuse this stream you raise the question of justiciability—this dreadful problem we potentially have with the High Court that we have talked about before. Is the removal of a judge justiciable? Would the removal of the President be justiciable? If it is justiciable, can we get an injunction to prevent the President from being removed? These are areas we do not want to go into.

Ms HALL—Professor Craven, I am probably getting you to restate what you have already said, because you covered a lot of it in your last answer. Firstly, you think that the situation outlined in this legislation reflects the current legislation. Secondly, maybe the nomination process and the dismissal process is a little more stringent under this legislation than it was under the previous legislation, and there is a little more accountability and visibility in the new legislation.

Prof. Craven—Yes. I believe, as I said pretty much at the outset, that this is a bill which accurately reflects our existing constitutional system with the changes necessary to place it in a republican idiom. In other words, you are taking the existing jewel of our Constitution from an 1890 setting and you are putting it into a 2000 setting. The jewel remains the same. It is not cut. It is not a different thing.

As regards those issues of nomination and dismissal, the reality is that at every point this system is more superior and is more stringent than the existing system. How? Because under the existing system the Prime Minister is completely free to choose anybody they like as Governor-General. Under this—and this is the one thing; it is absolutely objective—the choice is restricted. It is restricted in a number of ways, but it is restricted.

The other is that at present the Prime Minister is able to dismiss a head of state without any formal constitutional accountability requirement. A telephone call to Buckingham Palace where the Queen is told to sign on the dotted line is not an accountability requirement. Here, he must account to parliament. It is superior on both points.

Ms ROXON—With the public nomination process as it stands in the existing draft bill, there is no requirement that the short list from the nominations committee be made public. It goes to the Prime Minister and presumably there is an assumption that the Prime Minister would select someone from that list. Do you have a view about whether it should be public, whether it should be given to the Leader of the Opposition or whether having a 32-person committee means it is essentially public anyway?

Prof. Craven—I would leave it pretty much to the operation of the system. I see this as one of these things that would evolve over time and that you would not want to overcircumscribe. I would leave it to the Prime Minister. The Prime Minister will not have to pick somebody from the list, but the reality is that they almost certainly will. They will take it to the Leader of the Opposition. They will talk about it. I probably would not publicise it, because there are some nervous nellies who seem to say, 'I'll be your President, but not if anybody knows that I am being asked.' I think that is pretty silly, but that seems to be a view. The reality, of course, is that, if anybody's name is seriously being considered it is going to be in the *Australian* the next day anyway. There is not that much point in getting excited.

CHAIRMAN—We read in the *Australian* this morning about a letter that Malcolm Turnbull has sent to me, and I have not seen the letter.

Prof. Craven—I received my instructions in the *Australian* this morning from the same article.

CHAIRMAN—I have not seen the letter, but the *Australian* published it. Incredible, isn't it?

Mr PRICE—We have raised with you the qualification required for someone nominated as a President conforming to that of a member of parliament and, therefore, this issue of office of profit. One reading of the legislation would be that, if you are currently a judge, a vice-chancellor or a public servant, once you are nominated—

Ms ROXON—Or a teacher, a nurse or whatever.

Mr PRICE—Or a teacher, a nurse or whatever, that you really need to resign your position before being nominated to the committee.

Prof. Craven—As I am sure members of the committee are aware, this is a big issue and it goes well beyond presidents. In fact, it is much more important for members of parliament, because there are a lot more of you than there are ever likely to be heads of state. Yes, it is a problem.

Mr PRICE—Do you see it as being acceptable that, if we were to change it so that prior to being nominated by the Prime Minister and seconded by the Leader of the Opposition, a person should then be allowed to resign, and that the qualification cuts in at the point of parliamentary approval?

Prof. Craven—It is hard. I think there is a real problem with that. If you could have such a thing, what if you were to have an extremely popular High Court judge who took it into their head—

Mr PRICE—Give us a realistic example.

Prof. Craven—All right, a very popular head of the ABC.

Ms JULIE BISHOP—No, come on.

Prof. Craven—I cannot say a popular politician.

Ms ROXON—Isn't the theory of section 44 that it is much more sensible for a member of parliament than for a President? If you are standing for an election, this idea that you should not receive public support at the time that you may be campaigning to be elected is totally different when you are not going to be a person that is open to public election?

Prof. Craven—That is the question we have to ask. Does the fact that we have carefully and wisely turned our minds away from the idea of an elected President to a President who is appointed and chosen in this manner sufficiently differentiate it from that electoral situation that you can take the step you are proposing? It is not something I have spent a lot of time thinking about. To the extent that I have, my feeling has been, yes, that is right; it is not such a problem. But then I do have just these nagging fears in the back of my mind saying, 'Is there somebody in some public office who could float themselves as President by virtue of their office?' Maybe. I have not been able to come up with examples. Maybe it is not a problem: maybe there is not anyone.

Ms JULIE BISHOP—It is going to depend when the nomination is considered to be a nomination. Is it nomination to the committee? In which case you could have 300 people nominated, and you have a High Court judge resigning his position which could be untenable.

Prof. Craven—Which you could not have.

Ms JULIE BISHOP—Or is it nomination at the time the Prime Minister takes that name, and you give an undertaking you will resign?

CHAIRMAN—We recognise it is a problem, too. Professor Craven, thank you very much for coming and joining our lively discussion today. We appreciate your views. I am delighted that you are pleased with the drafting. Can I say to you that the committee will report on 9 August, and we will certainly be sending you a copy of our report.

[11.11 a.m.]

BUXTON, Mr Jeremy Clifton Gurney (Private capacity)

CHAIRMAN—Welcome. We did receive your submission, and I would like to invite you to speak to it briefly before we ask you questions about it.

Mr Buxton—Thank you. I do not intend to read it through; I think that is quite unnecessary. I will just try to visit the most salient points.

It is the possible unintended consequences that are of particular sensitivity to Western Australians. So often, a measure or amendment to achieve what seems to be a fairly discreet goal seems to bring in its train little nasties that can later on be interpreted in different ways, and in a way that gives us a more centralised constitution.

Item 5 of schedule 3 of the bill appears on the surface to be merely stating a fact or, as Professor Craven might have said, a signpost that this is what is going to happen, so there is no problem. That of course is the matter of the states being able to make their own transitional arrangements after there has been, presumably, a successful vote for a republic. The problem that we have to consider is that that bland statement can be interpreted to be giving the states permission to change their constitutions in the way that they are provided for, and in Western Australia it actually means a referendum if it is dealing with the powers of the governor and the new powers. That leads to suggestions that perhaps the Commonwealth would have been well within its rights, in the referendum, to amend the state constitutions in one hit.

In Western Australia, and among many constitutional thinkers, there is a very strong belief that the states were not created by the Commonwealth. The state constitutions, in so far as they are not incompatible with the Commonwealth, have continued as they were before Federation, and it is getting into new and centralising territory to ever suggest that state constitutions can be amended centrally in the way that the federal Constitution can. That ultimately could result in the Western Australian Constitution, for example, being amended in a majority vote of states when Western Australians voted against that particular amendment.

It just seems that this particular item could have an unfortunate interpretation in the future. There should be some qualification—if the item should be there at all—to make it abundantly clear that the states will change their constitutions because it is their right to do so and not because the Commonwealth is standing back and letting them do so. Without that, I think that you are running into a problem.

I have got a real concern about the next item, item 6, which talks about the unity of the federal system. I do not know why that item is there. I do not have legal training, but obviously I have spoken to people who do. Maybe it was put there to stop states thinking they could secede because the Constitution is being radically changed. Maybe it is there to protect our common law tradition. But the word 'unity' to my mind has a very obvious connotation that there ought to be standardisation of law and administration in the Commonwealth.

A unified federation is one where there is no real devolution and no real difference of sovereign power between states and Commonwealth. Again, I am sure it was not put there to impose it; but, in 20 years time when the High Court might be interpreting something else, that word 'unity' could be very useful indeed in imposing a centralised interpretation on the Constitution.

Ms JULIE BISHOP—Could I interrupt, just in case there is a misunderstanding here? Have you seen the changes that were made after the exposure draft went out? They have in fact deleted the word 'unity'. They are still using the word 'unified', but they are now using the word 'continuity' where 'unity' was. You might be aware of that, but I just wanted to make sure that that was what you were referring to.

Mr Buxton—I would think that even a reference to a unified system of law really ought to be looked at rather carefully because, again, there could be implications far and beyond what was originally—

Ms JULIE BISHOP—You will note that they have taken out 'unity' and put 'continuity'.

Mr Buxton—But even so, the heading is 'Unified federal system'. I think they have got to go back and decide: are they talking about an indissoluble federation or are they talking about a cooperative federation? I would hope that any reference to the nature of our federation would say that it was cooperative rather than unified, or coordinated or whatever. They are different models of federation. A unified federation is something that Australia is not but, if we are not careful, it might one day become one.

The other point relates to item 7, about the Australia Acts. It has been pointed out that there is simply no need for this bill to be talking about the Australia Acts. They have provision for cooperation between states and Commonwealth; therefore why make a statement which can have implications that the Commonwealth will increase its legislative power in this area?

CHAIRMAN—I could probably answer that question for you. The Commonwealth has said that the Commonwealth would not need to rely on the power if all the states were to pass legislation under the Australia Acts requesting the necessary amendment.

The states have indicated that the latter is their preferred approach, and that they aim to enact request legislation by the end of July. Consideration will be given to removing the fall-back power altogether if all the states are able to pass that legislation by the time the Constitution Alteration (Establishment of Republic) Bill 1999 is finally debated.

Mr Buxton—I would have thought that was always what was likely to happen, and that therefore that provision really should not have been there.

Ms ROXON—As we understand it, the state solicitors-general have agreed to follow that process. I probably should know the answer to this, but I do not: are you saying that in Western Australia, because you would need a referendum to then implement some change, you could not pass the act which asked or requested the Commonwealth government to act

under the Australia Acts and that that could not have force on its own—you would still separately need to have a referendum?

Mr Buxton—As I understand it, the referendum would not affect the provision in the Australia Acts. The referendum is needed when you ultimately become a state republic as distinct from a state monarchy.

Ms ROXON—Julie probably knows the answer too, but is there anything to stop those two referendums being held at the same time in Western Australia?

Mr Buxton—There is nothing to stop it. Basically, it is commonsense. Certainly the government—and I think the opposition—are agreed that the Commonwealth referendum comes first. If that is carried, parliament firstly has to debate what form the appointment of a governor under a republican constitution will take.

Ms JULIE BISHOP—It could not happen together in case it gets a no at the federal level and a yes at the state level.

Ms HALL—It could be confusing.

Senator ABETZ—It would be an undesirable outcome.

Mr Buxton—Yes. It is one of a number of entrenched provisions.

Ms ROXON—It would be extraordinarily expensive to do it the other way.

Ms JULIE BISHOP—In case the outcomes were different. In case the federal answer was no republic and the states' was yes to a republic.

Senator ABETZ—Jeremy, do you want to ask any of the witnesses a question?

Ms ROXON—Point taken.

CHAIRMAN—Well said, Eric.

Mr Buxton—I think it is an interesting point to explain that, if you were having a referendum on the nature of the governor's appointment, it does give the people a chance to reject what they might consider an undemocratic means of appointment of a state governor under a republican constitution for Western Australia.

I would think, psychologically, that if, for example, Western Australia had voted no but the referendum had been carried, having that other referendum gives people a chance to say, 'Well, we made our point, but now perhaps we have got to face up to a different situation.' I think that is a very democratic way of reconciling a 'no' voting state to the general new order.

Ms ROXON—On the assumption that Western Australia voted no.

Mr Buxton—I do not believe that Western Australia is going to vote no and the referendum will carry, because referendums have a way of being carried in every state or losing. But, naturally it is a democratic possibility.

The only other point I was going to make from the submission is this concern about schedule 2 of section 117—changing 'subject of the Queen' to 'an Australian citizen'. Where does it leave those electors of Australia who are not Australian citizens but who have been exercising the rights and duties of citizenship for many years? These are the people who were grandfathered under the electoral roll in January 1984.

Again, I do not believe that in drafting this bill any thought was given to removing any rights from these people, but it does seem to create a bit of an anomaly as to their status. They are not Australian citizens; they are citizens in Australia. Should there perhaps be some covering provision to emphasise that they will still receive the protection of section 117 of the Constitution? There are people in the community who dispute their right to be on the electoral roll, and one activist for changing the flag rather charmingly suggested they should all be thrown off the roll. If that were to happen, in the real world of politics a government would have to make it very clear what it was doing and why it was doing it.

Mr PRICE—But actually, if they accidentally fall off the roll—that is, they move and fail to notify their address, and it has been discovered that they do not live at their former place of enrolment—to get back on, they have to become citizens.

Mr Buxton—Yes. There are a diminishing number.

Mr PRICE—It is quite a heated issue with them, I might say.

Mr Buxton—The last thing constitutional amendments on a republic should be doing is in any way influencing other areas. It is that old story of unintended consequences. I feel that there ought to be some recognition of what happens to citizens who, in effect, are not Australian citizens.

CHAIRMAN—I can assure you that the committee will take advice at the highest levels on that question.

Mr McCLELLAND—On that last point, it may be something that could be tidied up in the Australian Citizenship Act—to effectively deem those people, subject to their objection, as being Australian citizens, perhaps.

Mr Buxton—Possibly. There is always a slight difficulty when one thing is amending the Constitution and the other thing depends on acts of parliament.

Mr McCLELLAND—It partly does already.

Mr PRICE—But it is an issue of citizenship.

Mr McCLELLAND—The second issue is: do you think that there should be a reference in the long title to replacing the Queen?

Mr Buxton—I do not have a problem with the long title as it stands. I feel we are getting into an area of electioneering on one side or the other of the referendum. It suits proponents of the yes case to be talking about the Queen rather than the model. In other areas, I have always felt that what matters in an amendment to the Constitution is the nature of the amendments—the details—rather than getting towards the more emotive questions.

Mr McCLELLAND—There has been reference to Candy's case, which I recall reading in another context, which has already determined that Australia does have a unified system of law. Are you aware of that case? Does that change your views about clause 6 of schedule 3?

Mr Buxton—I would always be very reluctant for anything regarding our Constitution to be pushing the question of words like 'unity' and 'unified system of law'. That may well be the case now in our legal system, but the less possibly centralised language that creeps into our Constitution the better. Again, I think that words like 'unit' and 'unity' can have a specific interpretation, but they have very much a generalised interpretation that can be picked up in the future and used against the continuity of the federal system.

Ms ROXON—I do not really understand your answer about the long title, given that your comment on the last page of your submission states:

Australians in November will be asked to approve a particular method of electing a republican Head of State. This should be the sole purpose of the referendum, and its sole effect if carried.

Given that that is your view, I am not really sure how you think the current long title reflects that being the sole purpose of the question. I am surprised to hear that you do not have a view that it might be more appropriate to put in some of that wording about the method for electing a republican head of state. The change to a head of state is not even in the current long title at all. Certainly it is a question of campaigning, because that will be the question that is on the referendum paper, but surely there is a requirement for it to be accurate as well.

Mr Buxton—Are we talking about the simple words Constitution Alteration (Establishment of Republic) Bill 1999?

Ms ROXON—No, the words underneath it: 'a bill for an act to alter'—

Mr Buxton—'. . . a republic with a President chosen by a two-thirds majority of the members of the Commonwealth parliament'. That, to me, is pretty succinct.

Ms ROXON—It does not deal with the point you say is the most important point. Where in there is the method that deals with electing a republican head of state?

Mr Buxton—The central part of electing a republican head of state under this bill, as I see it, is choosing the President by a two-thirds majority of the members of the Commonwealth parliament. That is the central point of the whole referendum.

Ms HALL—That is the appointment process, not the process of the selection. It does not take into account the whole community consultation and the committee, et cetera. That is just the final part of the process, so how do you line that up with what you are saying?

Mr Buxton—The community consultation is—

Ms HALL—There is the committee, the nomination committee and the fact that the Prime Minister must consider those names. The two-thirds majority is only the final part of the process, and that is not giving a true picture. If that should be there, shouldn't the rest be there?

Mr Buxton—The two-thirds majority is the central part of the constitutional change. The rest, frankly, is window dressing—through an act of parliament rather than an amendment to the Constitution. It is not what I came here to talk about; I came here because I was concerned about any possible effect on the authority and standing of the states.

Ms JULIE BISHOP—But your point is about what is contained in the Constitution, or the proposed Constitution, rather than what is contained in the Presidential Nominations Committee Bill.

Mr Buxton—Yes, that is irrelevant. That could be repealed.

Ms JULIE BISHOP—Quite. I will ask a question on something completely different. On item 5, which you have referred to—the states, it is in the transitional provisions for the establishment of the republic—your concern is that it may be subsequently seen as a source of authority in some way, and I can understand that, but perhaps it would be read in the context of being a transitional provision for the establishment of the republic. It has been put to us that some mention ought be made to ensure that there is no ambiguity—that the states' position remains as it is here. I think the intention is that it be a statement that a state that has not altered its laws can do so in its own time, more or less, rather than being the source of the authority that you are talking about. As it is in the transitional provisions, do you think that is a real cause for concern?

Mr Buxton—There are two things that can be done with it: either you take it out, and it is silent on the understanding that the state constitutions are perfectly able to operate; or, if you put it there, you qualify it by stating very firmly that the state constitutions have acted because of their intrinsic power to do so and not because the Commonwealth is permitting in any way the exercise by the state constitutions. I would not presume to suggest how you word that—I think you need an expert to do it—but, as it stands, I think there is a problem and, like so many things, it creates a sleeper in our constitutional system that can be used against the intent of the Constitution.

Senator ABETZ—Also on item 5, schedule 3, if there were to be an introductory sentence to that clause, or one at the end which says 'nothing herein expressed shall be interpreted to in any way diminish the intrinsic right of the state constitutions to exist in their own right'—and I am thinking about it as I say it; it was put somewhat clumsily—that would overcome your objection to this item 5 in schedule 3?

Mr Buxton—If it were made abundantly clear, yes.

Senator ABETZ—In relation to item 6, with a unified federal system, if the term ‘cooperative federal system’ were to be used—

Ms JULIE BISHOP—Or ‘coordinate’.

Mr Buxton—From a layman’s point of view it sounds reasonable, but I think you would need to take advice from constitutional lawyers with a strong interest in preserving the federal system.

CHAIRMAN—Thank you for coming to talk to us today. We will take advice on those issue. I think the Australia Act thing is likely to have itself sorted out before we get back to parliament. We will report on 9 August and we will be delighted to send you a copy of our report.

[11.35 a.m.]

HARMS, Mr Jonathan Edward, Secretary, Elect the President

WEBB, Emeritus Professor Martyn Jack, Convenor, Elect the President

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

Prof. Webb—I am the convenor of a group of people currently known as Elect the President. At present that group consists of 10 persons and will be formally announced at the end of this month with many more than that.

CHAIRMAN—Thank you for that. We did not receive a submission from you before today.

Prof. Webb—We were trying to produce one in time.

Mr Harms—We only have three copies at present.

Prof. Webb—I hope that the members present will allow me to make a few introductory remarks.

CHAIRMAN—Certainly.

Prof. Webb—My interest in the question of republicanism was prompted by the only two reasons you should consider republicanism in Australia—first, to advance democracy in Australia, and, second, to advance the status of the people from subjects of the Queen to citizens of Australia. There can be no other justifications. Therefore, from the beginning, the alleged republican movement was concerned with the dishonourable aspects of republicanism which were nationalism, anti-Britishism and anti-monarchism. Those are no reasons to change. They are reasons to question but not to change.

Secondly, I began my study into this issue after I read Lord Halisham's remarkable book called *Dilemmas of Democracy*, published in 1977. For the purposes of my studies, I began to make regular trips to the United States of America and to read the British material as well as the American material concerning republicanism and democracy and above all to discover the essentially English or British nature of republicanism world wide. I stress that. The greatest contribution that the English speaking peoples have made to the world has been in republicanism and, secondly, in democracy.

The problem we have had from the start has been—and the most recent evidence given and the comments made in the newspapers justify my point—that we have been engaged in a massive deception exercise in order to deflect people from the central and most important question about republicanism, which is that it is an alternative system of government. It is not merely a rebranding of monarchism. You have probably heard Professor Greg Craven arguing that the best way of 'rejuvenating the monarchy'—these are his exact words—'is to

create a republic under the proposed bills before you'. I think that illustrates my point to a tee.

The problem for people like me—and here I must give credit and recognition to that remarkable man, the late Paddy O'Brien who I began to work with in the mid-1980s, long before all this came up—has been that it was not merely a question of republicanism versus monarchism; it was monarchism versus revived monarchy under the heading of republic and true republicanism. This has been the issue. I want to illustrate my point, because it has enormous financial consequences. In the second reading speech in presenting these bills, the Attorney-General, on page 3 of a copy I have from the web site, says:

> The government recognised that there are sincerely held views—in the parliament and across the broader community—on both sides of the debate.

Ladies and gentlemen, that is a travesty of the truth. The truth is there were three sides, not two. What is the consequence of that? It meant that when the money was allocated, the $15 million from the yes and no case, we who had as many delegates as from the eastern states—that is, 15—were not recognised. It took some energy to increase the number of people on that no case to raise it from one, Ted Mack, to two, with Clem Jones. I want you to remember that I am speaking on behalf of what I would like say is the third and truly republican side.

Firstly, I drew up, for the state of Western Australia—as an example and as my contribution to the 100th anniversary of our independence from Whitehall in London—a republican constitution. I will submit it as evidence. If you wish to copy it you may do so. This is a model constitution for the states which would match a truly republican Australia.

At my own expense I have, as I told you, travelled to the United States and to London. I have even been to South Africa, because when they changed their constitution they created a thing called CODESA, which examined 140 different constitutions to find a solution to their problem, which is typically and absolutely South African. I prepared this book as a case, which is now under consideration for publication by publishers, for arguing that if we go in the full flower of our roots and our traditions, we can only go one way, and that is to a true republic founded upon the people as sovereign. The second reading speech also says:

> The Prime Minister announced at the time that if clear support for a particular republic model emerged—

There was no clear support, only 73 people. Many of those appointed delegates actually voted for the model that has emerged as the so-called bipartisan model. The majority of the people either abstained or voted against.

Patrick O'Brien, at the time, attempted to draw people's attention to this. He published a full document, which I have here, which goes through and analyses what actually happened. I see there is at least one member present who was there. What happened was that the interpretation of clear support was used in order to stymie the possibility that the public might be asked, first, whether we are to be a republic—and that is an independent and separate question—and, second, whether the head of state, if there was a majority, should be appointed through a parliamentary process or elected through an electoral process, without description as to what the processes were in either case. The public should have been

allowed to answer that but it had to be stymied, and stymied it was. As a consequence, we are in the present almost farcical position.

If you attempt to rebrand something, people are going to ask, 'What is the whole thing about?' I will not do a Paddy O'Brien and hold up the cartoon in today's *Australian*, but I felt tempted earlier this morning, to say, 'Mr Chairman, that is it.' You have seen the editorial in the *Australian*, which has been pro ARM, and you have seen what Malcolm Mackerras has said. Given that, it therefore did not have a clear support for a particular republic.

When it came to the question at the Convention, 'Are you in support of a republic?'—because that question was put—only 89 members of the convention voted in favour. Yet, in Western Australia, only a few weeks ago, Mr Malcolm Turnbull, in front of a very susceptible audience of Chinese, proclaimed that 133 people voted in favour of a republic at the Convention. Those who knew the figures knew immediately what he was quoting. He was quoting the number of people who voted to put the model to a referendum, and most of those who voted hoped that it would be turned down at the referendum—that is the question.

I would like to put this book forward and I would beg that at least one of you would do me the courtesy of reading it because it will make you feel proud to be a parliamentarian and proud of what you really stand for. You will see that, when we had the divine right of kings and attempts for kings to take over and mimic the French absolute monarchs, how parliament has the right, under English law, to appoint their head of state, and did so when they removed James II, and replaced him, and did so when they executed Charles I.

I beg at least one of you to read this because I raise all the issues that are to be considered in the proposed but yet not legal second constitutional referendum. Why hold a second constitutional referendum on the republic, if we are going to make a republic? Because it is admitting that we are not about to create a republic. We are about to dismiss a hereditary head of state and replace them with a parliamentary appointed head of state, which we have done before in the English tradition with Cromwell. The nearest parallel that we can find is of course Oliver Cromwell, the Protectorate, the military dictatorship and its collapse, and the Restoration.

I do not now wish to say more except that this is another thing that worries me enormously. In that second reading speech you will find the reference to the following:

> The government has established an expert panel, chaired by Sir Ninian Stephen, to provide advice on the educational material to ensure that it is fair, balanced and accurate.

If you suppose there are only two sides to the question, where do the true republicans stand? Do you follow me now? It is very important. We are talking about tens of millions of dollars of public money. When asked by public opinion polls more than 70 per cent of the people said, 'If there is to be a republic, we wish to elect our head of state.' That is 'our' head of state not 'the' head of state.

This group is supposed to be giving a fair, balanced and accurate advice but, if the whole tenor of the second reading speech is specifically to indicate there are only two sides, how

will we get the third side, the one that I believe the public are interested in? How do we know a republic? From about 1986, Paddy O'Brien and I began to give extramural lectures. We also spoke to clubs in Western Australia. Between the two of us, I would say we have directly communicated with at least 500 people. Most recently I have been communicating with people on the content of the bill. I have not met anyone who has been prepared to accept what that bill contains.

In addition, on this second reading speech, the Electoral Commission will distribute to all electors a yes and no case. Had we had a proper debate, the no case would have been between true republicans, who were prepared to debate, and monarchists who were prepared for the status quo. Instead we have three groups; status quo under the name republic, status quo under the name 'monarchy' and republicans.

Senator ABETZ—With respect, you have made this point a number of times but there are a whole lot of different combinations, aren't there? What about the McGarvieists, for example? That is another form of the republican model, and I am sure there would be a whole host of others. At the end of the day, don't the people have to make a decision, yes or no, on a particular model?

Prof. Webb—Yes, they have to make a decision as to whether it is appointed by some means of parliament—McGarvie would be under that heading—or whether it is directly elected by the people, and there are many ways of doing that. But we, the people, have been deprived of that choice by a Convention which was, to say the least, large, unwieldy and largely appointed—half were appointed in one way or another. Yes, the people must decide, but our feeling has been from the word go that while we may be pushing our barrow for a directly-elected president we do not wish to deprive the alternative. That is why we believe the question put to the people in November must be the one that was rejected.

Prime Minister Howard interjected, 'I will have no plebiscite', 'I do not want a plebiscite'. We have to say that you on this committee have a duty—I will explain what your duty is constitutionally in a moment—to insist that the question allows the public to do precisely what you are suggesting, to decide first yes or no to a republic. If a majority of states and a majority of people agree to a republic, then they must decide which form—either through the parliamentary process or through direct election.

Ms ROXON—Can I ask you a question in respect of that. Isn't it fundamentally misunderstanding the process of a referendum if the vote of the people, provided a referendum is successful, is actually the act whereby a bill becomes law, unlike all other circumstances where it needs to be passed by the parliament and signed off on by our current head of state, the Governor-General? It is not possible, is it, with our current Constitution, certainly not as a referendum, to actually do what you are saying and say, 'Look, let us have a vote on whether we want to be a republic. Let us then vote on the models and let us knock them out along the way.' Aren't we constrained by the realities? We could have a plebiscite. As I say, we could not have it as a referendum. Aren't we constrained by the reality of our Constitution so that what you say is actually quite impractical for us to try and do?

Mr Harms—I think that Professor Webb merely misnamed the vote. It would in fact be an indicative plebiscite, first to identify that the people wished a republic to come into existence and the second vote indicating the form that that republic would take in general terms, after which it would require some hopefully democratic process to further draw up a precise model.

Ms ROXON—And then have a referendum after all that.

Mr Harms—And then have a referendum.

Prof. Webb—It does raise certain constitutional points. I would like to come back to that later. It is absolutely fundamental, I think, to our Westminster system of government that parliament cannot be directed except by itself. We have therefore to ask what is the constitutional position of the Convention. The position of the Convention is that it is merely an informal device for obtaining some advice, but it is not compelled in any way to fulfil that.

CHAIRMAN—I need to interrupt you. Is it the wish of the committee that the paper presented by Professor Webb be accepted as evidence before the committee? There being no objection, it is so ordered. Please proceed, Professor. We can now hand it out.

Prof. Webb—Attention has been drawn to item 2 on my list. Section 128 gives only parliament the right to initiate alterations, and what the people have therefore is only the right of veto. You must understand that that is what it is. It is not a true referendum, it is not a citizen initiated referendum—and that provides the problem to which you are referring. Plebiscites themselves are unconstitutional as well, but they are informal devices—

Senator ABETZ—The Australian people voted for that mechanism, though, didn't they, at Federation?

Mr Harms—They voted for that mechanism. A plebiscite is not of the constitution but it is not unconstitutional.

Prof. Webb—That is right. People are missing the distinction. The conventions of the 1890s and the result became a bill and became a movement called The Bill To The People. That was the name of it, The Bill To The People. But there was no federal government to unbalance the situation. At the present moment the federal parliament is unbalancing the situation, not because it exists but because it demands greater parity then it should have. If you look at membership, for example of the proposed committee, you will find that there are more federal parliamentary members than there are state members. There should be the same number.

CHAIRMAN—That is a debating point. It is not a legal point.

Prof. Webb—No, it is not a legal point, because it means that in terms of voting power, clearly, but I do not want to be dissuaded from that. Therefore, I want to put forward the proposal to you that the constitutional changes which we are about to consider are more

important than those that were put to the Australian public in the 1890s. The 1890s ones did not actually change the system of government but maintained the monarchy.

Ms ROXON—It changed at Federation, didn't it?

Prof. Webb—Federation did not change the system of government. We adopted under the Constitution the practices and procedures of the Westminster system of government.

CHAIRMAN—That is not strictly true. I am not a lawyer, but we took a very distinct part of our Constitution from the Swiss, that being the referendum that you are disagreeing with, and we took a very major part of our Constitution from the United States, being both the Senate and the High Court. So it is not true to say that we just transferred the Westminster system of parliament to Australia.

Prof. Webb—I discussed this fully in my manuscript.

Ms ROXON—I am sure other committee members have a view, too, but we have actually fairly strict terms of reference. Because it is interesting to all of us, we could engage in this debate, but it might be helpful if we actually focus on the matters into which we are inquiring.

Prof. Webb—The point I am trying to make is that we are dealing with a constitution. We are not dealing merely with the laws necessary to change that constitution. What I am trying to suggest here is, most importantly, that the procedures of government, known as the Westminster system, were adopted virtually holus bolus. The chairman is quite right in saying that we virtually copied in many other respects the American Constitution and removed from it its key and unique elements except for one—federation. The Bill of Rights was removed; the separation of powers was removed; direct election of the President was removed; everything was removed that made it uniquely a constitution.

I will come on to the bills directly, and my colleague Jonathan will give the details. I will go to item 11. The bills as presently constituted and as submitted by the government are contrary to these interests and put the nation and its democratic institutions at risk. This is the burden of our argument. I beg you to consider this carefully. Firstly, they are depriving the people of their democratic rights of election. Secondly, they place excessive and effectively unaccountable powers in the hands of a future Prime Minister. They demean the office of head of state. They present to the people—and contrary to their known interests—a referendum question, the answer to which involves those answering yes to agree to four separate and distinct constitutional changes. What these are is really the core of my argument. The first question for a yes vote is turning Australia to a Republic. The second one is placing the President as a head of state under the direct control of the Prime Minister as head of government, through his direct and indirect control of the nominating, confirming and dismissal procedures. And lastly, it is introducing three new and undefined elements into a written constitution. These elements are—and they have not been mentioned before—a Prime Minister, a Leader of the Opposition and, with regard to the use of reserve powers, the phrase 'constitutional conventions'. Those offices—Prime Minister and opposition—are undefined and constitutional conventions are highly debatable.

Mr PRICE—How are our democratic institutions at risk? That is how you start off section 11.

Prof. Webb—Do you want me to go back?

Mr PRICE—You say that the bills that we are currently considering are placing our democratic institutions at risk.

Prof. Webb—My colleague Jonathan will explain the detail. We are talking about a hundred years; not just tomorrow. This is constitutional, not political. Given a hundred years conspectus and the known instability of republics, which is true, I would conceive of a situation where, if the Constitution Alteration (Establishment of Republic) Bill were to go through, along with the Presidential Nominations Committee Bill, which is a parliamentary bill, so much power would be concentrated in effect in one man, that is the Prime Minister, that the actions of that person in alliance with the party and with a President—or even in the absence of a President, because there does not have to be a President all the time—could in fact bring about a perceived emergency situation that could bring about a very direct threat to our institutions.

Ms HALL—I think there is a need to explain that to us. I actually think it restricts the power of the Prime Minister.

Mr Harms—I may as well take up a direct discussion of the bills now, and we will go through the proposed alternative procedure at the end. The first point to note is that the executive power of the Commonwealth will now be vested directly in the President as it is presently vested in the Governor-General. In fact, the proper change to a true republic would be to vest the executive power of the Commonwealth in the people, and to have that exercised by the President on their behalf.

Senator ABETZ—Could you explain the term 'true republic' to me?

Mr Harms—A true republic is a system of government whereby the people come together in collectivity and delegate certain of their innate rights of self-government to an authority to exercise on their behalf.

Senator ABETZ—Like a parliament, for example?

Mr Harms—Like a parliament, a President or a republic being a system of government, essentially.

Mr CAUSLEY—The old Greek republic, is it?

Mr Harms—Greek republic and America is a good example, which was largely based on the classical models. The thing is that the proposal that we have had put forward is essentially a perpetuation of monarchical government whereby the power comes from the top down as it does in the present system and the monarch commissions all the officers of state. So the people under the proposed republic that is being put before us remain as subjects of their government. That is not reconcilable with a truly republican system of government.

The executive power is vested in the President, who retains an absolute discretion to appoint whoever they wish to the federal Executive Council. This is the only mention which is made of the procedure whereby the Prime Minister is appointed. It should be noted that no reference is made to this person having the confidence of the House of Representatives. This is a glaring defect. It should be remembered that in 1975, which is so often held up as an example where the monarchy did the wrong thing, what actually happened was the Governor-General dismissed the man who, for all his faults, had the confidence of the House of Representatives and then appointed his nominee, Malcolm Fraser, who then advised the Governor-General to dissolve parliament.

Nothing in the proposed new Constitution would prevent a President doing exactly the same thing; dismissing the man with the confidence of the House and appointing someone, who need not even be a member of parliament for three months, to advise them to do whatever they wish. That to me is a grave threat to our tradition. It is preserved only by reference to convention, and conventions are merely practices.

Mr PRICE—You will concede that the threat exists already. The very grave threat is here with us today, before the referendum.

Mr Harms—I would not actually think so, because there remains an independent source of authority which cannot be appointed or dismissed—the monarchy. I would say that, if there were a truly grave threat to the democratic processes of the Australian state, it is a remote and unlikely possible contingency.

Mr PRICE—The Queen would come riding in.

Mr Harms—But, if that were to take place, I cannot imagine that the monarch would stand by without dismissing the Prime Minister and precipitating an election.

Ms HALL—That is different from what Malcolm Fraser was telling us. He argued very strongly that what the Queen did, and solely what the Queen did, was on the advice of the Prime Minister, and that she really did not have that discretionary power at all.

Senator ABETZ—She did not do anything, in fact; it was the Governor-General of his own volition.

Mr Harms—In fact, the nature of a reserve power is that it may be exercised against or without advice. These flow from the fountainhead of the Crown. The Governor-General is the Crown's delegate. The original power is and always remains the Crown's, the Queen's, the occupier of that office by hereditary right.

Prof. Webb—The absence of any reference to the Crown in the bipartisan model or in the debates is its fatal flaw, because at the present moment the Queen is our sovereign and, indeed, is the holder of the sovereignty. When you remove the Queen, by implication you remove the Crown; crown law, crown courts and so on. Therefore, I believe that one of the most fatal things is the failure to identify sovereignty.

While I do not want to discuss the preamble, it is rather interesting to note—before I go back to Jonathan—that it contains one reference—and this is the first one that I have seen—to sovereignty. It says:

We hope in God, the Commonwealth of Australia is constituted by the equal sovereignty of all its citizens.

Do you realise that, if this is made a fundamental part of the Constitution, you will have created a true republic because in a true republic all citizens are sovereigns? That is the consequence of what Jonathan was saying: all citizens become sovereigns. But since this was only put in the preamble and not written into the Constitution, there is no constitutional basis for arguing that under the proposed law the citizens would be sovereign.

Mr Harms—To go back to the reserve powers, I would say that they are creatures of convention. The defining characteristic of a reserve power is that it may be exercised against or without advice. It is inconsistent with a written constitution to explicitly rely on unwritten conventions. Why would you import unwritten conventions into a written constitution, which at best should merely be a gloss on the interpretation of the written provisions of that document, when a few words of plain English could correct that? In fact, the founders of Federation explicitly wished to preserve the unwritten elements of the British Constitution. In the ARM's model we see a leap back in time. This explicit reliance on unwritten elements, which could easily be resolved by a few words of plain English, is an assault on constitutionalism itself. It is also without any apparent transcendent underpinning in principle.

This makes the development of those conventions, according to an orderly or logical legal process, very much more difficult and possibly impossible. There are certain sorts of discretion exercised by ministers which courts have held to be non-justiciable because they import a blanket discretion to the person exercising the executive power. To me, the reserve powers would have to be the epitome of such a non-justiciable discretion—either we will be left with a situation whereby the High Court is writing the Constitution, which is not the role of that body, or we will have a situation where there is no law whatsoever. That is a step back in time for Australia.

Secondly, the Prime Minister and the Leader of the Opposition are mentioned in the new Constitution, but they are not adequately defined. Once again, this leaves the situation open to abuse if someone who is determined to abuse the lack of clarity takes office. Turning to the issue of nomination: the Prime Minister is not obliged to accept the recommendation of the Presidential Nominations Committee. These recommendations will almost certainly never be published in their entirety because it would require the written consent of every nominee. This is the antithesis of a transparent process and not really acceptable in a democratic country. It should be open for all to see who has been nominated and who has been knocked back.

In terms of the method of appointment, as we have already stated, our clear preference—from an understanding of the nature of republicanism—is that the people should appoint the President by their own hand, though the ballot box. The spectacle and symbolism of the political elite of this country appointing, after some sort of deal, one of their mates for the rest of the population to look up to is entirely obnoxious and contrary to the legitimate

democratic aspirations of the Australian people. It also points, once again, to a complete lack of any appeal to transcendent democratic principle within the new Constitution and all that that entails for its future development.

Turning next to the term of the President: there is no fixed limit to the term of a President because a President will remain in office until the next one is appointed. Further, in the event of a dismissal or a casual vacancy, the President will take office retrospectively to validate any acts of the government occurring after the removal of the individual from that position. This is unacceptably vague. If we had a decent written constitution, this would be sent back by any competent court. Turning finally to the removal of the President: the Prime Minister may remove the President simply by signing a letter with immediate effect. The Prime Minister clearly may also sack any deputy or interim President, taking office by process of law. When this is combined with the fact that the only official with the constitutional authority to remove the Prime Minister is the President, the implications are very serious.

It is argued that there is little difference from the system that presently exists. However, the one benefit from having the Queen approve the removal or appointment of the Governor-General is that the event is clearly fixed in time. If we were to go down the road that has been proposed, the Prime Minister—if the President purported to dismiss him—would simply backdate his own notice of dismissal. We would then be engaged in an evidentiary process to find out who was first in time. During that time, the executive power of the Commonwealth would be hamstrung. We would be literally leaderless. There is no principle laid down in the proposed Constitution according to which the President may legitimately be removed.

A Prime Minister wishing to break the Constitution or the unwritten conventions would presumably remove the President first so that he was not susceptible to removal himself. It is argued that a Prime Minister acting in such a way would face an automatic vote of no confidence in the House of Representatives. This is not an explicit constitutional requirement. Even if it were, who would sack the Prime Minister in the event that they lost such a vote? There would be no office holder there. The President cannot be reinstated and anyone taking the office by process of law would himself be susceptible to dismissal.

Mr CAUSLEY—What if there was an Acting President?

Mr Harms—From my understanding of the bill, clearly that person could be dismissed and if the person who would take office by process of law had already been dismissed by the Prime Minister, they would not be able to take office. I would think that only the longest serving governor could take office by process of law. Once he was dismissed—

Mr CAUSLEY—Then the next one would come?

Mr Harms—That is not made clear, I have to say, from my reading of the bill. That would be a matter for interpretation. But presumably you could write six dismissal notices and make them one minute after the other.

ACTING CHAIR (Mr McClelland)—I would just interrupt you there. Our time is limited and by the time you have read your statement, I think you would find that we would not have time for questions to elucidate on what you had said.

Ms HALL—There are only a few minutes left.

ACTING CHAIR—I think you will find that you will get more value in elucidating your arguments if we start going through our concerns, so I will open it up to questions.

Mr CAUSLEY—What you seem to be saying to us is that you reject the model that has come from the Constitutional Convention, you reject the bill, you are not happy with any of the procedures to this stage, and you would prefer your own republican model.

Prof. Webb—No, that is not what we are saying at all. We are saying that the question being put to the people deprives them of the right of making a fair and just vote. This is why Mr Malcolm Turnbull twigged—because we are engaged in a massive deception. I believe that the question should be put to the people. It is quite right, as the lady on my right pointed out, that what we are really doing is asking for a plebiscite. I believe that, since parliament makes the decision, parliament should decide. I do not believe—with due respect to our present executive members of government, beginning with the Prime Minister; I respect them all for their office—that they should have a part to play in this at all.

This is a convention parliament matter. If you look up the history of what are known as 'convention parliaments', the executive does not get itself involved. The ministers are representatives of the Crown. They are also members of parliament. It is for parliament to decide, without the intervention of its members in executive mode. Therefore, I believe that this select committee has a public duty which transcends whatever views you came here with, whatever party loyalties you have, because the public interest requires that the questions be correct and appropriate and manifest as a result the true will of the people. I believe, and my colleagues believe, that the question being put will result in very large numbers of no votes and will be detrimental to the true republican cause, because the answer is in the question. We are begging you to come out with the regretful conclusion that we must either rephrase the question—despite the problems of the Constitution that may be involved—to say the public must be allowed to speak for itself.

Mr Harms—If I could just take up that point, we obviously have our own preference for a directly elected head of state as a true manifestation of the system of republican government. However, we do not put forward any model specifically but argue that a properly democratic process should allow the drafting of a republican constitution after an indicative plebiscite to indicate the people's will, in general terms, as to whether or not they, firstly, wish a republic and, secondly, wish an appointed or an elected head of state.

Mr CAUSLEY—Could I take it a bit further. Obviously, you are saying you would prefer a simple question. First of all, are in you favour of a republic or not?

Prof. Webb—Yes.

Mr CAUSLEY—Let us assume you have got that far, and people have said we want a republic. There are myriad different republics. How do we move from there?

Prof. Webb—This is what we have avoided and, as I tell you, we have been conjured into avoiding the issue. The question of what sort of republic we need, oddly enough, is partly implicit in the decision to call, in the communique, a second convention to discuss some of the issues that affect true republicanism. But that convention is most unlikely—as Malcolm Turnbull said, it is possible—to overturn the first fatal mistake, which was to have a head of state appointed under the bill as presented.

As I mentioned, India took two years of a special constitutional assembly. I was in India shortly afterwards. I discussed it with the Indians. If you look at Canadians when they altered their constitution, it was done by big public debate, including in the end a kind of bill of rights; not a true one, but a kind of bill of rights. What we have not been allowed to discuss properly is the form of republic that we would like to have. We have been given a question: republic—take it or leave it, provided it is this one. I think we have been deprived of the debate. There are dozens of models of republics in the world. According to my reading of CODESA, South Africa examined 140 different republican constitutions.

Mr CAUSLEY—But didn't the republicans take the attitude that a referendum was unlikely to be carried unless they took the minimalist view?

Mr Harms—Some republicans took that view. It is plainly not our view in that there is widespread popular support for a directly elected head of state. There is, and I think this is going to become apparent—

Mr CAUSLEY—That would require a different constitution, would it not?

Mr Harms—In fact, the Irish model is the Westminster system with an elected head of state. I do not think that you need to make massive changes but, if that is the people's will, you do require clarity and you do require thought.

Mr CAUSLEY—But the Irish President has not got very many powers; the position is a figurehead.

Mr Harms—That is right. So, in fact, you could elect a head of state and largely preserve our Westminster system, if that is the course that the people wish to take.

Ms JULIE BISHOP—I understand the position from which Professor Webb and Mr Harms are coming. I understand very much their submission and the exhibits that they have put forward, and I have no questions in relation to them.

Prof. Webb—I just point out in answer to Mr Causley's question, which was a very good one, I went through this exposure draft very carefully—as you can see from the notes I have made on it—and the thing that struck me was that you can take almost everything in the bill as presented except the method. In other words, in answer to your question, all that is needed to bring into play—if the public so decided—an elected President, by whatever

form was then decided, is one big change, and that is to the section dealing with the method of appointment. That is all.

Mr Harms—And dismissal.

Prof. Webb—There will not be any dismissal; that is the whole point, because the only thing you can do is involve the old tradition of impeachment, and you know how difficult that is. I did not see myself immediately rewriting the whole thing, because if, having established a true republic, we do go to a second constitutional convention, then the things that people wanted to see—like a bill of rights, recognition of the Aboriginals, et cetera—could be done. I do not see a massive change. This bill could be the platform just as much for an elected President as for an appointed President.

CHAIRMAN—The situation is, very simply, that we have no power whatsoever to withdraw the bills. The bills have been presented by the government. We will in the week of 9 August present our report. Some time during that week the bills, as existing or as amended, will be voted on in both houses of parliament and, if passed, they will then go to a referendum. So, while we thank you for your submission, I have to say that this committee really has no power in respect of executive government.

Prof. Webb—With great respect, Mr Chairman, may I just remind you that you are a select committee of both Houses of parliament.

CHAIRMAN—That is correct.

Prof. Webb—Which means, therefore, that you have a higher order—in theory—non-political recommendation. I am not suggesting that you have the right to withdraw bills. This has been made a government bill, which is tragic. If you were true legislators, you would have the right to change the bill. But I am begging you, please, to reach the conclusion in the public interest that this bill is not only flawed but fatally flawed and to recommend to the parliament certain appropriate action. Parliament may totally disregard you. The fact that you cannot withdraw a government bill is not relevant, I think. You can reach any conclusion you please, and I am begging you to seriously consider on behalf of the people of Australia what you are about to do.

CHAIRMAN—We have heard your views. We will take your views into consideration. I can assure you of that. I thank you for coming and thank you for your submission.

Resolved (on motion by **Ms Hall**):

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

Committee adjourned at 12.26 p.m.