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JOINT SELECT COMMITTEE ON THE REPUBLIC REFERENDUM

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

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JOINT SELECT COMMITTEE ON THE REPUBLIC REFERENDUM

Wednesday, 28 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 Mr Charles, Mr Danby, 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

BUFFETT, Mr David Ernest, Deputy Speaker, Norfolk Island Legislative Assembly 762

DOHERTY, Mr John Robert, Convenor, Referendum Taskforce, Department of the Prime Minister and Cabinet 672

FAULKNER, Mr James Richard, Assistant Secretary, Referendum Taskforce, Department of the Prime Minister and Cabinet 672

GOVEY, Mr Ian Ross, First Assistant Secretary, Office of Legal Services Coordination, Attorney-General's Department 672

LEWIS, Mr David Charles, Referendum Taskforce, Legal 1, Department of the Prime Minister and Cabinet 672

MACKERRAS, Associate Professor Malcolm Hugh (Private capacity) 753

McGARVIE, Hon. Richard Elgin (Private capacity) 742

ORR, Mr Robert Grant, Deputy General Counsel, Office of the Australian Government Solicitor 672

POWER, Ms Sandra May, Acting Assistant Secretary, Constitutional Policy Unit,

Attorney-General's Department 672

ROSE, Mr Dennis John QC (Private capacity) 695

RYAN, Dr Pamela Margaret, Managing Director, Issues Deliberation Australia Ltd 725

SAUNDERS, Professor Cheryl Anne (Private capacity) 695

SAUNDERS, Professor Cheryl Anne, Deputy Chair, The Constitutional Centenary Foundation 731

WILLIAMS, Mr George John (Private capacity) 695

WITHEFORD, Ms Anne Myongsook, Convenor, ACT Branch, Australian Republican Movement 773

WRIGHT, Mr Donald Rae, Adviser, Government of Norfolk Island 762

ZINES, Professor Leslie (Private capacity) 695

Committee met at 9.54 a.m.

CHAIRMAN—Is it the wish of the committee that submissions 94 to 107 be accepted by the committee as evidence to the inquiry and authorised for publication? There being no objection, it is so ordered. I want to thank the Hon. Roger Price and the Hon. Ian Causley for forcing me to get off an aircraft on the way to Brisbane last week. Thank you very much. I would be in one hell of a lot worse shape today if you had not done that. I am a stubborn old bastard, but well done. Thanks, Rog.

I declare 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 in June to provide for the Constitution to be altered to lead the way for Australia to become a republic. Over the course of the inquiry, the committee has taken evidence at public hearings, firstly, of course, here in Canberra, then in Adelaide, Brisbane, Broome, Canberra, Darwin, Hobart, Melbourne, Newcastle, Perth, Sydney and Townsville. Today is the final public hearing.

At the beginning of this process I said that there were three things that the committee wished to accomplish. The first was to determine to the best of our ability whether or not the draft legislation, as put together by the Referendum Taskforce in the Attorney-General's Department, substantially meets the intent of the outcome of the Constitutional Convention. The second issue was whether, in our view, the provisions of the bill, if enacted by being accepted at referendum in November by the people of Australia, will work properly in the way they were intended to work. The third reason for our inquiry was to give the Australian public the opportunity to have a say on these most important legislative provisions. From the list that I have read out you can see that we have well and truly covered Australia—not just the capital cities but also the regions—to the extent that we could find people who wanted to talk to us. Along the way, during our little sojourns around Australia, we have talked every day to down-to-earth battlers and Australians, to some of Australia's most competent, high profile constitutional lawyers, and to a former Commonwealth Solicitor General, a former Prime Minister and a former Governor-General.

My personal view is that probably the best submission we received was from a young man in Adelaide. He came off the street to talk to us and described himself as a former British national. He is now an Australian citizen and working as a boilermaker in Adelaide. He gave one of the most explicit and well-spoken messages of why Australia should in fact become a republic. With all due deference to the academics and highly qualified people leading the debate, the young man was, in fact, excellent. As I said, he came off the street to speak to us, and the committee talked to him and listened to his message.

[9.58 a.m.]

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

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

ORR, Mr Robert Grant, Deputy General Counsel, Office of the Australian Government Solicitor

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

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

LEWIS, Mr David Charles, Referendum Taskforce, Legal 1, Department of the Prime Minister and Cabinet

CHAIRMAN—I welcome members of the Referendum Taskforce. Thank you for coming to talk to us once again. I advise witnesses that although the committee does not require you to give evidence under oath, the hearings today are the legal proceedings of the parliament and warrant the same respect as the proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Thank you very much for coming back to talk to us again. Do you have a brief opening statement that you would like to make to the committee?

Mr Doherty—It is very brief. We have through the Taskforce monitored the evidence provided to the committee, and we have presented a supplementary submission which goes to some of those issues that we see as having arisen. I think our main purpose today is to answer questions on that submission or on any other issues that members feel they could usefully get comments from us.

The only piece of additional information I would pass on is that we understand that South Australia yesterday passed through parliament the request bill to facilitate amendment of the Australia Act, section 7. South Australia is the last state now to have that passed through their parliament. This would clear the way for the Commonwealth to consider removing the provision, which is currently there as a fall back, to allow the amendment of the Australia Act provision through the referendum process. You may recall that the states had a clear preference to do it through the request act process.

CHAIRMAN—We accept that. Could you tell me what the process is likely to be now?

Mr Doherty—We will now need to advise ministers of that and seek their decision as to whether the provision would be removed. That would then be removed by government amendment if they agree to do so in the course of the debate. Obviously it is a matter that the committee may wish to comment on if you have had submissions on that issue as well.

CHAIRMAN—I can tell you, and I may as well tell my colleagues too, that it is our intention over the next few days for the secretariat to put together a report, piece by piece. I consider it to be most important that we have a good report first that very accurately sets out what we have learned, what we have heard, the yeses and noes. We will start to deliberate next Tuesday morning at 10 o'clock. We will continue deliberating until we reach a resolution on a report. If that takes us into Wednesday then it does, but we will not stop once we start Tuesday morning until we have a report. We will probably comment on those issues, as we will all the substantive issues that we should be required to.

Mr Doherty—If it would assist, we could do a survey of the states and get more concrete information on the titles of that legislation just to provide for the completeness of your report.

CHAIRMAN—That would be very helpful to us. The shorter we can make that session, the better. From my viewpoint the better it would be because I think it is now non-controversial. Is that right?

Mr Doherty—Yes, definitely.

CHAIRMAN—If it is, then there is no sense in us dealing with it in any major respect. We might as well write a few words and say, 'The states dealt with it and everybody is happy with it.' Is there more that you wanted to say?

Mr Doherty—That is all I have by way of opening statement. Thank you, Mr Chairman.

CHAIRMAN—In your supplementary submission you said a number of things. You said:

> . . . if the referendum succeeds, consequential legislation would expressly provide for the President to exercise all powers currently conferred by legislation on the Governor-General;

Can you confirm that? I do not think we are quite that clear. There are conflicting opinions to your opinion.

Mr Doherty—The provisions in section 59 are intended to cover the powers of the President under the Constitution. There may be provisions in a range of other legislation which currently give powers to the Governor-General. A classic example would be powers of appointment. So in the ABC act there may be a power for certain executive council appointments involving the Governor-General. The intention would be that there would be a second round of legislation which will pick up all the references to Governor-General in ordinary Commonwealth legislation and translate those powers to the President. That would need to be done as extra legislation coming forward in the period between the referendum and the commencement of the republic proposals. It does not happen through the constitutional amendments here which deal only with the constitutional powers.

CHAIRMAN—Those would be consequential amendments to legislation as a result of the public acceptance of the referendum.

Mr Doherty—Exactly, yes. Obviously their approval is subject to parliament passing those, but you would think that would be a matter of formality.

CHAIRMAN—You say section 59 would explicitly require the President to act on advice when exercising all of these non-reserve powers. Section 59 says:

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

You are quite happy, in a constitutional legal sense, that those words mean exactly what you said when you said section 59 would explicitly require the President to act on advice?

Mr Doherty—In relation to the powers, other than the reserve powers, yes. I think that is what section 59 says.

CHAIRMAN—There is no disagreement amongst any of you?

Mr Faulkner—No.

CHAIRMAN—You are 100 per cent. Thank you for that. Under proposed section 60—there is a good one—you have said, in relation to the use of the words 'appointment', 'chosen' and 'affirmed':

The term 'appointment' reflects the language of the Convention to describe the overall process while the other terms distinguish between the affirmation of the Prime Minister's motion by the House and the result that the nominee is chosen as President.

We have had lots of conflicting advice on those words. Would you like to comment further on that?

Mr Faulkner—I do not quite know what to add to what we have said there. We chose those words very carefully. I suppose one could say that the term 'appointment' is there to keep faith, as it were, with the Convention's words that they used when they were talking about this process. As we say, it really is a shorthand reference in a sense for the overall process, or what was generically termed 'the appointment of the President'. But there are good reasons for the constitutional provision to be quite precise in distinguishing between what happens—that is, the affirmation of the Prime Minister's motion—and the fact of choice ultimately by the parliament in affirming the Prime Minister's motion. There is no real hidden agenda there; they are simply three different words to make sure that we are quite clear about what is going on there.

CHAIRMAN—Thank you, Mr Faulkner, but could I point out to you that we have had an awful lot of submissions and a good deal of controversy over the use of the word 'chosen' and the preferred long title of the bill.

Mr Faulkner—Sure.

CHAIRMAN—It says:

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

We have had heaps of submissions that would imply to us that it is an act of affirmation, not an act of choosing, of the parliament.

I would point out to you that another responsibility I bear is on the Joint Committee of Public Accounts and Audit. We have an advise and consent role with respect to the Auditor-General and the independent auditor, which is new—really new. It is, in fact, an approval role. We have no role to suggest someone else. If we do not like the choice of the Prime Minister that is put up to us, we simply say 'no', and no means no. But it is not a choice role; we are not choosing, we are only approving. I would like you to consider carefully the use of the word 'chosen' in the long title in the context in which you put those three words 'appointment', 'chosen' and 'affirmed'.

Mr Doherty—Would 'approval' be better in the sense that it covers only that yes or no decision, it does not allow a substitution?

CHAIRMAN—It would seem to me that it would more accurately reflect what will happen in the House of Representatives in a joint sitting. Am I wrong?

Mr Doherty—The word 'chosen' can bear that connotation of a wider decision making power, which would say that the parliament may have a more open field of candidates to select from. In that sense, I think we should look carefully at whether approval is more precise. I think the use of another word, for example 'affirm', would be going in the wrong direction, but I do think we could look closely at 'approval' and whether that is a more precise term for the title.

CHAIRMAN—I cannot speak for my colleagues, but personally I would not like 'affirmation'. I do not think it deals adequately with the process, but approval very definitely does. Because, in effect, what you are asking two-thirds of both houses to do is approve a decision by the executive and the alternative executive put to the parliament as a proposal. It is exactly like the Prime Minister puts an Auditor-General proposal to us. We have no right to say, 'No, we do not like Joe Bloggs. We want Jean Grimes'—none whatsoever. We can only say yes or no.

Mr Faulkner—Could I add to that. I take your point, and we similarly thought 'affirmation' was not a good word. In looking at the words of the constitutional provision itself which section 60 used, and trying to decide which was the best one to use in what is necessarily a fairly telescoped description of what is going on, we thought that of the three—'appointment', 'chosen' and 'affirmed'—'chosen' was the best of the three. That really directed our choice. I certainly take the point that you are making.

CHAIRMAN—Thank you. I have one last question before opening it up to my colleagues, and this one is contentious. On page 7 of the supplementary submission it says:

The qualifications for office must be satisfied at the time the person is chosen by the Parliament, not before (eg, at the time of nomination).

This was a highly contentious issue all around Australia, I can tell you. It was about at which point in the process an individual need divest himself or herself from public office, from membership of a political party, from any adherence or allegiance to a foreign power, from bankruptcy proceedings, et cetera. What on earth makes you so absolutely confident about your statement? It states:

The qualifications for office must be satisfied at the time the person chosen by the Parliament, not before . . .

How can you demonstrate to us that that is fact?

Mr Doherty—That is our understanding of the operation of the provision as drafted.

CHAIRMAN—We do not understand it that way.

Mr McCLELLAND—If I can come into the issue. If you look at section 20 of the Presidential Nominations Committee Bill 1999, it talks about the content and form of nomination. It says, of course, that the nomination must be in writing and it must have:

(b) a written statement in support of the nomination, including a statement indicating whether the nominee is qualified to be chosen as President; . . .

That is in subclause 20(b). That creates ambiguity in the sense that it suggests that, at the time the person's name is nominated by a member of the public, the nominee must be qualified. Could the issue be resolved, for instance, by clarifying the operation of section 20 of the Presidential Nominations Committee Bill by saying, for example, that the person shall give an undertaking whether they will be qualified or something along those lines?

Mr Doherty—I think there is a useful thought in that. If we take an example of the appointment of someone who is currently on the High Court bench. To take up the position of President, if it came to that, that person would need to resign that position. When they do so, it should not be at the stage of nomination. They may end up being unsuccessful, but they could, at the stage of nomination, say, 'If selected, I would resign,' and therefore deal with eligibility in that way. It needs to be dealt with at the time of nomination. I think that is what we tried to deal with in the bill. You need to address that issue of eligibility, even if you have not at that stage removed all the impediments. At the time that parliament actually makes the endorsement, they need to make sure that the person has actually taken that step.

Ms HALL—Could the time of nomination be deemed the time of nomination in parliament when the Prime Minister moves the nomination and the Leader of the Opposition seconds it? Could that be deemed the time of nomination when a person must no longer be a member of a political party or hold a position such as a High Court judge?

Mr Doherty—Technically, I think you could. I am not sure that it is all that different. I think we would envisage that the nomination would be on one day and the approval by the joint sitting would be on the same day.

Ms HALL—Maybe that needs to be clarified.

Mr PRICE—Does it need to be clarified in the legislation? To what extent do you have to clarify it in the explanatory memorandum?

CHAIRMAN—Mr Doherty, I have to say to you that, firstly, notwithstanding your words of encouragement, my sense would be that the committee does not believe this issue has been adequately dealt with and, secondly, the words in the Presidential Nominations Committee Bill do not say what you say they say.

Mr Faulkner—Can I add one thing to that? This comes back to the question of choice. The third paragraph in section 60 says, 'The qualifications of a person who may be chosen as President shall be as follows: that a person is chosen as President once they are affirmed by the House, by the Parliament.' There is no doubt that the constitutional qualifications apply at that point, not before. The provisions of the Presidential Nominations Committee Bill refer to a document that nominees must provide, which requires them to consider the situation of their own qualifications.

Mr McCLELLAND—Yes, but the chairman's point is that that is ambiguous. Could you suggest some way of tidying up section 20 so it avoids that ambiguity and that involves something such as a declaration that, in the event of being nominated, they would be eligible, or that requires them to sign an undertaking that they would resign?

CHAIRMAN—Something that says they meet the requirements.

Mr McCLELLAND—In other words, can you have a look at that?

Mr PRICE—Could you answer my question, please?

Mr Faulkner—I am sorry. Would you mind repeating it, please?

Mr PRICE—Do you need to clarify it by legislation in the bill, or can it be clarified in the explanatory memorandum?

Mr Faulkner—Are you referring to the situation under the Presidential Nominations Committee Bill about providing that document?

Mr PRICE—And when you need to be absolutely qualified.

Mr Faulkner—It is something that could be spelled out a little more clearly in the explanatory statement that applies to either bill I suppose. The point I was trying to make a moment ago is that it seems to me that any uncertainty here really goes to, perhaps, what is going on under the Presidential Nominations Committee Bill rather than the constitutional provision. So any clearing up of any uncertainty is probably to be done in that bill. It is a judgment, really, as to whether you would make further provision in the explanatory memorandum as opposed to the bill.

Mr Doherty—Mr Chairman, I think I agree with that. If there is a significant ambiguity in the bill, we should do it through the bill.

CHAIRMAN—Would you give us some words? We would appreciate your advice. It is a consistent criticism of the legislation throughout our inquiry, and I speak for all my colleagues in that respect. It is reasonably clear that as members of parliament we must satisfy the requirements of section 44 on the day we nominate to stand for election, but it is unclear that that process needs to apply with respect to the position of President. I suspect that the majority of us would not want that requirement to have to apply; otherwise we might require it of sitting Supreme Court justices and other high profile individuals, perhaps even a state governor, causing them to be ineligible.

Mr PRICE—Or a nurse, a teacher or fireman.

CHAIRMAN—Or someone who just happens to be a member of a political party. There have been some bloody good governors-general who were ex-politicians.

Mr Doherty—I do not think there is any disagreement about the substance. The qualifications would apply definitely at appointment, but at the time of nomination there should be clarification that they will be met.

CHAIRMAN—Yes. That is why we would appreciate some words from you that would help us to frame a proper recommendation, which you can accept.

Mr Doherty—Sure. I understand.

Mr DANBY—I am being very ecumenical asking this on behalf of Senator Abetz in his absence: returning to the chairman's point about 'approved' or 'chosen', would it in your view detract in any way from the long title to substitute the word 'approved' for 'chosen'?

Mr Doherty—We have already agreed to look at that as a provision.

Mr DANBY—But do you have a view at this moment about it?

Mr Doherty—Off the cuff, I cannot see that it would be a problem to replace 'chosen' with 'approved' in that context.

Mr Faulkner—To reiterate a point I made before, we were trying to use the language of the constitutional provisions themselves in the long title, which seems to me a good idea in the main—to the extent that it can be pursued. Moving away from the constitutional language to a word like 'approved', we would have to think about what consequences there would be, if any, of simply arbitrarily choosing another word like that that is not in the provision itself. I just flag that as something we need to think about.

Mr Orr—That is probably an important point to be made. We are not necessarily conceding that we think that 'approved' would be a better word than 'chosen'. It is just that, if the committee is thinking about different words, I suppose we would say that 'approved' would be a possible word but may not be the best word.

Mr DANBY—If you did change it to 'approval' in the long title, would you have to change it to that in sections 20 and 60 of the bill where you cited 'chosen' as being used?

Mr Faulkner—That is one of things we would need to think about. These kinds of word changes, while they do not seem particularly significant at one level, could possibly have unintended consequences that we would need to think very carefully about. The words we have chosen have been thought about very carefully, with a great deal of attention given to their consequential operation.

Mr PRICE—The words you have 'approved', you mean!

Ms ROXON—Recommended!

Mr DANBY—Thanks.

Ms HALL—Another issue that is being raised at considerable length is the Nominations Committee and the fact that the legislation does not ensure the diversity that was recommended by ConCon. A number of people have raised the point of cultural diversity, representation by different ethnic groups, gender, and age, et cetera. What would you say about that?

Mr Doherty—You have a continuum of provisions that you could think about, which start off being very general and say something like, 'The Prime Minister should have regard to diversity in the appointments.' Arguably, this does not get you very far from where you are because it is then a matter for his judgment as to what reflects diversity. To go any further than that, however, you are getting to the stage of trying to pick which group, which elements of diversity you are looking for and how the breakdown might be made. You get into problems of starting to limit or picking which of the elements of diversity you want to stress over others, and I suspect you would end up with a huge list of interests which would need to be represented or considered in the decision making.

To our understanding, the reason it is left as it is is that a Prime Minister would always appoint a broad base to this group. That was the experience with the Constitutional Convention, for example. Again, there was no restriction there on appointments, but a very diverse range of people was appointed in terms of gender, ethnicity, age, whether they live in regional or metropolitan areas and whether they are in business, welfare, employed or otherwise. You got that diversity without having a provision there. I guess the answer is that we are not sure that a broad provision is going to make much difference, and we do not think a prescriptive provision would be appropriate.

Ms HALL—That was an issue that was criticised in just about every place that we had public hearings. The other thing that related to that was the fact that the Prime Minister would have the power to appoint whom he or she chooses. That in itself could distort the operation of that committee. It was suggested that maybe it should be in consultation with the Leader of the Opposition, or words to that effect.

Mr Doherty—All I would say in relation to that is that this is a process in which, at the end of the day, the Prime Minister's nomination will need the support of the Leader of the Opposition. If a clearly diverse group of people is appointed to the committee, the whole process is going to be able to run more successfully.

Ms HALL—The third issue relating to the Nominations Committee that I would like to raise is the fact that the Prime Minister is not obligated to accept a person recommended to him or her by that committee.

Mr Doherty—That is clearly the case. There is no legal obligation on the Prime Minister to put forward a person from the committee's short list. That was the basis on which the Convention proceeded and we have identified, in our first submission, the references in the transcript for that. I can envisage circumstances where that may be necessary to give the Prime Minister that room to move. He may be unable to secure agreement to anyone from the short list. An alternative may be someone who is obviously suitable, but indicated to the Nominations Committee that they are unavailable, but then, for whatever reason at the time when approached by the Prime Minister and the Leader of the Opposition, they said yes, they would be considered.

Ms HALL—Don't you think maybe it should be referred back to the committee, rather than the Prime Minister totally disregarding the role of the committee? Doesn't it make the committee just a paper tiger?

Mr Doherty—I do not think our provisions would rule out the Prime Minister going back to the committee for advice on a further nomination that he had in mind.

Ms HALL—Do you think the legislation could be improved if you recommended that, thus improving the accountability and the community participation in the process?

Mr Doherty—I think technically there is no question that you could build in some provision like that. Whether it would be an improvement, I do not know. Ultimately, we would need to see what ministers thought about that.

Mr Orr—I think it is an important point to note that these things are in the bill, in the general legislation, not in the Constitution. The constitutional provision is quite a broad and general one. I think the Convention was of the view that this was a process which would probably develop over time and should be subject to general legislation, so that over time that legislation could perhaps change and address some of the issues you are talking about.

Mr PRICE—You said you were going to consider the words, 'appointment', 'chosen', 'affirmed' and 'approved'. Would you agree that 'chosen' does not accurately reflect the actions of the joint sitting?

Mr Doherty—We have already agreed to look at that issue. It seems to me 'chosen' in one sense would be correct, but that it may also have this possible interpretation of a wider range of choice. That is exactly what we will look at, whether in that sense 'approved' is a tighter word for the same sort of concept.

Mr PRICE—I should be fair and say that it has been pointed out that the President will not have the same powers as the Governor-General. He will have similar powers, but not the same. Those powers have been, if you like, changed somewhat by the nomination process and also the safety net of dismissal.

Mr Doherty—I do not know that we would accept that at all.

Mr McCLELLAND—While Roger has said it has been pointed out, I do not necessarily accept that proposition that he has put, either.

Mr Doherty—Our intention has been to put the powers on the same basis.

Mr PRICE—I accept that. The issue of emoluments also arose during the hearings. Have you any proposals about the emoluments of the President being tax free and free of customs? Apparently, it was essential for the Governor-General to have this to properly exercise his powers. Will the President be required to pay taxes and custom duties and still be able to exercise his powers?

Mr Doherty—There is a policy issue that needs to be worked through. There is no decision about what the remuneration for a President would be. On one issue you raise there, which is the tax exempt status of the Governor-General, it has also been the case that the level of salary set for the Governor-General has been adjusted to take account of that tax exemption. The end result is to try and pitch his actual income at the same level as the Chief Judge of the High Court. So I do not think governors-general have benefited by that tax exempt status, if you like. The gross figure has been adjusted as well.

Mr PRICE—And that has also been adjusted for customs duty?

Mr Doherty—I do not know the answer to that.

Ms ROXON—I have two questions. One is just a brief follow-up from Jill's point on the diversity of the committee. I understand that it is in the bill and can be changed at some later point. I do not really understand how the Taskforce justifies in this situation departing from the recommendations of the Constitutional Convention, when there are a whole lot of other things you have said to us, such as, 'Our hands are a little bit tied because that is what the Convention said.' This is one of the things that community members were actively concerned about. I find it a little difficult to explain or justify why this would be one instance where we have departed from what the Convention said. That was the first point.

The second point is about polling. I understand that the Taskforce did some polling about voter awareness, and we were referred to the polling that had been done by a number of people who gave evidence to the committee. Could you talk to us about what polling was done and whether it is actually going to be made available to us. The context in which it came up, and which might be of assistance to you, was in talking about the recognition the community has for issues that are highlighted in the long title. It would be very helpful to the committee to have access to that research. If you could address those two points, that would be great.

Mr Doherty—I will deal with them as they came up. On departing from the Convention model in relation to the Nominations Committee, I think our understanding is that the result will be exactly what the Convention was looking for, which is a diverse basis of appointment.

Ms ROXON—But the Convention actually recommended wording such as federalism, age, gender and I think cultural diversity.

Mr Doherty—It recommended that those be taken into account. But, correct me if I am wrong, I am not sure that there was a—

Ms HALL—But the submissions we have received have reinforced what Nicola is saying—that the community is not happy with the departure from the recommendation of the Convention.

Mr McCLELLAND—I suppose the issue is that it is already in the explanatory memorandum. The question is: what is the harm if those terms are included in the bill?

Mr Doherty—Is the idea that there would be a general provision saying that, in making appointments the Prime Minister would take account of considerations of 'diversity including'—or just 'diversity'.

Ms HALL—Not 'should' but 'must'. It must take account.

Mr McCLELLAND—You could have either option—'should have regard to'.

Ms HALL—'Should' is a better word.

Ms ROXON—Your suggestion, whether it is 'have regard to issues of diversity including' or 'have regard to issues of federalism, age, gender', whatever, I do not think is greatly different.

Mr Doherty—But you would spell out the list one way or the other.

Ms ROXON—Yes. Certainly in the submissions being made to us by a number of groups they did feel pretty strongly about that, and it seemed to make a great deal of difference about the faith they would have in the process the Prime Minister of the day would undertake. That is why I am asking: why diverge on this point but not on others?

Mr Doherty—Technically, I cannot say that there would be a problem about doing that, and if the committee recommendation is that it would help to have that sort of provision in there, then we can make sure that ministers look at it.

Mr PRICE—There was one alternative put to that and that was that the Prime Minister consult with the Leader of the Opposition and party leaders of more than five members. It was through that consultation process that you would presumably get the diversity, but at the end of the day the Prime Minister has the final decision.

Mr Doherty—Again, technically I do not know that there is an impediment in doing something like that. To my knowledge, it is not a form that has been followed in relation to appointments, even though in a range of appointments there may well be consultation.

Ms ROXON—But we have not had to appoint a President before, have we?

Ms HALL—It would be really good if you could look at that for us.

Mr Doherty—We have had to appointment governors-general, I suppose.

Mr McCLELLAND—I get from the tone of your evidence that you would be against it being too prescriptive. You would want to keep as broad a discretion as possible.

Mr Doherty—I think that is the judgment, certainly. I cannot see that it would be appropriate to have a prescriptive provision. When you get to a broader provision, I guess the judgment becomes, 'What difference does it really make?' If it is a presentational one, certainly we can take that—

Ms ROXON—The second question was on the polling.

Mr Doherty—As part of preparation for the public education program, which the government has announced, the Taskforce commissioned Newspoll to conduct some qualitative and quantitative research into the levels of understanding in the community about the issues on which people will ultimately have to vote. That research also covered what sort of media they might look to to get that information—what they might be receptive to.

The results are being used as part of the preparation for that program and the government is still making decisions on exactly what the program would look like. I think the government envisage that the results will be released at some stage, but they have not made them publicly available at this stage. They have released them to the committees which are working on the development of the 'yes' advertising campaign and the 'no' advertising campaign on the basis that it is directly relevant to the work of those committees.

To date, the content of that research has not been seen as relevant, I must say, to the work of this committee because it does not go to the content of the proposals at all. If there is a request from this committee, I can take that, too.

Ms ROXON—Although, Mr Doherty, we did get some fairly strong evidence in Broome from members of the Aboriginal community. I understand that in some of the other remote areas—

Mr PRICE—In Darwin.

Ms ROXON—I was not at the hearing in Darwin. At other remote areas we received similar submissions about it actually being an important consideration for this committee in recommending, on various aspects of the bills, what sort of education campaign was going to go into supporting people's understanding of those bills. People were talking to us about the need to simplify particular provisions if there was not going to be sufficient education about how they would operate—those sorts of things.

Certainly, from my point of view, I think the polling would be useful for this committee. We have not discussed it in a private meeting so I am not sure that a formal request can be made from the committee, but I certainly think that it would be helpful. Perhaps, if the

chairman thinks it is appropriate, we need to make a decision on formally requesting it. Perhaps we can do that at another time.

CHAIRMAN—Sorry, I missed that.

Ms ROXON—Mr Doherty was saying that if there was a request from this committee for that research to be made available that they would obviously put that to the government. I said we have not discussed it as a committee. I think it would be helpful, but perhaps we need to discuss it privately if there is any issue with us making a formal request.

CHAIRMAN—I do not have any problem asking for research. If you can make it available, please do so.

Mr Doherty—I do not know that I can. I can take the request to the government.

CHAIRMAN—Fine.

Mr Doherty—Their question is going to be—

CHAIRMAN—No, we are not subpoenaing you. If you can, please do. If you can't, then don't.

Ms ROXON—And if you can't, please let us know.

Mr Orr—Yes.

Mr McCLELLAND—Looking at the third paragraph of section 59 of the bill, a concern has been put to us—indeed, it was restated in a submission by Premier Kennett—about the three sources of advice. To overcome that concern, Sir Gerard Brennan put a submission to us that the third paragraph should be rephrased to read:

The powers of the President, other than the reserve powers, shall be exercised on the advice of the Federal Executive Council, the Prime Minister, or, in a matter relating to a department of state, the minister administering that department.

He also omitted the reference to acting in accordance with customs. Leaving that customs issue aside, what do you think of his wording to avoid those three conflicting sources of advice?

Mr Doherty—I can get Jim to comment on the wording more precisely, but I am not sure that it actually achieves the result that he is intending, of making it clear what the source of advice would be in a particular case. I would also be concerned as to whether it is entirely consistent with the current conventions where, for example, the Attorney-General would advise on the assent to all legislation. I am not sure whether legislation on a customs issue would be seen as relating to the affairs of that department. You may end up distorting the current conventions whereas our intention has always been—and our understanding is that this is what happens—that they would continue under this provision.

Mr McCLELLAND—Just on that point, in a more general sense you have said in your submission that it is important that the Constitution reflects the actuality of government. Why do you think that is important? Are there risks if it does not?

Mr Doherty—I guess it is the impossible dream, to some extent, to have the Constitution clearly set out exactly how everything works. What we are aiming towards is some additional clarity. I think that comment was probably made particularly in the context of section 59 and the articulation of the broad basis on which the reserve powers and the ordinary powers are exercised.

Mr McCLELLAND—My next question—again from Premier Kennett's submission—is in respect of the Acting President, the next available Governor, stepping into the role. There have been concerns expressed about the next Governor not being qualified, something of that nature. Do you think there is cause for defining the term 'the next available Governor' or, if those are the words used, to say 'the next available Governor shall be a person qualified to be President in accordance with clause 60'?

Mr Doherty—I would have to say that our intention is that the provisions at the moment do not pick up the qualification requirements in relation to a Governor acting as President. So if there is a Governor who, for example, holds a commission as a judge, that would not necessarily exclude them. At the moment it is left on the basis that if they are a Governor they are seen to be—

Mr McCLELLAND—An appropriate person.

Mr Doherty—appropriate, subject to availability. We see availability as having two strands. One is that the Governor is willing to do it and, secondly, that the government, on whose advice they act, is able to make them available.

Mr McCLELLAND—So you do not think it would be appropriate to impose the same qualification on an Acting President?

Mr Doherty—At this stage I do not think so. But I would also point out that there is scope in those provisions for legislation down the track to clarify those arrangements. It may be that in the fullness of time it does become appropriate to ensure that you do not have a Governor who for other reasons would be ineligible. I think that is something that could be dealt with by ordinary legislation down the track if necessary.

Mr McCLELLAND—My final question is again from Premier Kennett's submission. In light of the state acts that have been passed, do you think there is now a need for clause 7 of schedule 3?

Mr Doherty—I cannot see that there is still a need for that. I think the only academic possibility you might envisage is that one of the states would repeal their legislation. I do not think that is a realistic option. The Prime Minister has indicated to premiers that he would consider removing that provision if they passed their legislation. I think that was given in a positive sense, and my expectation is that there is no impediment now to removing that clause. We will certainly look closely at that. I do not want to have a

technical problem arising and having left a lacuna. But, subject to that consideration, I cannot see that there is a—

Mr McCLELLAND—Thanks.

CHAIRMAN—Mr Doherty, former Senator Baden Teague put it to us that the position of Deputy President was anachronistic and, in fact, has never been implemented. It was intended only as a short-term measure until the colonies became states with governors. We wonder why the term 'Deputy President' is still retained within the Constitution and whether or not it could create some confusion in terms of lines of succession and responsibility.

Mr Doherty—The provision for Deputy President as opposed to the Acting President?

CHAIRMAN—That is correct. They are very distinct and different positions.

Mr Doherty—Yes, that is right. The expectation is that a deputy would exercise a limited range of powers in circumstances—

CHAIRMAN—It is my understanding that there has never been a deputy.

Mr Doherty—Deputies are certainly appointed. There are commissions given to the governors of Victoria and New South Wales to act as deputy. The provision might operate, for example, if the Governor-General was in hospital or something like that and could exercise the major duties of his office if necessary but could not sit at Executive Council meetings or something like that. You could then bring someone in to do those jobs without having them take over the full administration, if you like, the full role of Governor-General. To my understanding deputies are not used and their importance would have been much more in the earlier part of the century when transport and communications were different sorts of issues.

The role of deputy does still add an extra level of safety, I suppose. In a situation of illness or unavailability of the President you could make some arrangement for someone appropriate to fill in, with that person having specified functions.

CHAIRMAN—But you have the role of Acting President.

Mr Doherty—The role of Acting President would kick in if the President was totally unavailable to do the job—

CHAIRMAN—Where does it say that?

Mr Faulkner—It arises only in the case of a vacancy or where there is incapacity of a kind that the Prime Minister considers to be serious enough.

Mr McCLELLAND—A casual vacancy?

Mr Faulkner—In a sense.

CHAIRMAN—Is being in hospital a casual vacancy?

Mr Doherty—Not if he is still in a position to exercise the most important functions.

Mr Faulkner—Could I add that the Chief Justice is acting in the capacity of a deputy when he opens parliament. It is a position that is not greatly used, but it is a further level there that has been used to add some flexibility. It must be conceded that it might be one of the issues that you looked at if you were interested in generally tidying up the Constitution, but that is not what we have seen our role to be. We see this as a tidying up issue which is outside the bounds of things we have been looking at.

CHAIRMAN—Thank you. You have said in your latest submission:

An acting President would be required to meet the same eligibility requirements as the President (although this could be changed by legislation).

I am sorry, but could you tell me where it says that? That was an issue of contention throughout the inquiry. I do not know where it says that.

Mr Orr—Mr Chairman, you have left out the word 'not'.

CHAIRMAN—I am sorry, but the dot point in your submission that I have in front of me says:

An acting President would be required to meet the same eligibility requirements as the President . . .

I do not know where it says that.

Mr Faulkner—Our submission at page 9 says:

An acting President would not be required to meet the same eligibility requirements as the President . . .

CHAIRMAN—I see. Our secretariat apologises.

Mr PRICE—So does the chairman, but he is not resigning!

CHAIRMAN—No, I am definitely not resigning. I have to give a report, dead or alive. This is my last question. Section 70A would locate only those prerogatives currently vested in the Governor-General in the President. Prerogatives currently vested more generally in the Crown in right of the Commonwealth would go, in effect, to the executive government of the Commonwealth. I am interested in what led you to that conclusion and how we can satisfy ourselves that it is true, or, at least, reasonable?

Mr Faulkner—This is one of the more esoteric elements of all of this. The point of proposed section 70A of the Constitution, which is the relevant provision here, is that the prerogative enjoyed by the Crown in right of the Commonwealth—that is, enjoyed immediately before the office of the Governor-General ceases to exist, when we become a republic—goes to the Commonwealth. That is a broad concept which would be understood to mean the executive government of the Commonwealth.

The basic proposition is that those things that were enjoyed by the Crown in right of the Commonwealth go to the Commonwealth government generally, that is, the executive government. In particular, those things that were enjoyed personally by the Governor-General—and that is a subset of those things that are in the Crown in right of the Commonwealth—

CHAIRMAN—Section 59.

Mr Faulkner—will go on to the President. What we have said is that the total, the universe of things, goes across to the Commonwealth except to the extent that these things are with the Governor-General now. To that extent, they will go across to the President. It is simply making sure that what is with the Governor-General now goes to the President in the future, and what is more generally with Commonwealth executive government now stays more generally with Commonwealth executive government.

The question of what kinds of prerogatives fall into either camp, even now, is not one which you can talk about in a short time. It tends to be a fairly complicated sort of question. The intent of this provision is to make sure that if it is with the Governor-General now it goes to the President and, if it is more broadly held now, it goes to the government more broadly.

CHAIRMAN—Are our legal comrades satisfied that that section meets that test?

Mr Orr—Yes, it certainly does.

CHAIRMAN—Thank you.

Ms HALL—My question relates to the failure to gain approval of the House with the no-confidence vote. I also refer to the submission from the Premier of Victoria where he also picks up on this. I must say that, at the same time, this has been something that has been brought out at a number of public hearings that we have attended.

I think the Premier puts it quite well in his submission where the communique has been ignored on two points—that is, the Prime Minister does not have to seek the approval of the House of Representatives and the Prime Minister does not have to obtain the approval. This has been of great concern to a number of people because they feel it is watering down the accountability. The other issue that was raised that does contravene the communique to some extent is the period—a number of people felt the 30 days was a bit too long.

Mr PRICE—That was my point.

Ms HALL—There you go! There is also the watering down of the accountability in the legislation, that maybe the Prime Minister never has to get the approval of the House of Representatives and the effect of not having that no-confidence motion. I notice in your later submission that you say it is not clear enough as to whether the no-confidence motion is in the Prime Minister or the government. Surely that could be written into the legislation, that it is the Prime Minister. That is what we are looking at, isn't it—the accountability of the Prime Minister to the parliament and to the people of Australia?

Mr Doherty—I will deal first with your second issue about the 30 days, because that is a little simpler. The 30 days came from the Convention. It was a resolution.

Ms HALL—I realise that.

Mr Doherty—It may be a matter of judgment whether you could impose something shorter but, in terms of breaks in parliamentary sitting patterns and things like that, I think our brief was to stick with the model on that one.

Ms HALL—Maybe we should stick with the recommendation from the Convention and the communique that was received in relation to the other point.

Mr Doherty—Is this in relation to the appointment of the Nominations Committee?

Ms HALL—Yes.

Mr Doherty—We have said that if the committee sees a benefit in including some sort of provision there we will put that to the government.

Ms HALL—I would like you to look at that; I do not know about other members of the committee.

Mr PRICE—You say in your additional submission that a no-confidence vote may result in the loss of government or the loss of only the Prime Minister, depending on the nature of the vote. If Prime Minister Howard does not get the resolution for dismissal his government falls. Costello may then take over as leader and be invited to form a new government. In effect, only the Prime Minister is changed—indeed, there is a completely new government. Isn't that slightly misleading in your submission?

Mr Doherty—I am not sure you can say that the government would necessarily fall.

Mr PRICE—If you have a new leader, the government has fallen, hasn't it?

Mr Doherty—It is a new Prime Minister.

CHAIR—Did the government fall when Keating took over from Hawke? It did not.

Mr Doherty—A government of that party could take over instead. The point we were trying to make is: does that party lose government and do you end up needing another election or do you simply appoint another person from that party? Whether that is appropriate seems to me to depend on whether the Prime Minister was acting off his own bat or with the support of his colleagues and how the numbers fall out when the matter is voted on in the House. That is really the nub of our concern about trying to write in the no-confidence motion. You cannot say that the one result or the other is always appropriate. If you start trying to codify it you start getting more into the tax act than into constitutional provisions.

Mr PRICE—A number of people raised with the committee that the dismissal should be a joint sitting. You do not address that in your additional submission, or have I failed to pick it up?

Mr Doherty—I think the model from the Republican Movement, and before them the Paul Keating republican model, was that you would have dismissal by the same manner as appointment. It was probably the main issue at the Convention. The substantial change to the ARM proposal was to change the dismissal provisions to more closely reflect the current balance where the Prime Minister can advise the Queen to dismiss the Governor-General summarily. My understanding of the sense of the debate in the Convention was that, if you left it at the position with two-thirds majority by parliament to remove a President—given that any removal of a President is going to happen in the context of a politically charged debate—you would be giving the President such a degree of tenure that you would be making a substantial change to our current system.

Mr PRICE—Is it also a valid argument that the Prime Minister is accountable to the House of Representatives, so that element of accountability that we were debating a minute ago is lost, because it is a joint sitting? The only precedent we have for joint sittings is approval of bills, and a Prime Minister certainly does not fall if a bill fails to pass a joint sitting, or a government does not fall.

Mr Doherty—I guess we have created another one with the appointment of the President.

Mr PRICE—Yes.

Mr Doherty—I have not thought that through.

Mr PRICE—I would find it helpful if you could think that through later and give us the benefit of your thoughts.

Mr Doherty—Our position was to give effect to the Convention model for removal, which was by the Prime Minister.

Mr PRICE—I make it clear that I do not support a joint sitting for a dismissal, but I think it is worthy of thinking through the implications, should that be adopted. One member of the public made a suggestion which I thought was not too bad, but fraught with difficulties, that in this day of accountability there should be some form of annual report by a President. I concede that the Governor-General does not do that, or does he do that?

Mr Doherty—Yes. The official secretary of the Governor-General provides an annual report.

Mr PRICE—That is the annual report; I am not talking about boring annual reports! That is done by the secretary and not the Governor.

Mr Doherty—But it covers the official functions of the Governor-General and it follows, as I understand it, the same reporting guidelines as all Commonwealth organisations.

Mr PRICE—Have you had an opportunity to look at the long title proposed by Michael Lavarch in Brisbane? If so, what was your response to that?

Mr Doherty—We have looked at a lot of long title propositions and they tend to blur into one another.

CHAIR—Would you like to pick a set of words?

Mr PRICE—A number of people before the committee suggested that a President who was dismissed should be merely suspended and then, depending on the vote, be reinstated. What is your response to those suggestions to the committee?

Mr Doherty—Again, I think that is quite different from the model that was suggested by the Convention, where it clearly says, 'The Prime Minister's removal takes effect immediately on issue of the notice.' It seems to me it would open up a whole range of other issues and could again be seen to affect this balance about who has the say on those issues.

Mr DANBY—Mr Lavarch's resolution says:

A bill for an act to alter the Constitution to establish the Commonwealth of Australia as a Republic with the Queen and Governor-General being replaced by an Australian President having the same powers as those currently exercised by the Governor-General.

Mr Doherty—I guess the proposed long title as it stood was, in the government's view, the way to encapsulate the proposal, giving sufficient information about what was in the bills without introducing elements which would be highly argumentative. I think statements such as 'the same powers currently exercised by the Governor-General' and 'replacing the Queen as Australia's head of state' may be seen as argumentative, as we have already heard this morning. Again, we come back to the situation where the long title is not driven by the technicalities; it is driven by the presentation elements—what is a sufficient description of the bill? I do not think it is a matter for us to respond to on a technical level.

Ms ROXON—Why is it that almost every witness who has addressed this committee about the long title does not necessarily—

Ms HALL—Constitutional monarchists.

Ms ROXON—I will be corrected if there were any who thought that the current long title actually encapsulated the major and significant changes that were going to be brought about if this bill was voted on.

Ms HALL—There was only one group of people who supported it.

CHAIRMAN—I am sorry, but your old professor very strongly supported the current long title. You do forget. You had the flu.

Ms HALL—The constitutional monarchists, without exception, all supported the proposed long title. They were the only group that supported it absolutely.

CHAIRMAN—I am sorry, but that is not true.

Mr Doherty—The current long title does two things: it says that the bill would establish Australia as a republic and it indicates the model—the two-thirds appointment by parliament model, which distinguishes it from the direct election model or from the McGarvie model. I think that is the nub of where the government was at. It gave people that description.

CHAIRMAN—Mr Doherty, you have done your job. If you will, it is a political decision. If the committee wants to recommend a change to the long title, that is a political decision by the committee. We have no right to ask you to change it.

Ms HALL—My question—and, once again, this is an issue which has been raised at the public hearings—relates to the fact that the office of President can be left vacant. There is no requirement for the Prime Minister to actually ensure that the President is placed in that position immediately or replaced if the President is removed. The other part to the question is the limitation of the term of President; that the President can be reappointed for any number of five-year terms. It was suggested to us that that maybe should be limited to two.

Mr Doherty—Let us deal with the first one: that there is no compulsion to appoint a President. I should firstly point out that there is no prospect of an absence of someone to perform the functions. If the term of office finishes, the President continues until a new President is in place. If the President is removed or resigns, an Acting President immediately stands in. The proposed arrangements do not allow for a gap with no-one to perform the functions of the office.

Ms HALL—It was argued that that could allow the Prime Minister to move away from his or her obligations to have that community involvement or to have someone as an Acting President who is sympathetic to his or her agenda, and the same with allowing the current President's term to continue.

Mr Doherty—He has no choice in Acting Presidents. But if there was a vacancy there is no legal obligation on him to proceed with the reappointment or the appointment of a new President at any particular time.

Ms HALL—That is the weakness.

Mr Doherty—However, the expectation is clearly there, and it would be a matter of his public accountability as to why he was not moving immediately to do that. At the moment we have no timetable for appointment or reappointment of governors-general, but they have turned over at appropriate times with some sort of flexibility to manage the appropriate changeover. I do not know that we should approach this fearing the worst and assuming that we have to tie everything like this down so that it becomes more like a tax act than a Constitution.

Mr Orr—To some extent the provision mirrors section 64 where the Governor-General at the moment is appointing the Prime Minister, and the similar 'may' word is used. There is an assumption that these mechanisms of government will continue and will be appropriately honoured by the parties.

CHAIRMAN—I have one last very technical question.

Ms HALL—The second part of my question has not been answered yet.

Mr Doherty—I am sorry, I have forgotten it.

Ms HALL—The limitations of terms.

Mr Doherty—Again, it is technically correct that there is no prohibition on having several terms one after another. This is not a typical re-appointment process, in that you have to go through the full panoply of public nomination, support from both sides and approval at a joint sitting. It seems unlikely that you will get reappointments through that arrangement, but if you do get into a re-appointment, then it is being done with the agreement of everybody involved.

CHAIRMAN—I have a question on a minor technical issue. There appears to be no provision in the Constitution for a joint sitting to approve the choice for President.

Mr Orr—What do you mean?

CHAIRMAN—To the best of my knowledge, there is no provision in the Constitution that would allow us to sustain any joint sitting for that purpose.

Mr Orr—This proposed section 60 would specifically provide for that joint sitting.

CHAIRMAN—I am not convinced that it does.

Mr Faulkner—Are you suggesting that, in saying that there shall be a joint sitting, it would not be possible to have one?

CHAIRMAN—That is correct—because there is no provision for a joint sitting.

Mr Doherty—This is the authority for that joint sitting.

CHAIRMAN—Could you confirm that to us? Would you consider that issue seriously and confirm that to us in writing.

Mr Doherty—Yes.

Mr Faulkner—We have certainly considered it very, very closely. I would have said that our very firm and settled position would be that there is no doubt that you could have a joint sitting to facilitate the operation of that provision in that it expressly and explicitly requires a joint sitting for that to occur.

Mr Doherty—That would provide the basis then for additional legislation, if necessary, dealing with the mechanics?

Mr Faulkner—Quite possibly.

CHAIRMAN—I hear you, but I ask you to confirm that in writing.

Mr Faulkner—Without getting into too much detail, this is a matter of parliamentary procedure, so there are already provisions in the Constitution that deal with the kind of arrangements that go on for that sort of thing. Section 50 is one example.

CHAIRMAN—This is a particularly serious one: if it falls down, we do not have a President.

Mr Orr—I would be surprised if any commentator seriously suggested that. I would be interested in hearing what submission has put to the committee that this did not allow a joint sitting.

Ms ROXON—One of the submissions did; it was contrasting the specific provisions that applied after a double dissolution. It looked at the mechanical detail that there was about organising a joint sitting, and that joint sitting then being able to pass the bills that were the trigger for the double dissolution to start with. I do not recall who the witness was, but they were basically saying, 'Look at the level of detail that has gone into the only other time you can have a joint sitting: is that similarly required in this situation?' I think that is where Mr Charles's question came from.

CHAIRMAN—As I said, it is not a big deal, but please get back to us about it.

Mr PRICE—I want to ask one question on the long title: whilst it is a political decision, wouldn't you agree that the long title should reflect the tension between accurately describing the constitutional change, and keeping it simple enough so that the widest possible number of people in the community understand what the proposition is?

Senator ABETZ—That is not a legal question—that is a political question.

Mr Doherty—It has got to describe what the bill does, and it should not be too long. In broad terms, I agree with what you are saying, and I think that that is the way the government has proceeded with its suggestion.

CHAIRMAN—Thank you very much for the generous time you have given us and the responsive way that you have handled our questions. We appreciate your advice and we will appreciate your further advice on the issues that were raised today, as a matter of some great urgency. We will start report consideration on Tuesday morning at 10 o'clock, and that does not leave us long to write it up, not to mention get to recommendations.

Mr Doherty—I understand. We will get back to you soon.

[11.13 a.m.]

ROSE, Mr Dennis John QC (Private capacity)

SAUNDERS, Professor Cheryl Anne (Private capacity)

WILLIAMS, Mr George John (Private capacity)

ZINES, Professor Leslie (Private capacity)

CHAIRMAN—I now welcome our academic friends, three of whom are reappearing before the committee, and one, Professor Cheryl Saunders, is appearing for the first time. Thank you very much for coming today. You attended the earlier session this morning, so you have heard some of the issues that this committee has addressed as it has gone around the country—some contentious, some not contentious, some very important and some probably ridiculous. There is a great divide amongst the academic community particularly. My colleague Nicola Roxon said that she thought all the republicans were agin the long title. As I recall, her former professor—and very much a republican—who spoke to us in Perth, thought the long title was terrific. Regardless of that, do you have a brief reopening statement that you would like to make today?

Prof. Saunders—I will be appearing before you again this afternoon, when I will make a brief opening statement. It is a question of whether you would just like to put questions to us to save time—whatever you think would be the simplest way to proceed. We know there are a number of things that you particularly want to address to us today.

CHAIRMAN—We have until in 1 o'clock, when we will turn into pumpkins, so I am offering you the opportunity to say something briefly about the issues that concern you. Then we can get to the questions that we have that are particularly relevant at this point in the debate.

Prof. Zines—I have sent some belated and somewhat cryptic submissions. I could say a few words about those, if that would be all right with you.

CHAIRMAN—Sure.

Prof. Zines—The thing that has troubled me most—and I just do not understand it, actually—is why the covering clauses and the enacting clause have been left as they are, because that creates an extraordinary situation. Assuming all this goes through, you open up the Constitution Act and you see that the people of several colonies have agreed to unite under the Crown. You get the act enacted by 'the Queen's Most Excellent Majesty' and then the first substantive provision you get to is a definition of the Queen. All that is inconsistent with the basis of what follows.

To make it worse, the two operative sections, given that the Convention said operative sections should go into the Constitution itself—5 and 6 of the covering clauses—have all been redrafted in a modern form and put at the end of the Constitution in sections 126 and 127, yet the old 5 and 6 are still lying there. In fact, if any Australian or non-Australian

wants to find out how our system works, they are going to get the wrong impression when they start reading. They will not know until the end of the Constitution that two of the early sections have been quietly overruled and yet have been allowed to lie. This is contrary to the resolutions of the Constitutional Convention and I just find it a bit extraordinary and very muddled for anybody. There is no indication of why it was done. All the Attorney-General said in the second reading speech or in the explanatory memorandum was that, if it were intended to get rid of them later, that could be done either by referendum or by all the states agreeing.

I have no need to state again the question of the justiciability of the reserve powers; a lot of people have already gone into that. With the advice to the President, again it strikes me that a great opportunity has been missed because, while the three sources of advice to the President in section 59 are clear—and I think that legally they are effective—if you want to find out how the system operates, you get no help. Section 64 in its new form—and indeed in its old form—says that the President can appoint persons—that is, ministers—to administer departments. But you do not know that the Prime Minister is appointed as a result of a reserve power and that the other ministers are appointed by the President on the advice of the Prime Minister only. The draft Constitution drafted by the Constitutional Commission set all that out very clearly, and I think it indicated how the system operated, but at the moment we have for the first time ever a reference to the Prime Minister but no indication of who appoints him or her or how that person is appointed.

The explanatory memorandum says that the question of whether the President is incapable, so that the Prime Minister can appoint an Acting President, is up to the Prime Minister. But that is not so. The Prime Minister's power is only if the President is suffering an incapacity. That is a question of fact and it is one that a court will examine to see whether the power of the Prime Minister to appoint has come into existence. So, if it is intended that the court should not look at it and that the Prime Minister should have complete mastery of this, it should, first of all, depend on the basis of the opinion of the Prime Minister and also it should be indicated that it is not justiciable. But either the task force or the draftsman does not seem to like putting in provisions saying that things are not justiciable, and I do not know why.

The last thing I want to mention is that section 58—schedule 2, item 23—has the power of the President to refuse to assent to bills. The new provision leaves in 'at his discretion'. You could argue that gives the President personal discretion and that it is not subject to the advice provisions because it does not appear anywhere else in the Constitution. It was originally put in because it did give the Governor-General a personal discretion to decide whether to send things back to Britain or what have you. I think it ought to be taken out of section 58. The word 'may' is the usual word you use where there are two possibilities. It would be clear then that section 59 operates to require the President to act on advice, although I do raise this question: should a government have the power to advise the President not to assent to a bill that has gone through both houses of parliament, particularly when there is power to refer it back to that parliament for reconsideration? That is all I want to say.

CHAIRMAN—Thank you for that. Mr Williams?

Mr Williams—I will also make a brief opening statement to respond to some specific points in the submissions. Firstly, I do not come to you with another long title.

CHAIRMAN—Thank you; I think we have enough.

Mr Williams—Perhaps I can help you by just suggesting some criteria that might be applied. I think that there are three. Firstly, it must be accurate as to content; secondly, it must be short; and, thirdly, it must be in plain English—and I can sense that coming out in the early discussions. I think they are the critical criteria, and I am not sure that the existing long title matches each of those. It may be short but I am not sure it accurately reflects as to content exactly what this bill would achieve.

The second point is that I would like to make brief mention of the fact that the bill says the President could not be a member of a political party. In my submission I argue that is not appropriate. I also see that the Victorian Premier has said that. But, even if it is to be retained, I think that as a minimum you must establish what is a political party. I do not think that we can be sure that it would necessarily only be those parties participating under the Commonwealth Electoral Act. As the Victorian Premier suggested, it might be other groups advocating a particular vote in an election, such as lobby or other groups. That may be somewhat unlikely, but I still think it is uncertain as to what the result would be.

The third point comes as to the 'chosen' question and the nomination process. My reading of the language is that I think the likely result is that 'chosen' is chosen at the time parliament approves that person. But, looking at the Sykes and Cleary case back in 1992, I think that it would be perhaps a dangerous thing to take that interpretation as the only possible interpretation. It is certainly open to the High Court to take a broader view. If you were to remedy that problem as the committee is interested in doing, I think the appropriate solution is not to do anything to section 20 of the presidential nominations bill. Perhaps there might be some consequential changes there, but indeed what must be changed is the constitutional text itself, because the constitutional text is the ultimate prevailing document. Indeed, the High Court may say the presidential nominations bill in effect does not contain the relevant meaning; it is of supplementary value only but cannot change the meaning derived from the Constitution. So, if you are concerned about it, you must amend the Constitution itself.

The next point is about section 59 of the Constitution. My view is that section 59 is drafted well and I would not suggest any changes to that, with one minor exception. I would pick up the point made by several people, and in particular by the draft of Professor George Winterton, to say there should be an extra short provision saying that the reserve powers are not justiciable. I think there is some doubt as to that and I think it should be clarified in that particular provision. Otherwise, I would not make any changes to section 59.

The next point is about federalism and the states, and in particular the submission of Jeremy Buxton, which the committee has referred us to. I would disagree in several areas with that submission. In particular I think that it is quite possible for the states to retain their links, and schedule 2 at clause 5 would achieve that appropriately. I cannot see why any amendment is needed to that. Secondly, I also think that the point that perhaps a schedule would lead to some inappropriate centralism of power is misplaced. What the section

actually says is that we are recognising the unity of the Australian nation. That is quite a distinct concept from centralism and, again, I think any fear there is misplaced.

What this leads me to is one further point. My submission is that there should be an alternative procedure available to the states. Currently, a majority of the states would need a separate, perhaps costly, perhaps inconvenient referendum to make the transition to a republic. That would simply be because they have certain provisions entrenched in their own constitutional arrangements. My submission is that we should follow the path of the Republic Advisory Committee, who suggested that we should put a clause in the Commonwealth Constitution to allow a parliament—say, with a two-thirds vote—to overcome its entrenched provisions to make a break with the monarchy without actually having to have a separate referendum. It would not force them down that path but simply give them an alternative mechanism should they so wish not to have a referendum for whatever reason. It may be that the vote in a state is so high that indeed a referendum is simply an anticlimax after the event.

The only other point I want to mention in my opening statement is as to dismissal. One of the questions put to us was, 'Why is a delay relevant or useful?' My own view is that a delay is entirely appropriate for two reasons. I think that it will allow greater scrutiny and accountability of the process and also some form of cooling-off period. I think that if a Prime Minister can sack, simply immediately, a President, then that is inconsistent also with the status of the President being appointed by both houses. I think the appropriate compromise would not be to have another joint sitting, which I think is to put too high a barrier in the path of removing a President, but to allow the government to do so by achieving a majority vote in the House of Representatives, not as an afterthought of dismissal but as a component of the actual dismissal, perhaps on a motion put by the Prime Minister.

CHAIRMAN—Thank you for that. Anyone else?

Mr Rose—I might just address a couple of those points. On that last issue, I still maintain my disagreement with George Williams from the last meeting that we had. I think the Prime Minister ought to be able to dismiss the President instantaneously and that any delay is undesirable because of the situations that we discussed, that any delay would give the President the opportunity to dismiss the Prime Minister. My view is that the political responsibility lies with the Prime Minister, and the electorate can have its say at a later stage if there is disagreement over what has been done.

On some of the other points that have been mentioned, Professor Zines and the covering clauses, I certainly agree with him that what is proposed here leaves a rather messy result. I suppose the reason why the covering clauses were not covered in this exercise is some nervousness as to whether a referendum under section 128 could alter the covering clauses. I think I would be fairly bold on that issue and say it can be done, but there is some disagreement amongst the commentators on that. It probably does not do too much damage, though; it is just inelegant.

On the other points as to whether the question of the incapacity of a President is a justiciable issue, I would say it clearly would be. On the desirability of introducing a

provision that the reserve powers should not be justiciable, I think that would be highly desirable, though it may be argued that the provision as it stands in the bill would be ambiguous, and one could take into account what is set out in the explanatory memorandum to the effect that there is no intention to make anything justiciable that is not already justiciable. I think that is all I will say at this stage.

CHAIRMAN—Thank you very much. Mr Williams, can I say with respect to the issue of the states that it is our understanding this morning that every state has now passed legislation with respect to the Australia Act to come into line, so I would have thought that it was this committee's view it is no longer an issue.

Mr Williams—They would still need a referendum. That is apart from that.

Mr PRICE—Queensland and Western Australia, I think.

Mr Williams—Actually, all states would.

CHAIRMAN—I understand they have referendums. I say to you that every person that spoke to us on behalf of a state spoke extremely strongly with respect to states' rights, and they did not want the Commonwealth stuffing around with their constitutions. I, quite frankly, would be loath to make any recommendation whatsoever to this committee in that respect. They were extremely strong on that point. The second issue is that you say that you believe it would be desirable with respect to the qualifications for the position of President that we change the Constitution with respect to the qualifications for members of the House or Senate.

Can I say to you that these issues have been debated by the House of Representatives and by the Senate over and over again. They have been examined by committee after committee of procedure, or whatever, and recommendations have been made and not made, and we go back and forth. But there has never been unanimity of view with respect to changing the Constitution regarding those items which decide whether or not we are eligible to be members or senators because of those difficulties.

We are dealing here with an issue. The issue is, I thought, the change from a constitutional monarchy to a republic. I would have thought that we could deal with those issues of eligibility as a matter of timing rather than of substance within the legislation or, indeed, if necessary, within the Constitution, but without having to alter the requirements for membership of the House of Representatives or the Senate.

Mr Williams—I agree, and it would not affect those at all. My point goes only to section 60 of the Constitution, which contains the word 'chosen'. I was responding to the committee's concern that the word 'chosen' might mean the process beginning at the point of nomination going through to—

CHAIRMAN—Okay. Thank you.

Mr Williams—That was the limit of my point.

CHAIRMAN—Yes. I do not think we like 'chosen' very well, either.

Mr Williams—All I am suggesting, indeed, is that just changing section 20 of the nomination act may not be sufficient because the word 'chosen' in section 60 would override whatever is contained in the nomination act, it being part of the Constitution. You should also change it there, if this is a point that you are concerned about.

CHAIRMAN—Thank you for that. I am not a lawyer, so this word 'justiciable' is a new part of my vocabulary. It interests me that there seems to be very divided concern amongst the constitutional academic community and others as to whether or not any provision of the Constitution might today, or might some time in the future, become justiciable by the High Court. My question to all of you is this: where some have said we might make specific written provision that such issues cannot be justiciable at some future time—decades, millennia or whatever—when there is a crisis and it is resolved in a certain manner or by a certain procedure, and then people still question whether that is still relevant at that point in time and whether it is a proper resolution of that conflict, why would we preclude or attempt to preclude an outside look at these procedures by trying to cut off our nose and say, 'Never, never, ever'? I would be happy to hear from all four of you on that issue.

Prof. Zines—I agree with you. All I was saying was that the explanatory memoranda or the second reading speech—I do not remember which—suggested that a number of things were not justiciable, and that the reserve powers would not be. I was saying that if that is the policy then the bill should very clearly state it. My view—and it is not shared by everybody; it is shared by Professor Winterton—is that they are justiciable to a degree. My reason is that the High Court has said very clearly that there is an object in the Constitution of representative government. If the Governor-General does not comply with the conventions, then clearly representative government and responsible government as a particular form of representative government would not come about. Therefore, it seems to me to follow that the Constitution requires the Governor-General to act on advice where the conventions require him to act on advice, and when it comes to the reserve powers, requires the Governor-General to exercise those powers for the purposes that relate to representive and responsible government.

So if, for example, the Governor-General decided not to choose the person who has the confidence of the House of Representatives as the Prime Minister, my own opinion is that that would be justiciable. Not everybody has that view, and it is not clear to me that if we had a President that would still apply, because the President, to a degree, is representative in a way that the Governor-General is not. The Governor-General, he or she, has the approval of two-thirds of the people's representatives, which provides a fairly solid democratic base for the exercise of power. I am perfectly happy in my own mind that this should be justiciable, because I think that in the example I have given you the courts should stop it. Similarly, if the Governor-General got rid of a Prime Minister because he thought the government's policies were disastrous, that would be contrary to the conventions. Not everyone would agree that it is justiciable, and I am sure Dennis Rose would not agree with that. If that is the view, then it seems to me there should be a clear statement to that effect; that is all I am saying. Certainly in those specific cases like appointing an Acting President there needs to be something, I think.

Prof. Saunders—Mr Charles, I do tend to agree with what Professor Zines has just said. I think that in certain cases you might find that the existing provisions are justiciable, whether on administrative law grounds or constitutional law grounds of the kind that he mentioned. I am sure that if you were to have a repeat performance of 1975, or anything like it, there would be an attempt to approach the court. Whether it would succeed or not would be another matter. So it follows that, if this new clause were to be inserted in the Constitution, there is the same sort of chance that it might be justiciable at the margins also—perhaps a slightly greater chance, because the clause is slightly more specific. On the other hand, that is diminished a bit by that statement in the explanatory memorandum that says, in effect, that it is not intended to alter the situation as far as justiciability is concerned.

Mr McCLELLAND—Is it a bad thing that on the margins it may be justiciable?

Prof. Saunders—I do not think so. That does not concern me. I agree with what I think the chairman's point of view was, that that may be a useful mechanism. Nor do I think that some of the other concerns about justiciability that have been put forward, such as the length of time it would take to approach a court in a time of emergency, are a problem. The court has shown that it is perfectly capable of dealing with things quickly when it needs to deal with things quickly. So, on balance, I would be inclined to leave it as it is.

Mr Rose—Chairman, I agree with my colleagues that some of these issues may be justiciable. As far as this exercise is concerned, my preference would be to leave the position as it is. To the extent that they are justiciable, they should remain so, and if they are not justiciable now, they should not become justiciable. So the explanatory memorandum's approach is, I think, the best one.

Whether it is a good thing that they are justiciable is another issue, of course. It is not a legal issue. I would be very hesitant to see the judges of the High Court getting involved in these questions as to what are the conventions of the Constitution. There was a lot of debate about them, and it is difficult to know how to establish it in a court of law. There is also the timing question and the sorts of crises where these issues arise. I do not think it is at all appropriate to be going off to court, and I am not at all confident that they can be answered as quickly as Professor Saunders's optimism suggests. I think it would be a good thing if they were not justiciable. But if they are to any extent, then just leave the position as it is.

Mr Williams—I might help you to get a split panel on this. I would agree with Dennis Rose's position. I have two reasons for saying why we should put in a provision which says the courts should not deal with these issues, but I would limit it only to the reserve powers, so it may indeed be that other issues involving administrative discretions would be justiciable.

The two reasons I have are, firstly, that I think that issues such as the dismissal of a Prime Minister or other reserve powers are best left to the political process and ultimately to the Australian people. It is not appropriate that the High Court intervene in those matters. Secondly, there is the desire to achieve a minimalist position. I think that this bill does increase—probably a bit more than slightly, as Professor Saunders suggested—the possibility that indeed these discretions are justiciable. If we want to avoid increasing that possibility as a result of this amendment, perhaps the countervailing approach would be to say that the

best position that is currently recognised is that the core reserve powers are not justiciable and that it is appropriate to fix that if we want to keep things as they are.

CHAIRMAN—To the largest extent I think we can confirm—and most responses have said this—that the bills very faithfully reflect the outcome of the Constitutional Convention, with perhaps a couple of minor question marks. One of those question marks is the failure of the bills themselves to specify the effect in the case of a dismissal of a President by a minister where that decision is reviewable by the House of Representatives within 30 days. The Constitutional Convention, as I recall, recommended that that be ipso facto a vote of no confidence in the Prime Minister. The bills and the Referendum Taskforce, however, have chosen to remain silent on that issue. We would appreciate your views.

Prof. Saunders—Can I start the batting on that. All of us who know a bit about the way the system works know that it is pretty improbable that, if a Prime Minister lost a vote in the House in those circumstances, he or she would survive.

CHAIRMAN—How could he or she?

Prof. Saunders—It would be very difficult.

CHAIRMAN—But how possible? Is there any skerrick of a theoretical possibility that you can think of?

Prof. Saunders—Not off the top of my head.

CHAIRMAN—Very good.

Senator ABETZ—Would it not be possible, though, for some independent members of the parliament to say, 'I disagree with the Prime Minister's decision on balance and therefore I vote against it; but, in fairness, I do not think it warrants the dismissal of the Prime Minister, because I think he is doing a good job on the economy, unemployment and all of the other matters that the people are genuinely concerned about'?

Mr Williams—Indeed, there was a situation like that in Queensland with the censuring of the Attorney-General by the lower house—there is only one house there—and that is obviously a situation where you might have a split between support for the government and support for the government on a particular issue.

Prof. Saunders—That is a good example. What I was actually going to say was this: as the parliament presently is and as our political practices presently are, it is a bit hard to think of an example. But, of course, if the parliament is evenly balanced, if we become a little less sensitive to the parliament rejecting government motions, then the situation may change. Having said that, I still think that there would be some value in making a statement in the bill that says it amounts to a vote of no confidence.

Mr McCLELLAND—In the Prime Minister or in the government?

Prof. Saunders—I know that the Referendum Taskforce made the point earlier on that it is a bit odd to have a motion of no confidence in the Prime Minister. I do not see why it should not be a motion of no confidence in the government in those circumstances. Maybe you do not have to spell it out; you could just say that it would be equivalent to a vote of no confidence. But I say that partly for cosmetic reasons. I think people are a bit confused about the reason the bill does not go on to pick up the recommendations of ConCon in these circumstances.

Mr Williams—One question which has been puzzling me is what happens after a vote of no confidence? Does the old Prime Minister simply go to the new President and re-form the government? Is that what would happen? It seems a somewhat strange situation where you still have the majority there. It is perhaps anomalous that you could have a vote of no confidence but, essentially, someone can re-form exactly the same government. So it would not necessarily lead to an election; it would depend again on the decision of the Acting President.

Mr McCLELLAND—But, again, it comes down to whether it is a vote of no confidence in the Prime Minister or in the government. Your concern does not arise if it is only in the Prime Minister.

Mr Williams—That is right. Maybe that is a reason. I accept Professor Saunders's point that it would make sense to put it as a vote of no confidence in the government. But I would suggest, on balance, that any vote of no confidence perhaps just be on the Prime Minister, otherwise it would lead to some anomalies in what happens afterwards.

Mr Rose—If there is to be anything about a vote of no confidence, it should be limited to the Prime Minister. My inclination would be to leave it as it is. If the House wants to move a motion of no confidence, they will do it.

Prof. Zines—I agree with Mr Rose. It seems to me that only the House of Representatives can decide whether they have no confidence in the Prime Minister. I do not think a law should say, 'This has just indicated that you have no confidence.' Let them decide what they want to do.

CHAIRMAN—The difficulty I have—and Professor Saunders and Mr Williams have indicated some minor degree of support for this issue—

Mr Williams—I would agree with my colleagues that it should not be in there at all. I was merely saying that if the committee decided it should be there—

CHAIRMAN—Okay. Professor Saunders seems to be the odd one out. I am having great difficulty with this. My question to you, then, Professor Saunders, is how on earth you codify what the hell a vote of no confidence is.

Prof. Saunders—I do not think you can go on and say, 'And the following things will occur.' I agree with that.

CHAIRMAN—If you cannot codify, shouldn't you leave it the hell alone and leave it up to the parliament?

Prof. Saunders—Perhaps. This is not a big deal as far as I am concerned. All I am saying is that this is, as you said, one of the aspects in which the bill does not pick up what ConCon said, and it is not entirely clear why that is.

CHAIRMAN—That is the reason I raised it. By the same token—I am not sure whether or not you have views; it is not part of the constitutional bill but rather part of the nominations committee bill—the Constitutional Convention recommended this great spelling out of the diversity of the Australian public that should be represented on the committee that nominates the potential President to the Prime Minister.

Ms ROXON—The great spelling out of six words—federalism, gender, age and cultural diversity.

CHAIRMAN—Regardless, Nicola, in my view it said that we should have a codification of representatives of the broader Australian community—which, by the way, has to last for a very long time. The bill itself fails to act on that recommendation of the Constitutional Convention and leaves it to precedent. Could I have your views on that issue?

Prof. Saunders—It is a question of which end of the table we start at with these matters. Again, I think the recommendations of the ConCon should have been followed in the bill to at least some degree. I do not see why the bill could not say that, in appointing these 16 members, the Prime Minister must bear in mind the diversity of the Australian community. I know that is very vague.

Mr McCLELLAND—Paragraph 20 of the explanatory memorandum states that, in appointing the community membership, prime ministers shall take into account so far as practicable considerations of federalism, gender, age and cultural diversity. Would that be an appropriate form of words?

Prof. Saunders—If you want to spell out those particular aspects of diversity then that is one way of doing it. Or you could simply talk about diversity, if you are trying to speak for all time. I think there are advantages in doing that, and for two reasons—

Mr DANBY—Sorry; advantages in sticking to the second?

Prof. Saunders—No, advantages in spelling it out in one form or another. I would be inclined just to talk about diversity more generally, but I think there are two reasons for it. One is that this was a very important aspect of the compromise struck by ConCon. If I can put on my Constitutional Centenary Foundation hat for a moment, this is something that we get put to us all the time: why is the Prime Minister allowed to choose 16 people, and how is that discretion going to be exercised?

Secondly, even though a reference to diversity would be very vague and general, I think it brings a little accountability along with it. When the appointments are made, people will be able to say, 'In my view, does this really reflect diversity?' We may well have perfect

faith that successive prime ministers will try to make those 16 people broadly representative of the community, but I think there would be great advantage in saying so in the legislation.

Prof. Zines—I agree with Cheryl. It is in the legislation, so your remark that it would stay for all time would not be true, because it is not in the Constitution. It is in the bill, so it can be changed.

CHAIRMAN—Until such time as the legislation is changed.

Prof. Zines—It can be changed, yes. But it is different; the Constitution could go on interminably. Setting out criteria would also act as a basis for sound criticism if one wanted to say, 'The Prime Minister did not act properly, because the act says such and such.'

Mr Rose—I agree with what has been said by Professor Saunders and Professor Zines.

Mr Williams—I also agree. I think it was a recommendation of the Convention. Indeed, I found it quite strange that it was only in the explanatory memorandum. If it is important, then it should also be put in the bill. I share Professors Saunders's view that perhaps a reference to diversity might be sufficient, for fear that in trying to spell it out in too much detail you end up missing someone. I think that there should at least be a reference to diversity.

CHAIRMAN—In the bill or in the explanatory memorandum?

Mr Williams—In the bill. If it is important, it should be in the bill. Nobody reads the explanatory memorandum. When you are actually dealing with, say, community education, you need to have a statement in the legislation that can be pointed to, because that is what people will read. Explanatory memorandums are often very hard to come by, and people will often not be aware of them.

CHAIRMAN—Thank you for your views.

Mr DANBY—I have three questions for the people we have here this morning. Two I am asking under the Voltaire dictum on behalf of Senator Stott Despoja, and certainly, as a member of the House of Representatives, I swallow while I ask the first. The committee has heard evidence, such as that presented by Michael Lavarch, that the Senate should not be given a role in the dismissal process. Various justifications for this view include the belief that the Prime Minister is responsible only to the House and that the Senate is less representative. What are your views?

Senator ABETZ—We are more representative.

Mr DANBY—I am not asking for senators' views; I am asking for the views of our four witnesses.

Prof. Zines—I have not had time to read Mr Lavarch's submissions, but I must say I am against what he said. The Senate and the House of Representatives come into the process of appointing the President. But, more than that, the problem between the Prime Minister and

the President can come about because of actions of the Senate—indeed, that is what happened 25 years ago. This, therefore, could exacerbate the problem. The Senate has raised these issues; the Prime Minister in order to deal with them gets rid of the President. I believe the Senate should have a part to play.

Mr DANBY—Could it make things worse by the Senate not being involved?

Prof. Zines—Yes, because the Senate could feel that it has been badly treated as a result of not being given any formal say in what the Prime Minister has done. It could be done, of course, by a joint sitting.

Senator ABETZ—Can I just follow that up. If the dismissal is not approved by the joint sitting and it were to be seen as a vote of no confidence in the Prime Minister, then you could have the majority in the Senate in effect determining the fate of the Prime Minister, who still commands a majority support in the House of Representatives.

Prof. Zines—It would not be a vote of no confidence. I agree; I do not think the Senate should be brought into any questions of no confidence.

Mr PRICE—But didn't you say it would be better if the Senate is involved in a joint sitting to approve? That is the whole point.

Prof. Zines—Either the Senate itself could be involved or it could be involved as part of a joint sitting. But, if that is the case, you cannot say that is a vote of no confidence.

Mr PRICE—What do you mean by 'if that is the case'?

Prof. Zines—If it is a joint sitting, then it seems to me you cannot and you should not say that that amounts to a vote of no confidence, because I do not think the Senate should have any part to play in that.

Mr PRICE—Absolutely. The point is—if I can just pick up an earlier point—standing orders and House practice codify what a vote of no confidence is; it is already there. If you remove the concept of the House as the sole arbiter of the approval or disapproval process, you then negate the accountability of a vote of no confidence.

Prof. Zines—I agree with that.

Mr McCLELLAND—In summary of that, if you had a joint sitting you could actually complicate the issue of the House being the master of its own destiny in terms of how it treats a Prime Minister with whom it disagrees.

Prof. Zines—No, because once the joint sitting is over you are back to the House of Representatives and they can do as they like. It is true also that, even though there is no provision for the Senate to be informed by the Prime Minister or for it to approve anything the Prime Minister has done, there is nothing to stop the Senate debating it and coming up with such resolutions and censures as it pleases. But it would not have any official status in the Constitution, that is all.

Mr McCLELLAND—Does anybody else want to make a contribution on that issue? Mr Rose, did you want to throw some light on it? I saw you winding yourself up.

Mr Rose—I was not winding myself up but turning things over. I think I disagree with Mr Lavarch's proposition that the Senate should not be involved at all. I can see some merit in having the Constitution require the Prime Minister to seek the approval of the Senate and the House of Representatives or the approval of a joint sitting. But, as Professor Zines has said, the Senate can do what it wants by way of expressing disapproval.

Mr DANBY—To go off in an opposite direction to the thrust of Senator Stott Despoja's question, is it possible that involving the Senate in such a confidence vote after the dismissal of a President by a Prime Minister could contribute to a further constitutional impasse?

Mr Rose—There would be no constitutional consequences of a refusal by the Senate to give its approval, just as there are no constitutional consequences in the present draft for a refusal by the House to give its approval.

Mr DANBY—Professor Saunders, do you have any views on that?

Prof. Saunders—Mr Rose's last point is the important one, that whatever the Senate does is not going to change anything. But to go back to what I understand Mr Lavarch to have said—that the justification for only involving the House is that the House is more responsible and more representative—as I recall the Convention's rather tortuous deliberations on this matter, their main reason for leaving the Senate out of it was that the mutual power of dismissal is an uneasy balance of power between the Prime Minister and the President, and throwing the Senate into that equation disturbs that balance of power. In that sense, having only the House of Representatives involved in the dismissal is really the consequence of following down the minimalist path and not spelling out anybody's powers and not trying to deal with difficulties that all of us here know are in the Constitution. So, if you are actually seeking a justification, I do not think it is necessarily the justification that has been put forward but simply the likelihood, given our experience, that a constitutional crisis will be precipitated by the Senate rejecting supply.

Mr DANBY—I will not labour the point, because it is in Mr Fraser's testimony that this is best laid out. There are strong grounds for fearing the effects of an impasse involving people beyond the House of Representatives. He sets it out very strongly.

I now come the second question on behalf of Senator Stott Despoja. Under what circumstances would you envisage a Prime Minister ever moving to dismiss the President without prior confirmation of support of his or her government colleagues in the House of Representatives? If you agree that this would be highly likely, what implications might this have on the effect of the requirement that dismissal be ratified within 30 days by the House as a deterrent to capricious dismissals?

Prof. Saunders—It is pretty unlikely that a Prime Minister is going to dismiss a President unless he or she is pretty confident that a positive vote will come at some later stage. I am not sure that the need to get the approval of the House is the only deterrent in this matter; there would be a deterrent involved in the flurry in the press and the need to put

the wheels in motion at some stage to get another President and so on. There would be all sorts of other factors at work, apart from the vote in the House. I think it most unlikely that a Prime Minister would lose a vote in the House of Representatives in those circumstances.

Mr PRICE—Can I take you up on that?

CHAIRMAN—It just occurred to me that up to this point in time we have never had a Prime Minister dismiss a Governor-General. But, by the same token, ipso facto, since the Australia Act we have had the Prime Minister virtually appoint the Governor-General. With the new powers, with the change to the Constitution, it is not the Prime Minister's appointment only; it is also the parliament's confirmation of that appointment.

Prof. Saunders—Absolutely.

CHAIRMAN—That then implies that the President has more power than the current Governor-General. Is that more likely to exacerbate the situation where it might some time in the future occur that a Prime Minister would feel need to take it upon himself or herself to sack the President?

Mr Williams—I think that section 59 says that the powers are exactly the same. I think this has been very carefully drafted to say that the President must act on the advice of the relevant minister, except where it is a reserve power—and there are quite commonly held beliefs about what those reserve powers are. So my view is that it has been drafted as carefully as possible to ensure that that situation is not likely to arise. Indeed, it does fairly reflect the situation as it currently is.

Prof. Zines—Can I add something there. It seems to me that what you have just said, Mr Chairman, indicates why, say, David Jackson is wrong when he says you need not put anything in. It seems to me that is why you put it in: because the President is not in the same position as the Governor-General.

Ms ROXON—Can I just follow up on that point. I would be pleased to hear what Professor Saunders has to say on this, because we have heard from the others.

Mr PRICE—I want to follow upon on a point.

Ms ROXON—It is on this same point too, Roger. We have had a number of people raise the dismissal with us. I know that our colleague Mr Causley has asked a number of witnesses about his concern that it changes the balance of power between the head of state and the Prime Minister. He had all sorts of apocryphal stories about what could happen under this new system. He seemed to be very focused about the fact that the Prime Minister currently has to have the consent of the Queen, so the delay that it will take to ring, email, fax, phone, post or whatever—

Mr PRICE—A smart chap, I think.

Ms ROXON—somehow buys a bit of time, which may mean that the whole system will be more stable. I do not share the view, but I would like some comments about whether you

think this new system that is being proposed does fundamentally change it or whether—as I think you commented briefly before—all the pressures that keep the Prime Minister and the Governor-General or the President under control are not necessarily the ones that are spelt out in the Constitution.

Prof. Saunders—If we were drafting this model free from the desire to keep everything else much as it is, then I do not think you would draft a mechanism for dismissal like the one we have here. Having said that, I do not think it alters things very dramatically. Of course, there would be some delay under the present arrangements if a Prime Minister were to move to dismiss a Governor-General. I think that the extent of that delay may be exaggerated—there are all sorts of pictures drawn of the dossier that would need to be sent off to London and the manner in which it would get there—but clearly there is going to be more delay than would be inherent in the Prime Minister handing over an instrument of dismissal.

On the other hand, I think there are other checks and balances inherent in the proposed system that do not exist under the present system. If we were to have a rerun of 1975, I do not think that a Prime Minister, with a Senate blocking supply, would sit around waiting to be dismissed by a Governor-General in whom he did not have full confidence. I think he would be more likely to move early to ensure that there was in place a Governor-General in whom he had confidence. Moreover, once the Queen does the dismissing, that adds a veneer of respectability to the action, and I think to a degree shields the Prime Minister from accountability. So I think the situation is different, but I do not necessarily think that it makes one person more powerful than the other.

Mr PRICE—About five minutes ago I think you observed that you felt that, in the approval process, a Prime Minister would almost automatically be guaranteed the numbers he had—and I apologise, I do not have your exact words—in the House. I know it is a matter of speculation, but I suspect that there would be some deviation from the strict party discipline that we experience. I suppose the other point is that that may be encouraged or facilitated by the fact that the Prime Minister might be replaced but there is still the possibility that a new leader of the majority party or parties could step into that void. That would be a most serious issue for members to have to consider—and, as for whether we will get that opportunity, only time will tell.

Prof. Zines—I agree with what Cheryl says about there being a screen to give an air of dignity and so forth and to the Queen, and the Crown being there as a facade against naked power, whereas the naked power appears quite clearly in the proposed Constitution. I think that has some effect on the status of the person. Looking at the Constitution and seeing that the President, who is supposed to be the head of state, can be dismissed instantly by the Prime Minister, some might feel that it reduces his or her position to that of a flunky, especially when it becomes easier to get rid of the President than, say, the Secretary of the Department of Defence or somebody like that.

A point I did raise last time and I want to repeat is that it is by no means clear that the High Court would not say that the dismissal procedures are subject to the usual implications one reads into grants of power under statutes. I do not think the High Court would. But I can envisage a situation where a Prime Minister might accuse the President of doing things

wrongly where he or she had not been the one to do them and having been given no opportunity to put his or her case. Therefore, this is another situation where I think there should be a reference to justiciability.

I do not agree with this new tendency that everything can be smuggled into the explanatory memorandum. The people are not going to vote on an explanatory memorandum; there is a bill. The High Court might very well say—and I feel that some judges would most certainly say—that in their view the Constitution is clear, therefore there is no point in going to the explanatory memorandum and, even if there were, that it cannot negate what they see as clearly in the document. I would deplore any tendency to rely on the explanatory memorandum.

Senator ABETZ—Does the Governor-General have the power to dismiss the Prime Minister after the Prime Minister has tendered advice to Her Majesty requesting the dismissal of the Governor-General, upon which request Her Majesty as yet has not acted?

Prof. Saunders—Presumably.

Prof. Zines—I would say yes. Indeed, the Constitution gives legal power to the Governor-General to appoint ministers. That clause is regarded as having implied in it power to dismiss or change the ministers.

Senator ABETZ—Professor Saunders?

Prof. Saunders—Yes, I would agree with that.

Mr Rose—Yes, I do too.

Mr Williams—Yes, I agree as well. Until the Governor-General is validly removed, the Governor-General can still exercise the powers.

Senator ABETZ—I had that discussion with Mr Fraser, and I thought he was wrong and I was right. You people are suggesting I might be right, so that is nice.

Ms ROXON—I want to return to the question of the justiciability of the reserve powers and whether or not it would be helpful to put in some wording, as Professor Winterton suggested. I wonder whether you would comment on another suggested type of wording for a provision to be put into the republic bill that the amendments to the Constitution made by this bill are not intended to make justiciable either the exercise of any power by the President or any matter concerning the conventions associated with that power if, immediately before the enactment of the republic bill, an exercise of the equivalent power by the Governor-General or a matter concerning the conventions associated with that power was not justiciable.

I know that is complex. But is it helpful to have a provision in there that spells that out, or is it just the same to have the sort of Winterton suggestion that ‘this paragraph shall not affect the question of whether the exercise of the reserve powers is justiciable’? Are there any comments on that?

Mr Rose—I think the longer version that was read out is not limited to reserve powers. Is that right?

Ms ROXON—That is right.

Mr Rose—So that has a much wider scope. I myself would be happier if there were a provision in it about non-justiciability of reserve powers, at least that they are to be no more justiciable than they are now. I am not sure about the consequences.

Mr McCLELLAND—Don't you have the history of cases? For instance, there was an attempt to quarantine the former Conciliation and Arbitration Commission from any review of its decisions. But the High Court said, 'Well, we'll look at whether a jurisdictional fact existed, but we won't look at how the discretion was exercised.' For instance, under section 59 the President might say, 'Look, I'm making this decision, I've acted on advice and you can all go and jump because my decision is not justiciable,' and he might have received no advice to so act at all, and that is a jurisdictional fact. In that case aren't you more likely to get a High Court in 50 years time saying, 'Look, we'll have regard to the explanatory memorandum, we're not intended to examine the exercise of discretion but we are prepared to look at a jurisdictional fact, namely, whether any advice at all was given to the President'? Aren't you better to leave it non-specified to give the High Court that discretion as to whether there was no basis for the decision making at all?

Mr Williams—I suppose in support of that, the provision that is being put forward would be more likely to allow that type of situation while also attempting to leave things as they are as much as possible, if you like; it is a bit of a middle course.

Mr McCLELLAND—But would they? If that says, 'The exercise of this power is non-justiciable' and that is put before the High Court, they would say, 'Well, on the black and white reading of this section we cannot touch this,' whereas if it is in the explanatory memorandum they would have that discretion, wouldn't they?

Prof. Saunders—For the reasons we canvassed before, I would leave it. I am not persuaded either by the need to have a statement about justiciability nor by that particular clause, which seems very sort of cumbersome and possibly likely to do, as Mr Rose said, more than you want it to do.

Ms HALL—Quite a way back we talked about the dismissal process. Section 62 does not require the Prime Minister to ever bring it back to parliament; that has recommended the 30 days, et cetera. But the Prime Minister is not obligated to bring it back to the parliament, is he? Do you think included in the legislation should be a requirement that, regardless of whether an election is called or some other matter overtakes what is happening, the House consider the dismissal of a President?

Mr Williams—My own view is that the best way to deal with this is simply to have dismissal by a motion of the Prime Minister pass through the parliament itself. I have some sympathy if we are not going to take that route. It may never come to the parliament; indeed, in any event the parliament is almost an afterthought under the process. Given that, if it has to come, several months may have elapsed over a particular time, it would seem

perhaps a little odd to then be relooking at these issues after such a long period of time. So my own view is that, if we were stuck with this—which I do not like—I would not force it to come before parliament even after such a long period of time; but, on the other hand, I would change it so that you perhaps keep with the spirit of the Convention model—that is, that the parliament is involved, but make sure that it is the motion itself which leads to dismissal.

Ms HALL—Mr Rose?

Mr Rose—One would need to change the wording in order to accommodate that. At the moment it is limited to a Prime Minister who removes a President, and after an election there may be a totally different Prime Minister. So you would need to provide that, in the matter of the removal of the President, whoever had done it should be in some way brought before the new House.

Ms ROXON—Isn't the intention that, if you had an election following the removal of a President, that election would be the accountability? I am not saying that I necessarily agree with that, but that certainly has been put to us: that the process of re-electing the same government or not would be the accountability for the dismissal of the President. With the way the bill is currently drafted, I think there is no intention for it to go back to the parliament.

Mr Rose—Precisely, I would assume, for that very reason; the election was conceived as the accountability process.

Ms HALL—Would anyone else like to comment?

Prof. Zines—I agree with that. After all, after the election you may have a new Prime Minister, and the actual Prime Minister who removed the President might not come back into parliament.

Ms HALL—This is on the dismissal process, once again. You said that you felt the current system had more checks and balances in place than the proposed Constitution would have. A follow-on from that is: do you believe that currently the Queen could refuse to follow a recommendation of the Prime Minister to sack the Governor-General?

Mr Williams—No. The Queen can advise, warn, do the normal things. But if the Prime Minister says, 'This must be done,' then it must be done. I do not think there is any doubt at all with that.

Ms HALL—So, in effect, it is just a delaying tactic; it is no change whatsoever in the procedure.

Mr Williams—Can I also say that you suggested that maybe we were losing some checks and balances. I am not sure that I agree with that. I would take Professor Saunders's point. Indeed, I am not sure that the delay itself really matters much here. In fact, I would introduce some delay under a system by forcing it to go through the lower house, but that is because I think we have made changes to the status of the position, given the appointment

by two-thirds of parliament, and I think parliament should be involved at the front end of dealing with any dismissal. But it is not because of our losing anything from the current model, the current system, as I do not think we would be.

Ms HALL—Malcolm Fraser would agree with you. Malcolm Fraser said very definitely that he felt those delays were not there at the moment, that the dismissal of a Governor-General took effect the hour of the day that the Prime Minister gave the letter to the Governor-General.

Senator ABETZ—But the Prime Minister does not give the letter to the Governor-General; it goes to the Queen.

Mr Williams—The Prime Minister could say that the dismissal must be immediate, with no correspondence to be entered into, send off the email. Indeed, the Prime Minister could instruct the Queen not to delay, and that also could not be disobeyed.

Ms HALL—That was Malcolm Fraser's point of view.

Mr Williams—So you could just remove the delay entirely, if you wanted to.

Senator ABETZ—But if she is out walking the corgis, for example, then there would be delay. Even if a Prime Minister were to request or advise Buckingham Palace that the dismissal ought be instantaneous, it would not be instantaneous until Her Majesty acted on it. If she were not immediately available to pick up the phone or whatever to ring the Governor-General for that to occur, and if the Governor-General in the meantime got wind of what was happening, my premise, as in the question I asked earlier, is that he could still, whilst holding office and before getting the call from Buckingham Palace, sack the Prime Minister and still get in.

Mr Williams—That is true, although that is a different delay than what other people would point out. They would say that there is a delay in the Queen considering the issues, perhaps thinking about them over a period of days and taking further advice. There may be some physical delay in talking to the Queen over the phone or getting the message through. But I think that is different to a delay where the Queen can delay it for her own reasons.

Senator ABETZ—Are you saying that the Queen does not have any, if you like, reserve power to warn, counsel or suggest that the Prime Minister might like to consider whether his actions are appropriate? Are you saying that she does not have that reserve power?

Prof. Zines—No, I think she does.

Prof. Saunders—She does, but I would not describe that as a reserve power.

Senator ABETZ—A discretionary power.

Prof. Zines—No, not a reserve power but discretion on the Queen. If she is told to do something instantaneously, I do not see why she cannot say, 'Why do I have to do that?' and seek information.

Senator ABETZ—And thereby occasioning some delay.

Prof. Saunders—But then we come back to the point that Professor Zines was making about justiciability under the present arrangements. If the Governor-General were to dismiss the Prime Minister solely to prevent himself being dismissed, would that be a valid exercise of the power to dismiss? It might at least give rise to argument on the matter.

Senator ABETZ—I would have thought legally, yes; but for every other reason, no.

Mr McCLELLAND—This is on a related point: I think it was Professor Craven in evidence in Perth who said that, theoretically, there is nothing stopping the Prime Minister from advising the monarch, the Queen, to give him or her an authorisation to dismiss the Governor-General in the event that the Prime Minister so determines that the Governor-General is not acting in the interests of the government of the day; in other words, to put in the Prime Minister's back pocket a pre-authorised dismissal of the Governor-General. It was Professor Craven's view that, according to convention, the Queen would have to act on the advice of her Prime Minister.

Prof. Zines—Where does Professor Craven get the provision that allows the Queen to delegate it to the Prime Minister? The Constitution gives the power to the Queen, not to somebody she might feel like delegating it to, as far as I can see.

Mr Rose—I myself would not rule it out.

Senator ABETZ—Would it be a delegation, though, if the Prime Minister were to ask for an undated letter from Her Majesty saying, 'I hereby sack'—whoever it is—'the Governor-General' and for him to have that in his top drawer ready for a rainy day? That would not be a delegation; it would still be Her Majesty's decision, would it not?

Prof. Zines—It would be the Queen acting irresponsibly.

Senator ABETZ—And she would not do that, I agree.

Mr DANBY—What about if she gave a dated letter?

Mr Rose—A series of dated letters.

CHAIRMAN—Is anyone aware of any convention whatsoever that would allow the Queen to take such a course of action?

Mr Williams—I do not think there is any convention against it either. We are in completely uncharted territory. There are arguments both ways. It is theoretically possible. But you could not say any more than that.

CHAIRMAN—We have had enough fantasy land; let's get back to real stuff.

Mr McCLELLAND—The dismissal is one controversial area, of course. But the other area of controversy is in respect of the method of appointment of the President and the

discretion given to the Prime Minister to act or not act on a recommendation of the Presidential Nominations Committee.

Are there arguments for greater transparency in that process? In particular, it has been suggested to us that, before appointing that committee the Prime Minister should be required to confer with the Leader of the Opposition at the appointment of the committee. But at the point of consideration of the committee's recommendation, should the committee's recommendation be given to the Leader of the Opposition, and should the committee's recommendation be tabled in parliament, for instance? In other words, how would the Leader of the Opposition know that the Prime Minister of the day was not pulling the wool over his or her eyes by saying that this particular person had been nominated by the committee?

Mr Williams—I am strongly in favour of developments like that. If we look at what the Convention said last year, it said that the Australian people are to be consulted as thoroughly as possible in the process of short listing and selection. My own view is that the current bill fails to do that, because you can have a system where the committee meets in confidence and that is entirely appropriate. The committee hands down a report which is available only to the Prime Minister and, indeed, the Prime Minister can end up appointing someone who is not nominated as part of that committee process. Particularly when we are dealing with an upcoming referendum campaign, if people are made aware of that they will be rightly concerned that they are not involved in this process, and ultimately the committee may have little or no function in producing a report that is not available.

My own view is that the report should be made available to the Prime Minister and the Leader of the Opposition and then 14 days later it should be tabled in parliament. The downside of that is that it may well discourage some people from participating in the process on the basis that they do not want their names to be known as part of a short list. But my own view is that that is an appropriate trade-off in order to involve the Australian people as thoroughly as possible in debating and talking about what sort of person they would like to see selected by the parliament as their President.

CHAIRMAN—But aren't you arguing in variance with the recommendation of the Constitutional Convention?

Mr Williams—No, I do not think so. The Convention itself simply said that the people be consulted as thoroughly as possible. It does not actually say anything, for example, about tabling in parliament. It does say that the deliberations of the committee should be confidential, and I would agree with that. But I do not see the Convention report saying anything about the eventual short-listing also being confidential. If we are down to three, four or five names, then I think the Australian people should be able to discuss those names and take part in that process.

Ms HALL—What you are saying is that it is not naming all the names that were considered; it is just the short list.

Mr Williams—Just the five. Presumably, you would not be nominated. You have to consent to nomination. If it gets to the point where you are going to be named publicly, then you can withdraw from the process if that is not appropriate. It may mean that High Court

judges, for example, are less likely to take part, but if we are looking at making the transition to a republic then perhaps we should also be moving towards appointing different people as President than would otherwise be appointed under the current system in any event.

CHAIRMAN—Wouldn't you say that it would be so irregular for a Prime Minister to totally disregard the advice of the Prime Minister's committee as to be almost unthinkable, except in the situation where a deadlock has developed between the government parties and the opposition parties in the House and/or the Senate?

Mr Williams—I would say that is normally true, except for the fact that we are not aware of what the committee has decided. Given that the committee is bound by its own confidentiality and given that the report is also not available to the Leader of the Opposition, as a minimum I think that must be done. At least if you give it to the Leader of the Opposition there is some level of extra accountability built in. If that is not done, how are we to know whether or not this has been followed?

CHAIRMAN—Mr Williams, if we were debating this issue 100 years ago, I might have some sympathy for your secrecy views. How on earth would you expect that such a process of 32 people could wind up in today's communications atmosphere, not only in Australia but worldwide, where the Australian people would not be aware of the fact that the Prime Minister nominated someone to the joint sitting who was not proposed by his committee?

Mr Williams—I agree with the point as a matter of practicality, but are we to rely upon leaks, which is effectively what there would be? The only way the Australian people find out is if somebody in that committee leaks the fact. It is just not satisfactory, to my mind, that we have to rely upon that rather than official reports.

CHAIRMAN—Can I point out to you that we rely on freedom of speech, association, assembly, et cetera, without any guarantee whatsoever in the Constitution?

Mr Williams—That is right. What I am interested in is setting up a process which actually involves the Australian people being consulted as thoroughly as possible. I agree with the view that perhaps this would be disseminated in any event, but I take the view that that is not good enough. We should actually be building explicitly into the process an opportunity for people to receive information about who is on the final short list so that they can actually take part through the media and through informal discussions in the community and decide who they see as the most appropriate person or the sort of person they would like to see as President. If we do not have that, we are not responding to what I see as a very strong push for, for example, direct election and the view that people should have some involvement at the end of the process other than simply being told that this is the person who is going finally to the parliament.

CHAIRMAN—Thank you for your views.

Ms ROXON—There is a view that if you for some reason wanted to maintain confidentiality you could not have a provision which says that, if the Prime Minister is not going to select someone from the list, he needs to actually go back to the committee with the

name of the person he is hoping to appoint or nominate for the committee to consider. I do not share the view that some people have that it is important to protect the identity of the people who have been nominated. If for some reason people think it is, would there be anything to stop building in a provision which says that if you are not going to select someone from the short list you have to actually go back to the committee?

Prof. Saunders—It is making it so cumbersome. I agree with you that I think we are going to have to get a little bit less precious about what is confidential and what is not in our polity; however, we have not quite got there yet. I think ConCon did intend the short list of nominations to be kept confidential because they were trying to protect the position that you would still get the sort of people acting as head of state as we get under present arrangements. I am not convinced that we will get those sorts of people even if we keep on with our present system, but I think that was what ConCon was doing. To that extent, the bill reflects that.

I was just thinking, as you were all talking, what is the way out of this? I would like a little bit more accountability for this too. I would like, at the very least, a convention to develop that the Leader of the Opposition was shown the committee's report. If there is anything in the confidentiality requirements of the bill that would prevent that happening then I think it should be taken out. I was also wondering whether there was any merit in a report from the committee being tabled in the parliament, even if it did not name names at all but just talked about the process.

Ms ROXON—Talked about the types or range of people?

Prof. Saunders—Maybe that is some sort of compromise.

Mr PRICE—How many nominations have been received—

Prof. Saunders—I think there is value in that anyway.

Mr PRICE—Yes.

Ms ROXON—I want to ask one last question—again, it is a view, Professor Saunders, because we had some comments about this at the last hearing—about the long title. Perhaps some of the other witnesses might want to add something, given the focus that many of our other witnesses have had on the long title. Do you think that it adequately represents what we are going to have the community voting on?

Prof. Saunders—No, I do not. What emerged out of the Convention was such a delicate compromise between the various views. If you are going to focus on appointment in the long title then I think the public nomination process was very important in the Convention's recommendations. So to merely portray this as the parliament doing the choosing, which overlooks the bipartisanship of the nomination process and certainly overlooks the public nomination proceeding, I think is misleading.

On the other hand, to go back to the point that George Williams made earlier, you cannot have a long title that goes on for half a page. There is a view that even this is a bit long.

Personally, I would be inclined to make it a bill for an act to alter the Constitution to establish the Commonwealth of Australia as a republic and leave it at that. I think that is honest, accurate and short.

Ms ROXON—We did have a number of witnesses who said, 'What is a republic?' If you say you are going to have a republic, do you actually need to say that the type of republic we are going to have is one where we do not have the Queen and have an Australian citizen?

Prof. Saunders—I think that is getting unnecessarily cerebral about it all. I think that most people understand the sense in which we are using the term 'republic'. But if that is the concern then it would be to establish the Commonwealth of Australia as a republic with a President instead of a Queen and a Governor-General.

Ms ROXON—Do the others have a comment on that?

Prof. Zines—No.

Mr PRICE—To pick up the bipartisan issue of the nomination, it seems to me that in a process sense it will not work unless the Leader of the Opposition is in fact informed of those nominations. The whole thing is to try to elevate the process beyond the partisan politics. But without any mention of it in the bill or in the explanatory memorandum, I think there is still, if you like, a degree of deficiency. Perhaps we should just rely on the goodwill and commonsense of a Prime Minister. I think it would be helpful, though, if it were put in.

Mr Williams—Let me add one thing. I think it is a bit bizarre that this change would give the Leader of the Opposition a constitutional duty of seconding the nomination. Given that, it seems very strange that that person will not have access to the report that has led to that seconding.

Ms ROXON—At least not officially.

Mr Williams—Not officially, but it may well develop that way. It is an easy thing to change, and I think it would say something significant in the text about the need for bipartisanship and the dual roles of those two people.

Prof. Zines—The fact that he has to second it would further the point that you are making, that in the whole process the Prime Minister needs the opposition to get it through and he needs the Leader of the Opposition to second it. The process would lead to the result that they would be consulted. The same applies, if I might go off on a little tangent, in all those remarks about the confusion the President might be in to know whether he is going to accept the advice of the Prime Minister. All of these people are part of a government. If the Minister for Social Security tried to recommend the appointment of an ambassador, obviously the Prime Minister would be very concerned.

Mr PRICE—If not the cabinet. Perhaps you might help me in understanding the powers of the President and pick up the point made by Rob McClelland. The changes that we are affecting which we refer to as being safety net provisions or enhancing the process—

nomination committee, two-thirds approval by a joint sitting and the approval of a dismissal—are changes to the current system, as we know, and I would have thought all were beneficial. Do these changes in any way impact on the power of the President?

Prof. Saunders—Because they made the President more legitimate?

Mr PRICE—The President, in a sense, has the safety net of an approval process in his dismissal, whereas none exists now. I would argue that that slightly changes the power relationship between the President and the Prime Minister, the same as a Nominations Committee slightly detracts from the power currently enjoyed by the Prime Minister in nominating a Governor-General. What is the best way to describe that? We are saying that the powers are the same as the Governor-General's. Is that an absolutely correct statement, given those changes, or can you still run with the comment that they are exactly the same rather than similar?

Prof. Zines—It is a correct statement because the bill makes it so. It would not be so, in my view, if you did not have the provisions limiting the President in relation to matters of advice and saying that the President must follow the conventions in relation to the reserve powers, because ultimately, if you did not put all of that in, whether the President is going to be bound by convention is really only up to the President. The President can use your arguments, namely, 'I am not in the same position as the Governor-General. I am appointed by two-thirds of the parliament and, therefore, the purpose of the conventions, to ensure that there would be representative government, responsible government and democracy, does not apply to me.' That is why it is necessary to tie the President down. I think that he or she has been tied down.

Mr PRICE—Are these powers then the same? Are you comfortable with that?

Mr Williams—As they currently stand, yes, they are. Section 59, the third paragraph, is quite clear in doing that. But I should also mention that of course we are dealing with an evolving sense of government and reserve powers. We can say, yes, they will be as alike as they could possibly be as a result of this provision—I could not think of a better way of wording it. But it is also true that over the course of the years to come the relationship between the different players will alter. There may be different conventions develop, but that is a good thing. Our system needs to build in a possibility for change.

Mr PRICE—To describe the changes in the bill, then, we would be better saying that the relationship is somewhat different because of these different processes that reflect—

Mr Williams—It must be true that the relationship between the Prime Minister and a representative of the Queen is similar.

Mr PRICE—But not the same.

Mr Williams—It must be somewhat different to counter the fact that we are a republic as opposed to a constitutional monarchy. Subject to that, the drafting is as good as it could possibly be.

Mr PRICE—I need to defer to my colleague in his view, then.

Prof. Zines—I would expect a President to be more outspoken in the long run. I would expect a strong-minded President who disapproved of something perhaps to be more outspoken from time to time than the Governor-General would be.

Mr Rose—It might affect his behaviour but not his powers.

Mr PRICE—Yes.

Mr McCLELLAND—On that confidentiality aspect, I note that the part 5 definition of confidentiality in the Presidential Nominations Committee Bill applies to entrusted persons. That seems to restrict them to members of the Presidential Nominations Committee and the staff. There would seem to be nothing to prevent the Prime Minister giving the Leader of the Opposition a copy of the report, or nothing preventing the Prime Minister from tabling the report.

Mr Rose—Nothing at all, in my view.

Mr McCLELLAND—Is that adequate, or should there be specific provision saying that those two things shall be done? What is your view on that?

Mr Rose—As has been said before, it would be quite unthinkable that it would not be shown to the Leader of the Opposition; the question of tabling in the House might be another matter. Perhaps that should be left to the Prime Minister's discretion, because there could be things said in the report about individuals that perhaps might best be not ventilated publicly.

Mr McCLELLAND—You think the safeguard would be that the Leader of the Opposition would not second any nomination until the report is shown.

Mr Rose—I would think it extraordinary if he did so.

Mr McCLELLAND—I have one final question in terms of the selection of the community members—this has been another issue of concern. We have touched on the diversity issue. Is it sufficient that words be added to the effect that the Prime Minister shall as far as practicable have regard to the diversity of the community in appointing the representatives? Is that sufficient to create a situation where the Prime Minister would consult with all relevant political leaders, or do you think there should be a reference to the Prime Minister consulting with the Leader of the Opposition or the leaders of major political parties? Is that necessary, do you think?

Prof. Saunders—If you want consultation with representative of other parties, you should say so. The diversity is different in that instance from consultation.

ACTING CHAIRMAN (Mr McClelland)—It would be silly to give the other political leaders a right of veto, because it could be paralysed. But if you are required at least the courtesy of consultation, that may be something to consider. Any other questions?

Ms ROXON—I just have one. Most of you were here when there was the discussion with the previous witnesses about the qualifications for office and the point of time at which you should have to be qualified and able to meet the requirements. Did you have any comments on that? I do not think anyone picked that up earlier.

Prof. Saunders—That is something that George touched on earlier. If you wanted to be absolutely sure, and it might be desirable to be absolutely sure, it would be easy enough just to put a few extra words in the proposed clause 60 to make it clear that the point when the parliament is doing the choosing, or approving, or whatever verb you want to use, is the point when the nominee must satisfy the qualifications.

Prof. Zines—I might mention that in section 20 of the nominations bill, relating to the nomination form, I would have thought in 20B you could ask whether the nominee is at present qualified to be chosen as President and, if not, what steps would be taken to obtain that qualification, or something like that, such as 'I would resign as High Court judge.'

Prof. Saunders—Or, I continue to sit in my spare time.

CHAIRMAN—For your information, we have asked the referendum task force to come back to us with a set of words which will resolve this issue.

Mr Williams—The important thing is it has just got to be done in both—that is all. It is like the current qualifications for members of parliament. You have them separate in the Electoral Act and in the Constitution and they are additional to each other—that is all—so you would need to do both.

Ms ROXON—Let me just ask one follow-up question to that because I do have a concern. The High Court judge seems to be the one that we use as the example all the time. I have some concern that if this nomination process takes a year and a High Court judge is actually one of the people that is on the list and may at that time, unknown to anybody except the Prime Minister, be determining a constitutional question which affects potentially the power of the House of Representatives to do something, or maybe making a decision on a constitutional matter that he or she has some interest in if likely to be the future President, isn't that an issue we should worry about?

Prof. Zines—But that would be the case now. Sir William Deane was no doubt spoken to by the powers that be before it was announced that he was going to be the Governor-General. Indeed, I have a feeling that he had known for some months.

Mr DANBY—Professor Zines, I have heard your comments before that in your view the new bills would enhance the power of a Prime Minister vis-a-vis a President, as compared to a Prime Minister vis-a-vis a Governor-General. The countervailing view has been put to us that because some of the procedures—such as the going back to the House within 30 days—make it more of a process, that can lead to some restraint on a Prime Minister. Would it enhance that process if, for instance, a President were able to appear before the House to put his case?

Prof. Zines—It clearly would. But you keep getting back to the problem of the President dismissing the Prime Minister. This was raised, I think, by the New South Wales Law Society or some group or other. Obviously, the more protection you gave the President, the more his or her status would be enhanced.

I was talking about the status as the way people might see the President. After all, the head of state is supposed to be above us all and representing the community and a person who is neutral and not a protagonist and all that sort of thing. If you know anyone who can be dismissed instantly, and it says so in clear language—unlike the cover of the Crown where it is not so obvious—obviously it is going to affect, I think, the way people see the person. That is just an impression, that is all.

Mr DANBY—Are there any comments from any other person about that idea?

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

Prof. Saunders—Under the bill as it presently stands I do not think there is a lot to be gained by having the President appearing before the House of Representatives. After all, on this model, the President has been gone for about 30 days by then.

Mr DANBY—And to have him come back would exacerbate constitutional conflict?

Prof. Saunders—Yes. On the other hand, if you are looking at the accountability of the Prime Minister for this, one of the points that has been made to us a great deal is that people are concerned that the Prime Minister does not even need to give reasons. It is not so much the instant dismissal; it is the absence of any requirement for a public statement of reasons. Again, operating in the real world, the likelihood that the Prime Minister might stand up and say, 'I am dismissing this person and I am not going to tell you why', is pretty limited.

Mr DANBY—Surely, if he has to come back to the House, he has to state the reasons?

Prof. Saunders—Exactly; why shouldn't there be a statement of reasons in the House?

Ms HALL—But wouldn't you say that it is more accountable than the current process where the Prime Minister is in no way accountable for his actions if he sacks the Governor-General?

Prof. Saunders—Yes. I think you can make that case, but I think you can make it more strongly if you weave in a requirement for reasons in some way.

Mr DANBY—This is a more arcane legal question, outside the strict reading of the bills, but perhaps you can advise me, because I think it might determine some people's attitudes to this. In the case of the ascension of King Charles III to the throne—

CHAIR—This is hypothetical.

Mr DANBY—and the British government and people deciding to either abolish the monarchy following some scandal or change royal houses to Plantagenet, Tudor or go back to the Stuarts, what would the situation of the Windsors or Saxe-Coburgs be with Australia? Would they still be the sovereigns?

Prof. Zines—I believe they would remain the sovereigns of Australia because any changes to British law, of course, do not apply to Australia. The argument against that—one that I am very strongly opposed to—is that covering clause 2 of the Commonwealth of Australia Constitution Act, which is apparently going to remain, says that the reference to the Queen shall extend to her heirs and successors in the sovereignty of the United Kingdom. So there is an argument that whoever is the sovereign of the United Kingdom must be the sovereign of Australia. There was a similar provision in the Canadian constitution which was taken out in 1894 in a general statute law revision act. The purpose was simply to indicate that reference to the Queen covered her heirs and successors; that it was not just to Queen Victoria. The succession to the throne, I believe, is still governed by the common law and the Act of Settlement, and the Australian parliament can alter that.

Mr Williams—But the short answer is, is it not, that we would be left with Charles III, the King of Australia?

Prof. Zines—Yes.

Mr Williams—That would be the answer. Indeed, even if Britain did become a republic we would remain a monarchy, given our current constitutional arrangements and the fact that the monarchy is an Australian monarchy, not just a British monarchy. It is quite separate.

Prof. Zines—Mr Justice Gummow recently said that, if Britain changed the succession rules for the monarchy, it would not apply to Australia.

Mr DANBY—We could not have a fight, could we, between the Stuarts who might be ruling England and the Windsors who are ruling Australia, over who was in control of Australia in the sense of your point about heirs and successors?

Prof. Zines—There could be a legal argument. The provision in covering clause 2 would no doubt be a cause of argument. I am just giving you my very firm view that Charles III would remain King of Australia.

Mr Williams—I think the more intriguing question is what would happen if Australia changed the rules of succession, for example, to remove the fact that males succeed over females. I cannot see why Australia could not do that. Indeed, we could have separate monarchs for Australia, as opposed to the United Kingdom.

Mr DANBY—So we could have Queen Anne while they had King Charles.

Mr McCLELLAND—Mr Williams, just on your point about the clash with section 44 of the Constitution, on reading section 44, I think there is some legitimacy in the point to the extent that it refers to:

Any person who:-

and then it lists qualifications—

. . . shall be incapable of being chosen . . .

The High Court has construed 'being chosen' as going all the way back to the initial point of nomination. The reference to 'chosen' has been replicated in proposed section 60, which talks about the qualifications of a person who may be chosen as President. So that does raise the possibility that the High Court may apply that authority in saying that 'chosen' goes back to the beginning of the process. Would it get around that if the wording was amended to read, for instance, 'The qualifications of a person who may be nominated as President under this section shall be as follows . . . .'—in other words, the 'nominated' under this section being the process whereby the Prime Minister submits the name of one person?

Mr Williams—I do not think you would do that, because the first paragraph of section 60 says:

. . . consider nominations for appointment as President . . .

And indeed it refers to the earlier process.

Mr McCLELLAND—I see, yes.

Mr Williams—So that might actually strengthen the result you do not want to occur. Professor Saunders suggested that the best idea is to add a couple of words to say something along the lines of, '. . . who may be chosen by parliament,' or something to actually make it clear—put 'chosen' in a context that establishes that it is at the parliamentary stage and not before.

Mr McCLELLAND—This goes to our next position about whether parliament is choosing or approving—'. . . who may be approved as President by the parliament shall be as follows.'

Prof. Saunders—Yes, or 'The qualifications of a person who may be chosen/approved as President shall be at the time of approval by the parliament as follows.' That is a bit clumsy and you would need to strip away some of the words. But I think it is easy enough to find a form of words.

CHAIRMAN—Thank you very much for coming to talk to us again. Professor Saunders, we will see you again this afternoon.

Proceedings suspended from 12.56 p.m. to 1.33 p.m.

RYAN, Dr Pamela Margaret, Managing Director, Issues Deliberation Australia Ltd

CHAIRMAN—Welcome. Dr Ryan, I understand you will be giving us a briefing on deliberative polling. My understanding is that this issue was raised during our hearing in Hobart, which unfortunately I missed, which has led to you coming to talk to us today. Do you have an opening statement you would like to make?

Dr Ryan—Yes. I would like to talk to you about deliberative polling. Issues Deliberation Australia is a non-profit organisation founded to facilitate public debate, consultation and research on social and public policy issues in Australia. On 22 October through to 24 October this year we will be bringing together a random sample of Australians to Old Parliament House to think about and deliberate on the issues associated with Australia becoming a republic. When I say 'we', I am representing a consortium of universities, which includes the Australian National University, the University of Texas, where I have spent most of the last 14 years with the Center for Australian Studies and the Center for Deliberative Polling at the University of Texas, and the Hawke Research Institute at the University of South Australia. All three of those universities will be working together to conduct 'Australia Deliberates', along with Issues Deliberation Australia.

I am not sure what you heard about deliberative polling at the last hearing in Hobart, but you are probably asking, 'What is a deliberative poll?' So far, there have been 14 of them conducted in other parts of the world, mostly in Great Britain and the US. There have been five in Great Britain on a range of topics, including Great Britain's future in Europe, the future of the British monarchy, the general election, and the future of the National Health Service. In the United States one national issues convention was conducted, which was a four- or five-day event, and there have been eight regional deliberative polls in Texas on utilities and the provision of power to Texas households.

This will be the 15th one we will conduct, and we have been working on it now for almost a year. We will bring together a random sample of Australians to Old Parliament House. Those people will have been selected by Newspoll through their normal random sampling method, which as you probably know is through random digit dialling, using the white pages telephone directory and weighted according to geographical areas. So 1,200 to 1,500 people will be telephone interviewed by Newspoll people. At the end of that interview, the people will be invited to come to Old Parliament House.

The interviews will occur about six weeks prior to 22 October, so they will be in the first two weeks in September. We will send those citizens a briefing document, which we have been working on for about two months. That document will be passed by an advisory group for Australia Deliberates, which includes people like Malcolm Fraser, Bob Hawke, Don Chipp, Natasha Stott Despoja, Ian Sinclair, Barry Jones, Kerry Jones and Malcolm Turnbull. They will oversee the briefing documents, the questions asked of people when we do the telephone interviews and the agenda for the whole weekend. So, the citizens who say they will come will receive a briefing document that is a balanced, neutral document. As I said, we have been working on this now for two months and we believe that we are almost at the point, at version 12, where we have a document that is a distillation in a neutral, balanced way of the key arguments for both sides of this debate, removing it from the emotional rhetoric of typical campaigning.

Typically, in all of the deliberative polls done so far, about 30 per cent of the initial sample come to the central place, so we hope to have at least 300 people arrive at Old Parliament House in Canberra. They will arrive at around 5 p.m. on 22 October. There will be a welcoming statement. Kim Beazley has already agreed to make some opening remarks, and we hope that Mr Howard will do the same. We will give them a short briefing that will be a distillation of what they have already heard and what they are about to do for the weekend. They will then be broken up into groups of around 15 randomly assigned people. Those groups will remain together for the rest of the weekend of deliberation. They will have dinner together and start to form bonds.

The next morning they will come back to Old Parliament House and break up into their groups again and start to debate among themselves the issues that are associated with Australia becoming a republic or remaining as it is. They will form questions in their groups, which will then be put to panels of competing experts, as well as yes and no advocates in plenary sessions. This pattern of deliberation in their groups, debate among their peers and then taking questions to a panel of experts will be repeated for the two days. The plenary sessions will be televised live by the ABC, and we are hoping to have radio coverage of that as well. On the Sunday, *60 Minutes* will tape a special session of the yes and no advocates being asked questions by the group of citizens. On the Sunday at lunchtime the citizens will be polled again, and we will be able to look at opinion changes as a result of deliberation.

What we are hoping to do with this—our main aim—is a public education exercise to bring the voice of the people, not only to people in power and in decision making roles, but to the rest of Australia. Because this is a random sample of citizens, they will voice concerns that are the concerns of the wider population. They are representative of 12 million other Australians and, as a representative sample, they will be voicing concerns that the 12 million voters also have.

Through television and media coverage, we are hoping to bring the voice of the Australian people to the wider Australian population. The *Australian* is one of the financial backers of this exercise. We will be posting the briefing document on web sites for the ABC, the *Australian*, Issues Deliberation Australia, and all of the universities who are involved. The *Australian* has also tentatively said they may include the briefing document as a lift-out in the newspapers the week prior to the deliberative poll. So it will be a massive public education exercise. As I said, the briefing document itself is a balanced document where we have distilled the arguments for and against down to five key arguments. Over the course of the weekend, we will also be ensuring that each of the plenary sessions is very balanced in terms of who is represented and the arguments that are represented.

So you can think of a deliberative poll as a poll with a human face. It has the statistical representativeness of a normal random sample survey, but it has the richness and immediacy of a focus group. So, we are not trying to influence the debate in any way. We are not trying to predict how people will vote on 6 November. We are trying to bring the voice of the people of Australia and to educate via the media, particularly television coverage. Do you have any questions?

ACTING CHAIR—Who is going to pay for all of this?

Dr Ryan—That is a good question. It is being underwritten by Issues Deliberation Australia, but we have in-kind and financial contributions from each of the universities, as well as the *Australian*, Rydges hotels and several other organisations—for example, Social Options Australia—and we are continuing to raise funds.

Senator ABETZ—Will you be selling your research or findings to certain media outlets to give them exclusives?

Dr Ryan—No. It is a public event. We do hope to publish research in academic journals at the completion.

Senator ABETZ—I appreciate that.

Mr DANBY—How will the 300 people be chosen from amongst the 2,000? Will they be self-selecting?

Dr Ryan—The initial sample of 1,200 to 1,500 people will not be self-selected. They will be asked at the end of the telephone interview if they will come. Then, if they say yes, no or maybe, we have a team of people from the University of South Australia and Social Options Australia who will follow up all of those people and do what they can to persuade the people to come. We will do our utmost to target minority groups in that process.

If your question is getting at how random and representative those 300 people are who come, in the 14 deliberative polls that have been done to date, when comparisons have been done between the 300 who turn up, the 1,200 to 1,500 who were in the initial sample, and the general population using census data, there were no significant differences on both demographic characteristics as well as opinions. So that sample of 300 is representative of the larger group, as well as the general population.

Ms HALL—Could I ask what questions you will be considering? Will they be directly related to the legislation and the question that is going to be put to the Australian people? Or is it just going to be on the general concept of a republic?

Dr Ryan—No, it is the question that will be put to the people. Our briefing document says, 'In November you will be asked to comment on this question and we will include the actual question, which will be on the ballot paper.'

Ms HALL—And the constitutional changes?

Dr Ryan—The specific constitutional changes?

Ms HALL—Yes.

Dr Ryan—Yes and no. What we have done is to work with the yes group and the no group, specifically with Malcolm Turnbull and Kerry Jones and all of their teams, on the briefing document and the agenda of what will be discussed on the weekend. Obviously, the citizens will raise questions and we hope that the yes and no advocates will address the issues of the citizens.

Ms HALL—Thank you.

CHAIRMAN—You say in the documentation:

Each deliberative poll conducted to date has gathered a highly representative sample together in a single place. Each time, there were dramatic, statistically significant changes in views. The result is a poll with a human face.

How can you expect that the process which would take place over a weekend at Old Parliament House could be replicated among the general population prior to a referendum poll?

Dr Ryan—I am not sure what your question is. We are not trying to replicate that whole process before the referendum.

CHAIRMAN—You are supposed to be telling us what is happening at the referendum.

Dr Ryan—No, we are not.

CHAIRMAN—You are not?

Dr Ryan—No, we are not trying to predict what will happen at the referendum. We are trying to facilitate public debate, public education and public consultation on the issues associated with the republic, not try to predict or change people's opinion.

Ms ROXON—It sounds like a very interesting project, and I am sure the committee would be interested in the briefing document that you said you finalised after 12 or so drafts. I think it would be helpful for us to see what it is you will be basing the sides of the argument on. I am a little bit confused—and this is with no disrespect to the project you are proposing, which sounds great for public education and for promoting the issues—as to what relevance it really has to this committee given that we are charged with making recommendations about the particular bill that is going to be put to the parliament and the particular proposal. Do you have any views, apart from what you have talked about in terms of the polling, that you would like to put to us that are relevant to the recommendations we need to make to the government as a result of this committee's hearings?

Dr Ryan—I was invited to make a presentation to this committee about the Deliberative Poll given its public education implications.

Ms ROXON—You have a view about public education. I am just a little bit confused. This is part of it. Do you have views about whether there should be other things involved that are not happening? Do you have a view about the proposal?

Dr Ryan—I think the current state of public opinion, according to research from a Newspoll conducted by the referendum task force, shows that people in Australia have very little awareness of the detail or the facts about our Constitution and even our history, as well as the detail of this upcoming referendum. Public education, in whatever form, is vital. Our particular project will probably be one of the major public education programs that will occur prior to the referendum. In that sense, it is something I believe you need to know

about. We have talked with the referendum task force and have kept them integrally up to date with what we are doing, as we have with the yes and no groups as well.

Ms ROXON—Are you able to provide that briefing document to the committee?

Dr Ryan—I have three copies here that I can give you. It is version 12. It has not gone before the wider advisory group, which I mentioned earlier. It is currently with Malcolm Turnbull and Kerry Jones for the final revision by the yes and no groups. What I will do is call both of them after I leave here and check that that would be okay with them. Then I can do that.

Ms HALL—You might like to submit a final version when everybody has agreed to it, then we could have a look at it.

Dr Ryan—I think we are very close to it.

CHAIRMAN—Dr Ryan, my colleague is enthusiastic, and that is good. Notwithstanding that enthusiasm, I have to advise you that, when we table the report, we are finished. We are no longer a committee as soon as we table the report. That is a matter of law.

Ms ROXON—Maybe you could take it subject to your proviso that it has not been signed off on.

CHAIRMAN—We not only turn into pumpkins, we do not exist once we table the report, and that will be on 9 August.

Dr Ryan—When I leave here, I will check with Kerry Jones and Malcolm Turnbull; if they okay it, then you can have it.

Mr McCLELLAND—Is it true that the people that you will have coming along will be people who want to be informed? It is very difficult to get to the people who do not want to be informed about the issues.

Dr Ryan—No. It is interesting in that, from the previous deliberative polls, you really do get a random sample of people. You will have people flying in in their private jets, while 30 per cent of the American sample in the national issues convention had never flown before. So there will be people from all walks of life, from all attitudes and opinions, and from all levels of knowledge about the republic. We cannot predict what will happen here—we do not know until 22 October who will turn up—but if 14 previous deliberations are any indication, then the people who come are no different on opinions—including the one you just mentioned—from the wider population or the larger sample.

Mr McCLELLAND—If your telephone canvassers come against someone on the phone who says, 'I couldn't be bothered with all this—I'm not interested,' they are trained to press a bit harder, are they?

Dr Ryan—And overcome obstacles. In America, we had people who would not fly without a companion because they were scared of flying, so we paid for a companion to

come. Another woman said she could not come because she had no-one to milk her cows, so we paid for her to have her cows milked for that weekend. Our 'persuaders', as we are calling them, are trained to help people overcome the obstacles that they face, so that we do have a random sample.

Mr McCLELLAND—From past experiences, have you found that the more informed people are, the more inclined they become to accept an initiative, rather than adopt a conservative stance?

Dr Ryan—Change happens both ways. In all of the polls, dramatic changes have occurred, but it is hard to predict beforehand what will happen. We do not take personality measures beforehand either, so there is no way to predict if somebody is more change-averse or change-seeking. Those data are not included in the data we collect.

Ms HALL—Are the people that you invite to attend people who do not have a firm opinion—people who are not strongly affiliated with either one side or the other? Do you try to pick people in the middle?

Dr Ryan—No. What will happen is that there will be a random sample.

Ms HALL—Totally random?

Dr Ryan—Yes. Newspoll published statistics this morning in the *Australian* about the distribution of opinion. If we did the deliberative poll today, for example, and if our sample is truly random, we will have the same distribution that Newspoll has predicted.

Ms HALL—So if Nicola's name came up, you would accept her?

Dr Ryan—Yes.

Mr McCLELLAND—I wouldn't!

Ms ROXON—I need my cows milked, too!

CHAIRMAN—I will come if you shear my sheep! Dr Ryan, thank you very much for coming along and clarifying those issues for us.

Dr Ryan—I will go and check on the briefing document.

Ms ROXON—Good luck with it. It sounds very interesting.

[1.54 p.m.]

SAUNDERS, Professor Cheryl Anne, Deputy Chair, The Constitutional Centenary Foundation

CHAIRMAN—Do you have a statement you would like make?

Prof. Saunders—For the record, the Constitutional Centenary Foundation is a body that exists to try to help the public understand constitutional issues; not just the republic, which just happens to be the most high profile one at present, but all other aspects of the Constitution. We have been in operation since 1991. The nature of this submission is partly to make a few points that arose out of the analysis that we have done of the legislation—and I think your secretary has a copy of that that she can circulate to you—and then to make a few points about public education.

I will not go over the points in our analysis that came up this morning. I think we had a fair go at those. I will mention a few other points that came out of the work that we did. Firstly—and this is perhaps a minor point—as you read the draft amendments, they often refer to the President of the Commonwealth. Certainly 'Commonwealth' is then defined to mean Commonwealth of Australia, but it is almost as if it is in contradistinction to the 'President of the States'. Just as a presentational thing, we suggested in here that the President might be referred to as the President of Australia—or, if that is regarded as too controversial in particular parts, if the full title was spelled out, the President of the Commonwealth of Australia. Of course, that person will be acting as a constitutional head solely for the Commonwealth, but in a national sense, particularly when on the international stage, the President—if the republic were to be accepted—would be representing Australia as a whole.

One other point concerns the provision dealing with the acting presidency. The bill says that the Acting Presidents will be drawn from the ranks of state governors and the most senior state governor will serve, unless the parliament otherwise provides. I do not know whether you have had many submissions on that. I assume that the main reason for having such a provision to allow the parliament to provide otherwise is in case one or more of the states were to retain their links with the Crown for a period after a republic came into effect at the Commonwealth level. In that case, maybe it would be desirable to sunset that provision so that there is some certainty about what the line of succession to the acting presidency would be.

My third point concerns the substitution of 'citizen' for 'subject of the Queen' in section 117 of the Constitution. I accept that various judges of the High Court have in recent years quite often said that 'subject of the Queen' now effectively means 'Australian citizen'. Nevertheless, I wonder whether it is justified to restrict the guarantee against discrimination to 'citizens', as opposed to just saying 'people' resident in any state may not be discriminated against in another state, and so on. Finally, we would also endorse the point that Professor Zines made this morning about retaining the covering clauses.

I wish to speak a little more generally on the public education and related fronts. I have three basic points to make to you there. The first is to make the point which I am sure you

are aware of, that there is tremendous confusion in the community, not only about the proposed changes to the Constitution, but about the model that we presently have. That is partly because of the way in which we have achieved independence and the way in which we have moved from colony to independent nation. This was a long time ago, but all done in a very quiet fashion.

This is the first time that the people have actually become engaged in it. One of the consequences is that people have very different views about the extent to which we are independent and what our status is. Just looking quickly through some of the submissions that have been made to you, I notice that that is coming out in a number of them as well. In particular, there is one strand of thought that says that, if Australia has become independent and if the Constitution was enacted by the British parliament, then the Constitution is invalid and a whole lot of things flow from that. I mention that because I know it sounds extremely unusual from our point of view because we know the system, but there are a surprising number of people out there who could easily be misled along those lines.

The point of emphasising this to you at this stage is not really to tell you how to suck eggs, because I am sure you are aware of this as well, but to emphasise how important your own report can be in sorting out some of these matters in people's heads. If you go back to one of the things we discussed this morning, the question of whether the Constitution should talk about a vote of no-confidence in the event that the Prime Minister dismisses the President and what are the consequences of a vote of no-confidence, in effect, the panel this morning said, 'Well, you do not want to put all of that in the Constitution.' But I think your report could do a great deal to help people understand what the consequences of that sort of action might be and, if in the future we have a High Court that believes in original intent, well, your report will be very much part of the original intent that provides the basis for interpreting those new constitutional provisions.

CHAIRMAN—Would be?

Prof. Saunders—Yes, sure.

CHAIRMAN—Thank you for that.

Prof. Saunders—This is on the assumption that they were passed. My second general point is: whatever the result of the referendum in November, I would encourage this committee to reflect on the experience, the process, that we have gone through and I would encourage another process after it is all over to evaluate the experience. As an outsider looking at it, there have been a number of defects in the process from which we should learn if and when there is another attempt at constitutional change. I think those defects affect both the capacity of the public to understand and make their own decisions on the issue and the quality of the proposal.

In particular, if I can just summarise, I do not think the timetable as it is now set out gives enough time for the public to properly understand the issues that are going to be put before them. The Constitution allows us a lead time of between two and six months after a referendum passes the parliament. We will be taking the shorter end of that lead time, and we do that generally with referendums to change the Constitution, whereas all of our

experience suggests that people like longer to mull over it once they know what the final proposal is.

In a sense, we did the same thing with the Constitutional Convention. The Constitutional Convention was a great success; there is no doubt about that. But the rush between the passage of the enabling legislation and the election of delegates was such that a lot of people did not fully appreciate what they were doing, what they were voting for or what the issues were. That has been our feedback on a number of occasions.

We have said elsewhere that, if you were to focus on the convention's own procedures, perhaps with hindsight there was not enough time for the convention to fully develop a proposal to test public reaction to it and then to finetune it, and that is something that I think is still bugging your committee here. If we were to do it again and if we were to have another convention, it would be good to have a debate early in the piece about what the respective roles of the parliament and the convention were.

Listening to your committee speaking around the table this morning, you are taking the recommendations of the convention as a given, and I suspect that that is perfectly proper, given the assumptions that have been made. But, given the parliament's constitutional role in putting proposals to referendum, is that the way in which the parliament should be behaving, or should it be saying, 'No, blow the convention, if we have identified faults in what they have done, we will put the best possible model that we can to the people'? So, again, I think it is too late to do that on this occasion but, what I am trying to say to you is that I think there should be some reflective process, and I think that your committee's report could do a great deal to encourage that.

I would make one final point, which really follows on from that to a degree, on the future of constitutional change in this country. There are very different views within political circles and within the community at large about the extent to which the essentials of the present Constitution provide an adequate framework for government. Some people want significant change; some people say, 'This is basically all right.' We all know that. But for almost everybody there are some doubts as to whether this Constitution, in its exact form, will continue to serve us for a significant period into the next century, partly because of the number of provisions that are now outmoded and expended, partly because of the absence of references to basic constitutional concepts such as citizenship—and I think it is appropriate to make that point in the year of the 50th anniversary of Australian citizenship—and partly because of the absence of any reference to the machinery of government—the cabinet and so on.

It seems to me that another process of some kind will be necessary at some stage. Again, if your committee were to accept that, then there would be additional value in your reflecting on what that process might be in a way that would make it as inclusive as possible of the Australian community.

CHAIRMAN—Thank you very much. As you know, I am not a lawyer; I am an engineer and had actually no idea that our report might at some future time have any influence whatsoever on the justiciability of the provisions of these bills—or in fact considerations that we had. My colleague Robert McClelland assures me that he did

understand that and I assure you now that the committee will take that into account. I was interested in your observations of that time with respect to the Constitutional Convention and then the fact that we appear to be testing whether or not the bills themselves reflect the outcome of the convention.

Having been part of the process of establishing that convention all the way back in shadow cabinet days when it was first raised, when we were in opposition, there was a very lengthy—I will not describe it here; I might write that in my memoirs some day.

Prof. Saunders—I hope you do.

CHAIRMAN—In fact, I have much of it written down because I was secretary to shadow cabinet at the time. It was a very lengthy and deliberative process that we went through before the commitment was made. Once the commitment was made, it was a further extensive and deliberative process to come to the definition of what would be the Constitutional Convention—who would attend, how they would be selected and who they might represent. The current Prime Minister, in the 1996 election campaign, made a very definite commitment that, if the convention had an outcome, that outcome would be reflected in legislation which would go to the people in terms of a referendum.

There were great pressures on him from all sides to depart from that commitment and to depart from that model, everything from indicative plebiscites to you name it, just straight to a referendum with no nothing. My own view—not as a participant, but as an observer—was that we got exactly what that long process set out to achieve, starting in 1994. It followed very faithfully and did exactly what it had set out to achieve.

The participants in that convention and their representative nature—many people have commented on the fact that they more adequately represent the diversity of the Australian population than does our federal parliament—are beyond contest. It did not happen by accident. It was by design and it was very successful.

You say it was fast. You can let these things hang around forever. If you had had three weeks, you would have taken three weeks to achieve an outcome. If you had had four, you would have taken four weeks to achieve an outcome. I suspect you got to an outcome, and that issue is the all consuming issue.

You talked about future constitutional conventions. That is something that my colleagues might like to consider in terms of any recommendations that we might make or even conclusions we might reach about whether or not it would be desirable to continue such a process in the future and what it might look like. It is a very expensive process, as you well know. It is fraught with controversy and one needs to establish an agenda. One of the reasons your convention was successful was that there was a defined agenda.

Prof. Saunders—Yes.

CHAIRMAN—And attempts to move far out and away from that agenda to bring in other huge constitutional issues failed on the floor of the convention, as they should have. Otherwise, there would never be a result in November.

Prof. Saunders—I agree absolutely that conventions need to be carefully planned and structured or they just whittle away into the sand. On your point about time: I also agree that if all you do is extend the time out to three, four or six weeks, then people will just take that time. But with hindsight and also looking at our own history in the 1890s, I think that two sessions of the convention, with time to reflect in between, might have been very valuable and might have rubbed some of the bugs out of the model.

CHAIRMAN—Fair enough. On the last issue, that is, as a committee and as individuals on the committee, to determine that this legislation does reflect the outcome of the Constitutional Convention is basically, as far as I am concerned, very simple. The Prime Minister said that that was what was going to happen. Therefore, it must be our job to make sure that that is what happened because he meant what he said. Nobody on any side of politics would say he did not mean what he said because he did exactly what he said he was going to do. He said he would put the outcome of the convention. That has been attempted to be reflected by the Referendum Taskforce, the Attorney-General's Department and these bills. You have heard us question in detail where we believe the bill departs in minor or major ways from the outcome of the convention. I have no doubt whatsoever that we will deal with that in our report.

Mr McCLELLAND—Professor Saunders, the Constitutional Centenary Foundation recently had its own convention in Queensland looking at the transition on the part of the states, should we become a republic in November. Were there any problems identified with respect to the concept of an Acting President, where the next senior state governor steps into that role? Would it be a problem, for instance, if they were a state governor that was still a monarchy or if the state governor was otherwise not qualified, for instance, not an Australian citizen?

Prof. Saunders—I am trying to remember exactly what the communique said on that point. We could certainly provide a copy of it to the committee. This was a convention that we ran in Gladstone in Queensland with the Queensland government, similar to others that we have run around the country. My recollection is that that convention thought that a governor who in fact still represented the Queen or the monarch in the state ought not to be an Acting President and, therefore, ought to be taken out of the line of succession by the parliament's power under the amendments.

There was also a view in that convention that the Acting President should have the same qualifications as the President. This probably is not on the public record in Gladstone, but talking to some of the state officers at the Gladstone convention, they had a view that they would be trying to line up the qualifications for state governor with those four, so as to ensure that there was not any disjunction. If one of the disqualifications is having an office of profit in a state and if the position of governor is such an office of profit, then that would be a problem.

Mr McCLELLAND—Yes.

Prof. Saunders—I noted that that was something that was raised in your issues this morning and should probably be addressed when that part of the bill is being looked at.

Mr McCLELLAND—Yes. Prime Minister and Cabinet said one of the reasons they were not imposing the same qualifications was for that reason.

Prof. Saunders—On the Gladstone convention, one other thing that might interest the committee—and I was a bit surprised myself—is that the estimates are that, if the republic referendum were to be approved in November, each of the states would then need to go through their own decision making process and four state referendums would probably be necessary. I think four: certainly two, and probably four is the estimate. It comes as a great surprise to people when you tell them that 2000 would be full of state referendums as well. But the general feeling in Gladstone at least, even from people who tended to support the monarchy rather than the republic was, 'Look, if it gets up in November, then the state should just follow suit.' I detected very little interest in any quarter in a state holding out in those circumstances.

Ms ROXON—I have got two questions. One is historical. I am not sure whether you will know the answer. I probably should. Has there ever been a referendum that has been put to the people of Australia that has not actually been actively supported by a government? That is my first question. My second one is—because I am generally aware of the work that the foundation does—have you done any research or focus group work on what issues it is that people do currently understand about the republic debate that we are having that might perhaps inform us in the decisions that we need to make about what are key elements to go into the long title?

Prof. Saunders—I am not sure whether I can help with that.

Ms ROXON—It may not help with that. That is, I guess, where my question is coming from, but I am interested to know what sort of research or work you might have done in that area generally, anyway.

Prof. Saunders—On the active support, I am sure that I am right in saying that certainly every successful referendum in the past has had government support. That is sometimes a mixed blessing, I might say, because the fact that a proposal is actively supported by the government very often means that it is actively opposed by the opposition, so before it hits the hustings, you have already got a political battle that may actually not have much to do with the merits of the proposal. I do not know where it takes us, but I think the straight answer to your question is that, because it is effectively impossible to get anything to referendum in this country unless it is supported by the House of Representatives, it automatically follows that the government will be supporting it in most circumstances.

As far as the information material is concerned, there is a very interesting problem in providing public information material in this referendum, which we have actually worked out through trial and error ourselves, and that is that there is a tension between actually helping people to understand the issues and presenting them in the way that will make both the ARM and the ACM feel that they have had a fair go. In order to make them happy, you have to raise a whole lot of issues which are often total hares on the track and which just confuse people. I think that is a real problem, which, again, for the future, needs to be thought about more carefully because my own view is that it is the people who are more important.

Ms ROXON—Would you like to take some time telling us what you think those different issues are?

Prof. Saunders—Sorry?

Ms ROXON—Would you like to tell us, from the work you have done, what some of those issues actually are?

Prof. Saunders—Some of the issues we—

Ms ROXON—The ones that you think are the distractions or the ones that you think people actually understand or are interested in.

Prof. Saunders—Take the debate about head of state, whether the Queen is or is not the head of state, because the whole thing has been cast in those terms, because the ARM began it by talking about the head of state, many monarchists deny that the Queen is the head of state. So you find yourself playing with this notion of the head of state, whereas you would actually rather not be using the terms at all. That is one example, and there are plenty of others around.

Mr McCLELLAND—I suppose another one is whether or not the President would exercise the same powers as the Governor-General.

Prof. Saunders—That can be. Another one, which is a much more minor one, is the question of whether Australia will remain a member of the Commonwealth. We all know that in the real world the answer to that question is yes, but the fact of the matter—and the ACM says quite rightly, from their point of view—is that Australia may need to reapply and therefore you can't say absolutely that the answer is yes. So then you have to write a small book about the history of the Commonwealth if you are to cover that in any way that makes the two protagonists feel that they have had a fair go, whereas for the people that is probably not all that necessary.

We have prepared some basic material trying to explain the issues to people and we have trialled them both with a group of young people to get their reaction to them and with a group of people from non-English speaking backgrounds who therefore may not be as familiar with our own history as some others. We have learnt a lot about the way in which to present these things as a result of those discussions. What we are presently playing with, what we have been told on each occasion, is that it is very important to have some opening statements that make people think that this is worth them pursuing it, that make them think that this is an important issue whichever way they choose to go, that it is worth them spending some time finding out about it and voting responsibly—whatever the thing is that you are trying to make them do.

The challenge for us is to work out what those opening dot points might be that are neutral but still make people feel that this is an important exercise. One way of doing that is to say: 'Your vote matters. It doesn't matter what your vote is, but it actually matters to this exercise, because that's the nature of a referendum.'

The other thing that we have been told is very useful is to be able to compare key aspects of the system you have now with the system which would be in place if the referendum were to be approved and to do that in a quite simple chart type form, lining the bits up. Another thing we have been told is to have a focus—and this is no help at all for the long title—on the people themselves: 'You are the voter. What can you expect to happen between now and 6 November? You will get the following information and these are the groups that it is coming from and you do have to vote and you will turn up to the booth', and so on. These are the things that people are confused about because of the voting for the convention.

Mr McCLELLAND—Professor Saunders, have you done such a chart?

Prof. Saunders—We have, yes.

Mr McCLELLAND—And is it released?

Prof. Saunders—Not yet. Every time we go and trial it with another group we throw it in the air and watch the bits come down. But we could certainly give you a copy of it if you would like that.

Mr McCLELLAND—I think that would be useful.

Mr DANBY—I have a couple of questions. We had testimony in Queensland from an advocate, Mr Pike, who favoured direct elections—he didn't advance any empirical evidence for this, and I don't suppose that you have as a response—who said that he was hoping for the defeat of this referendum because he was convinced that it would make further constitutional change more likely. Do you have any view on that?

Mr PRICE—A greater degree of change.

Ms ROXON—I didn't even understand that. If it was defeated it would make further constitutional reform more likely?

Prof. Saunders—I personally disagree with that, but I think you can argue the case either way very convincingly. One of the reasons why I disagree with that is that even before this current referendum round began, when the foundation was in its very early years, just talking to people on either side of politics about the Constitution or constitutional change, they said: 'No, referendums always fail. We always end up with egg on our faces. Anyway, you can do most things that you want to do under the Constitution now if you are the Commonwealth. Why would we bother?' I think that while there might still be quite a lot of interest in the community in aspects of the Constitution, I doubt that it will be very lively in political circles. I don't think that the passion in the community will be such that it will force it into political circles.

Mr DANBY—Could I ask you something the converse of that? I notice there is a theme through what was said by Malcolm Fraser and Sir Zelman Cowen, and in an article written by the associate editor of the Melbourne *Herald Sun*, Andrew Bolt, which is the argument that if this resolution is not passed we are more likely to end up with direct elections

because that is something that is more popular according to the opinion polls and, therefore, they argue, we should vote this one in because we will get something that they regard as constitutionally worse if we do not.

Prof. Saunders—Yes, I have seen that argument and, again, that is a respectable point of view. I might say that, for all the events that the foundation has run, and we have run local constitutional conventions, conventions with schools and various other forms of active discussion of the Constitution, we have had very few, if any, forums that, at the end of the day, have come out with a wish for a directly elected President, and that has surprised me. What we have had—and this was even before ConCon came up with its recommendations—is community groups saying, 'Let us have the parliament choosing it, but let us have a public nomination process at the beginning.' I thought it was just extraordinary when ConCon came up with that because that had been something that different communities had come up with in their own right, which is quite interesting. I have absolutely no idea whether, if this were to fail, the next model would be direct election. Of course, we would not be able to move down the direct election path until we are prepared to bite the bullet and say what we think the President of Australia, or the head of state of Australia, ought to do. So far we have baulked at dealing with that.

CHAIRMAN—Given your very long experience of involvement in constitutional law and the potential for constitutional change, would you ever advocate the abolition of section 128, removing the one Swiss contribution to our very unique Constitution, in order to better facilitate constitutional reform?

Prof. Saunders—No, I would not. I think section 128 is and should be a source of pride. I suspect that we will be seeing more rather than less use of the referendum in countries around the world in the next century. We already see its growing use for major decisions by communities of all kinds. I think the challenge to us is to make it work. There is a sense in which we still bring too many of our habits of parliamentary government to the referendum process. I think that that is a big challenge for all of us.

Mr PRICE—Is there anything else?

Prof. Saunders—We do not do enough to help people understand the issues. With the parliamentary process, generally speaking, it is not necessary to get people to the point where they can make these decisions themselves. With the referendum, of course, it is important. The other parallel is that it is taken very personally by a government when a referendum fails. If they have been the sponsor and the referendum fails—nothing ever fails in the parliament so why should the referendum fail? Again, I think we need to accept, as a community, that that will happen, and that is not necessarily a bad thing.

Mr PRICE—Would you agree that, in terms of making it work, we probably need to have more frequent referendums—that is, to get the Australian public used to the idea that they have a say in modernising our Constitution, government or whatever?

Prof. Saunders—Perhaps so, but that is, of course, an expensive exercise unless you are prepared to do it at the time of the election, and you cannot do it at the time of the election unless you can break it free from the party political battle. If you can do that then that would

be a good thing. Equally, I do not think you should have frequent referendums just for the sake of getting the people used to it. I think that one message from our referendum record is that people are capable of focusing on whether referendums are significant or not. If you give them things that are not significant they wonder what is going on.

Mr PRICE—I guess my question was prompted by the fact that I think that governments are frightened of referendums because they are such a chancy thing.

Prof. Saunders—Yes.

CHAIRMAN—Thank you, once again.

CHAIRMAN—The committee authorises the following documents for publication: *1999 Referendum Draft Bills* from the Constitutional Centenary Foundation; *Australia deliberates: a republic, yes or no?* from Issues Deliberation Australia; a confidential exhibit, again from Issues Deliberation Australia; and a submission from Malcolm Mackerras. There being no objection, it is so ordered.

[2.36 p.m.]

McGARVIE, Hon. Richard Elgin (Private capacity)

CHAIRMAN—I welcome the Hon. Richard McGarvie, former judge of the Supreme Court of Victoria and former governor of Victoria.

Mr McGarvie—Thank you, Mr Chairman and members, for the opportunity of making submissions to you. My task is a formidable one. I set out first to put it to you that, when the Republic Advisory Committee said it was not a viable option to make no statement about conventions upon a change to a republic—that was wrong. I set out to persuade you that a very distinguished Australian, distinguished at the world level and within Australia—Dr Evatt—was wrong in the view he put about the reserve authority in his well-known book *The King and His Dominion Governors* in 1936. I put it to you that this is primarily a matter which is not a matter of law. Although I have spent most of my life in the law, the issues that are the important issues are issues which come from an understanding of the system and issues which depend on a knowledge of human behaviour and of organisations for which those on the committee, whether they be lawyers or not, are very well qualified from their political experience.

First, I put it that proposed section 59, taken in association with item 8 in the schedule, would bring in the High Court to an area in which it is highly undesirable that it enter. Being a great admirer of the law, lawyers, courts and tribunals, life has taught me that the regulation of the constitutional and political process is not a place for it—it would make a great change. At present, the courts recognise that there are conventions—just as the courts recognise that the sun rises in the east—but the courts have no part in the enforcement or the declaration of conventions. Section 59 in its present form carries, in my view, a very high probability of bringing the High Court in to declare and enforce the conventions that would be referred to. That would be bad for all concerned. It would be bad for the court.

I speak drawing on my 16 years as a judge. The greatest asset judges have in a democracy is the fact that they are trusted and regarded as impartial. To bring the courts into the highly controversial area of the exercise of reserve powers would inevitably mean—human beings being human beings—that the side against which the court decides would regard the court as having been politically biased against them. The courts would thus lose their greatest asset. It would be highly undesirable from the viewpoint of the other essential organs of government. It would bring with it an enormous shift of constitutional influence away from the head of state and the government to the High Court.

I have referred to the disadvantage to the court, but it would be also highly disadvantageous to the constitutional and political process because courts, of their nature, must be slow and deliberate to be fair. It would hold up the constitutional process. It would also move away from the flexible discretion to which I will be making a reference in a moment. The decisions of the courts would construct a rigid, inflexible code which would have all the disadvantages of the supposed codification of the reserve powers. For those reasons, it would be highly undesirable that a provision such as this be used.

No provision at all is necessary. I particularly ask members to take their political and constitutional experience into account and totally disregard anything they may have read about the law on this or, if they are lawyers, their knowledge of the law. Under our system, constitutional conventions are not laws; they are part of the constitutional system. We have the Constitution which is made of law: the laws in the Constitution, the Australia Act and other statutes. There is then an operating organisational system, known as the constitutional system, which is based on the Constitution but which is not part of the Constitution strictly so-called. The most important parts of that constitutional system are the constitutional conventions in Australia.

Nothing is more important to emphasise than that this must be looked at through Australian eyes. Looking at it through the eyes of English textbook writers immediately misleads because they are writing of a very different system. In Australia, a constitutional convention is an obligation which binds office holders in the exercise of their legal powers because they recognise the clear necessity of following that obligation in the interests of a representative democracy and because—and this is very important—it is backed by an effective penalty for breach. That penalty for breach is a penalty which is imposed by the system, not by the courts. It has nothing to do with the courts.

On a change to a republic, the important thing is to ensure that the system under the republic would operate in a way that would continue to mould those conventions. The conventions would still be recognised as clearly necessary for the achievement of representative democracy, they would equally be backed by practical penalties for breach. It is for that reason that I put it to the committee that a provision such as proposed section 59 and item (8) in the schedule would make a very great and undesirable change to our system.

The other thing I put very seriously: I am, as I foreshadowed, suggesting that a view which has been held since Dr Evatt wrote his book in 1936, and one which has a strong school of supporters, particularly amongst lawyers, treats conventions as though they are law, or akin to law, and as though they are to be looked at, constructed and enforced in the same way that the common law is built up and enforced. The underlying fallacy of Dr Evatt's approach is that he said we should look at precedent and at what has been done by kings, governors-general and governors and at rulings given by British colonial secretaries. In the first stage, from that we should work out the principles from analogous precedents. In the second stage we should have courts or tribunals enforcing them. In the third stage we should codify in black-letter law.

As those of you who are lawyers are well aware, the fallacy that underlines that is that decisions on the exercise of a discretion do not in the common law amount to precedents which lay down principles. That is because every discretion is exercised in a unique set of circumstances which has never been exactly the same before. They are guidelines; they are useful things to look at to see what people did in similar situations, but they are not principles. Because Dr Evatt was a very persuasive and eminent man and these ideas came from him, they have been virtually unchallenged and precedent is regarded as very important. I suggest to you that precedent is best disregarded. It is one of those words we would be better without in this area.

For that reason I want to put to you quite briefly: what is the reserve authority? I adopt Dr Evatt's term which he often used of 'reserve authority' rather than 'reserve powers'. It is a nonsense to talk about a reserve power to exercise a reserve power, so I talk about—as Evatt on occasions did—a reserve authority to exercise a reserve power, which is normally restrained by the basic constitutional convention of acting on ministerial advice.

In exceptional circumstances, where it is absolutely necessary to ensure the operation of the constitutional system and its essential safeguards, there is an authority and a responsibility on the head of state, such as the Governor-General, to use four powers—to appoint or dismiss a Prime Minister or dissolve or refuse to dissolve parliament—in a way that will transfer the decision either to parliament or to electorate; and to do that only if it is absolutely necessary in order to ensure the continued operation of the constitutional system and its essential safeguards of democracy. It is for those reasons that I am glad to be able to put this to the committee. I will do my best to answer any questions the committee might desire to raise with me.

CHAIRMAN—Thank you very much, Mr McGarvie. I am interested in the extent to which you believe the reserve powers today might or might not be justiciable. In asking that, I remind you that what some people would call a somewhat adventuresome High Court in the fairly recent past ventured into an area untouched by our Constitution—that is, an issue of rights, specifically, the right of the freedom of speech.

I wonder how the court's evolving processes in examining non-constitutionally specific issues relate to this issue of reserve powers currently assumed to be exercisable by the Governor-General under authority from the Queen versus what is proposed in these bills.

Mr McGarvie—There will continue to be pressures on the High Court to expand its area of operation. That comes largely from the modern structure of professional law schools. Professional law schools, like the rest of us, like to have their influence, and the main influence of law schools is upon appellate courts. Appellate courts, from my experience, tend to look to law schools and to look to other appellate courts around the world. I am not denying that there will be that pressure. There has been a lot of pressure. There is an idea abroad, which I am convinced partly came from Dr Evatt's philosophy, that human rights and liberties and the sorts of things we value in a democracy exist only if you can go to a court and get a judgment on it—something that I entirely disagree with.

CHAIRMAN—You agree or disagree?

Mr McGarvie—I disagree with that. I am a great admirer of the constitutional system—the way it works—and I am very strongly against the courts being brought into the political process, both from my understanding of the way the system works and from the way the system has given us what I regard as the best democracy the world has produced. Also, from the viewpoint of a former judge, it is very bad for the courts. In fact, I might tell a little story, Mr Chairman, about that.

When I was a judge of the Supreme Court, nothing pleased me more than when a friend of mine went to the Supreme Court as a party, as a juror or in some other capacity, and I would say, 'Who was the judge?' They never knew. I thought that was the highest

compliment the community could pay to our court. They do not think it matters whether you get judge A or judge B, which is a very good indicator, and I am sure that the same is applicable with Australian courts generally.

As to the risk of this becoming justiciable if things remain as they are, I do not think there is much risk. It has often been observed that the only arm of government whose powers are limited by its ethics is the judicial arm, because the highest levels of the judiciary decide the limit of their power. I think it would be such an obvious departure from constitutional principle that I do not think there is any risk of it. People who get to the High Court inevitably know a fair bit about the way our system works, and I do not think that it would stand up to the criticism it would get, particularly from the practising legal profession, who would understand. When you are a judge, the main thing that keeps you on the straight and narrow is that everything you do is done out in the open. You are sitting up there and everyone sees what you do. Because the legal profession is the most gossipy profession in the country, you know that, if you fall short of your standards, it will be all over Melbourne by sunset and all over Victoria by sunrise—that is speaking from a state point of view.

This would be an enormous change. The committee might think the Canadian Supreme Court have taken to declaring conventions with alacrity, but there is a very different jurisdiction there. They do that as a result of a reference jurisdiction in which their courts can give an opinion judgment on any question of law or fact. I think it would bring about a real collision between the parliamentary and the governmental branch and the High Court. I do not think in Australia it is a real risk. I say that because I have great faith in the Australian judiciary, and that is obviously the only answer that is open, short of judicial legislation.

CHAIRMAN—Thank you for that. If I could completely change tack and ask about something you did not put in your submission: as the author of the so-called McGarvie model, which was not successful at the Constitutional Convention, do you support the legislation which is in front of this committee?

Mr McGarvie—No, certainly not. I am very strongly against it without being against a republic. I think I am the only one in Australia who has consistently taken that view in that I have not said a word in favour of the republicans or a word in favour of the monarchists as to whether we change. I side totally with democracy and regard federation as an essential part of democracy. For that reason, I am, very sadly, basically opposed to the model that is going to the referendum in November.

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

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

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

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

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

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

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

any imagined mandate to represent the people and stand against the government—and lack of friction is quite essential to our system of government.

Let us look at the mandate that the model that is going to referendum will give. Firstly, the person who gets up will, more often than not, have been nominated by a very powerful community group—a peak council of an occupational organisation, a geographical organisation or a community ethnic organisation. That nomination will get the numbers on the short list committee and then, of course, it will have to go to the parties on both sides of parliament. How do you get a two-thirds majority of both houses when no government has had a two-thirds majority of both houses for 50 years?

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

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

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

Ms HALL—Is that how the Prime Minister chooses the Governor-General? We would not know, would we?

Mr McGarvie—The answer to that is no.

Ms HALL—How would you know?

CHAIRMAN—Let him finish, then you can ask.

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

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

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

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

We have had eight referendums. In seven of those, the states were unanimous. In the referendum on state debts in 1910, New South Wales dissented. But dissenting on the

Commonwealth taking over state debts is very different from dissenting and finding yourself hoist into a Commonwealth republic which you do not trust with your democracy and then finding yourself forced to change to a republic because it is quite impractical for a state to remain a monarchy. A Dead Sea fruit is being suggested—that the states could remain monarchies. If one reads the report—as no doubt members have—of the South Australian Constitutional Advisory Council, one sees that they recognise that.

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

ACTING CHAIR (Mr McClelland)—You mentioned in your answer just then that the Governor-General has enormous powers that can be exercised 'at will'—I think that was your wording. What is it that prevents the Governor-General from acting at will? Isn't it the convention that has been built up that the Governor-General acts on advice?

Mr McGarvie—Thank you for that question. The thing that gives us our democracy is not something in the black text of the Constitution. That is why I have asked you to keep away from the law. The Constitution is important, but that is not what gives us our democracy.

ACTING CHAIR—It is the conventions that are built up around our system.

Mr McGarvie—The conventions are absolutely binding.

ACTING CHAIR—Yes.

Mr McGarvie—They are binding because, in the first place—and I speak here as one who was bound for five years as a governor—

ACTING CHAIR—Isn't it desirable that the Constitution, insofar as it is possible, reflects that actuality and the fact that the head of state acts on the advice of the parliament? Isn't our system of democracy that you have spoken of based on a system of responsible government because the executive of the day acts on the advice of the government of the day?

Mr McGarvie—The only one of your statements that I disagree with is the premise that it ought to be put in the black text of the Constitution for that reason. What makes it binding is something much more effective and flexible. Every Governor-General knows that if the Governor-General did not act as advised by ministers the Governor-General would promptly be dismissed with total loss of reputation. That is why there has been no departure for a century, Commonwealth or state.

Mr McCLELLAND—But would you accept that a constitution has to make provision for remote, dangerous possibilities? What about a situation where the head of state lost their mind, dismissed the Prime Minister and sought to exercise their powers as commander-in-chief of the military? Surely, it is appropriate that you put in a black and white document that those powers should be exercised only on advice.

Mr McGarvie—As you will have seen from what I said at the Constitutional Convention, I do, and my model does, support a provision being put in which is the equivalent of the provision that applies to the exercise of powers of the Governor-General in Council. For most of the things—

Mr McCLELLAND—Yes, but with respect—

Mr McGarvie—Can you just hear me through?

Mr McCLELLAND—Yes, but you are going to deprive other members of asking the question. My question was in fact—

Mr McGarvie—I do not want to be deprived of giving you the complete answer to the question you have put, because it will be in the transcript. Next century, they might think I did not know.

Mr McCLELLAND—As long as you appreciate that my question was not directed at your model, but rather at the model being considered by this committee.

Mr McGarvie—Let me put it this way to make everyone happy. Every one of the four models that was a finalist at the Constitutional Convention—

Mr McCLELLAND—Again, my question was not directed at all of the four models; my question was directed at the model which we are considering here. I would like you to address your answer to that.

Mr McGarvie—I favour there being a provision which would prevent the Governor-General, or whoever the head of state is, from exercising powers, other than the four reserve powers I mentioned, except on advice by ministers. I go part of the way with your question. Before anything could be done, such as ordering the military forces, it would be necessary to have advice from ministers; otherwise it just would not be legal. It would not be binding without it. Your apprehension is not a justified one.

Mr McCLELLAND—But it is justified insofar as our current Constitution does not specify that the head of state should act on such advice. You would have to accept that our current system is deficient in that respect, wouldn't you?

Mr McGarvie—I am delighted that we are in total unanimity on that point.

Mr McCLELLAND—Thank you.

Ms HALL—I was debating whether I would ask a question, seeing that I think the time has expired.

Mr McGarvie—Would you mind making allowance for the fact that my ears are older than yours?

Ms HALL—Most certainly. Under the current Constitution, do you believe that the Queen has the right to ignore a recommendation by the Prime Minister to sack the Governor-General? Do you believe that she has discretion as to whether she follows a recommendation or a notice from the Prime Minister?

Mr McGarvie—No, I do not suggest that for a moment. There is time. The Queen would probably take a week or two to consider and decide whether to counsel against it. Ultimately, if the Prime Minister insists, that is that. King George V found that in 1931 when Sir Isaac Isaacs became Governor-General on the insistence of James Scullin.

Ms HALL—So she is obliged to follow the recommendation of the Prime Minister?

Mr McGarvie—Yes.

Ms HALL—You were quite worried about an open, visible and accountable selection process. You believe in the current system whereby the Prime Minister can appoint. You say, and I think most of us here would agree, that the majority of governors-general appointed in Australia have been worthy holders of that office. But the Prime Minister could appoint the first person that he saw going along the street if she or he chose to, or could appoint his or her chauffeur or gardener or cook or whatever associate that he or she may choose. I put it to you that, in a process where there is at least some degree of accountability, even though you may believe that the person who would be chosen would be someone who had been sexually harassed or had sexually harassed committee members, maybe the process that has been suggested is in effect more accountable, more open and more visible.

Mr McGarvie—Can I suggest that I am a great believer in politics and I am a great believer in people in constitutional situations. When you go to your doctor for medicine, your doctor could give you arsenic. It is not something you worry about, because the doctor would not. You look at the way people operate. You look at the way systems operate. You understand human behaviour. You look at the way things have occurred. Prime ministers are very smart. You have to be very smart to become Prime Minister. Prime ministers hold within their keeping the future of their party, their place in history. They want to be well thought of by the community. They want to be well thought of by history. This is practically the only thing that a Prime Minister does solely—just the Prime Minister. You will remember that before recent governors-general were appointed there were all sorts of rumours that they would appoint this one or that one from this sector or that sector to get a few votes. And who did they appoint? Superbly qualified people, because they understand politics. Perhaps you will allow me to say, speaking to a committee of politicians, that you underestimate yourselves.

Ms HALL—I have one further point I would like to make. I put it to you that if a doctor prescribed arsenic to her or his patient then that doctor would find themselves in a very nasty situation.

Senator ABETZ—And so would the Prime Minister if he appointed his chauffeur. Let's get real.

Mr McGarvie—And so would the Prime Minister's party. Prime ministers got there because their party members picked them as the best person to carry the future of the party, as well as their own political careers. Politics is much more sophisticated than the 7 o'clock news indicates. I do not need to tell this committee. I am not saying that the system is perfect, that it could not misfire, but I do say that we ought not look at the way the system would work in a perfect world peopled by perfect people but compare it with any other system that has actually worked or is actually working in the real world of fallible humans, as we all are.

CHAIRMAN—Mr McGarvie, thank you very much. We have run out of time and we must move on. Thank you for coming to Canberra to talk to us today and for your submission. We will report on 9 August. As with all other responders to our inquiry, we will send you a copy of our report.

Mr McGarvie—Mr Chairman, I just wish to add one thing. One of the reasons I particularly wanted to speak to this committee is that the things I have put to the committee today I have put in a book that is coming out in September. I thought it would be unfair to the committee and unfair to those good public servants who are doing the legislation if at least I did not foreshadow today what I would be saying.

CHAIRMAN—Thank you very much.

[3.24 p.m.]

MACKERRAS, Associate Professor Malcolm Hugh (Private capacity)

CHAIRMAN—Welcome to the committee hearing, Professor Mackerras. You would have heard before that we have received your submission and have authorised it for publication. Could I ask you one brief question and then I will let you speak to your submission. On 7 July in the *Australian* an article authored by one Malcolm Mackerras came to my attention. I assume that he and you are the same individual?

Prof. Mackerras—Indeed so.

CHAIRMAN—In paragraph 3 you stated:

> My view is that the present question—

that is, the long title of the bill—

> is an honest one and should be placed on the ballot paper when we vote on November 6.
>
> The alternative suggestion is tendentious at best. Some would call it outright dishonest.

My understanding from your submission is that you have now changed your mind?

Prof. Mackerras—I felt a little bit peculiar about this because the committee before which I normally appear is the electoral matters committee—and I appear often before them—and after the last election I happened to bump into Gary Nairn, your equivalent chairman of that committee, and I said to him, 'Look, there is nothing about the electoral system that needs reforming, either for the House of Representatives or the Senate, so I will not make you a submission and I do not expect you to call me because I would be the most boring witness you ever called and there is nothing wrong with the system.' I would have said that to you except that you called me.

Having called me, I thought to myself, 'Well, I can't be so boring as to go along and say that nothing needs to be changed in the legislation'—although that is my actual position—'and since Malcolm Turnbull has put up an alternative long title, why not put up my alternative long title.' I think my alternative long title is better than his because it describes more accurately the actual proposal's nature. His is pure propaganda.

Ms HALL—If you are making a ranking does your best possible option, which is the existing proposal, and your second suggestion come in before Mr Turnbull's? Are you saying that the one that you have given as the later proposal is really what you would prefer?

Prof. Mackerras—I would prefer the wording I have put forward before you because I think it gives the best description of what the vote is about. From my point of view, I think the present wording is actually quite a sensible compromise between my wording, which I admit would tend to maximise the no vote, and Malcolm Turnbull's wording, which in my opinion is pure propaganda. I suppose I am really here to say why I think you should not do what Malcolm Turnbull or the ARM are asking you to do.

Ms HALL—Do you think there should be a requirement that the question should not be framed to maximise the yes vote or maximise the no vote but be an honest, unbiased question which is put to the Australian people?

Prof. Mackerras—In my opinion, the present wording is precisely that. It is not designed to maximise the yes vote or maximise the no vote. It is an honest question. I am really here to tell you why you should not adopt Malcolm Turnbull's proposal. I suppose it is not a bad idea to have the two Malcolms' proposals—one which would have the effect of raising the yes vote and the other which would have the effect of lowering the yes vote.

I still think mine is better because mine is a completely accurate description of the existing situation and the proposal whereas I regard his as pure propaganda. I would not have appeared before this committee had it not been for the fact that he made that suggestion. Had he never made that suggestion your Chairman would not have invited me along. If I had seen him in the flesh at a party or something I would have simply said to him, 'I don't really have any objection to either of these bills.' That is not to say I am voting 'yes'—I am of course voting 'no', and everybody knows that. The fact that I am voting 'no' does not mean that I object to the bills.

The analogy I give is that with the previous referendum proposal which was called Constitutional Alteration (Simultaneous Elections) put in 1974 the result was no. It was put in 1977 and the result was no. It was put a third time in 1984. For what it is worth, in 1984 I was quite active in running around to everybody saying, 'You must change the title of this. It must not be called simultaneous elections because that is a propaganda title. It should be called terms of senators because that is what it actually is.'

I would simply say in this case that the present wording is perfectly honest and accurate. I hope that you will not change the question and have this piece of propaganda proposed by the other Malcolm. I put forward my alternative as a counter view. I happen to think mine more accurately describes the proposal and more accurately describes what the referendum campaign will actually be about.

Ms HALL—I have just sent a question across to Professor Mackerras that was given to us by Michael Lavarch in Brisbane.

Prof. Mackerras—What is my objection? I will tell you my objection.

Ms HALL—I just wanted to know what you thought of that. It may be a bit stupid, but I really believe we should give a very unbiased question and one that is not going to pre-empt a 'yes' or a 'no' vote because all the people that have come out very strongly in favour of this present question have been people that have been advocating a 'no' vote. I think that what we should put to the Australian people is a neutral question.

Prof. Mackerras—I deny the words. It says:

. . . being replaced by an Australian President having the same powers as currently exercised by the Governor-General.

That is patently not true. The Governor-General does not have the same powers as the proposed President, which is precisely why I have put the wording in brackets 'having broadly similar powers as those currently exercised by the Governor-General.' I would not object to Michael Lavarch's question if it said, 'being replaced by an Australian President having broadly similar powers as those currently exercised by the Governor-General.' I would not object if you changed 'having the same powers' to 'having broadly similar powers as.' I do not recommend you do it, but I would not object if you did that because I regard the description 'having broadly similar powers' as a correct statement. It is simply not correct to say that he has the same powers. It is patently untrue that the President has the same powers.

Obviously, a person who is subject to instant dismissal does not have the same powers as somebody who has what amounts to tenure. That is precisely why I raised this question of simultaneous elections. The argument about the simultaneous elections question was whether the power of the Senate was to be weakened. Obviously, it was. The proposal did not formally weaken the powers of the President, but because it changed the tenure of senators, it did weaken the power of the Senate, which is precisely why the correct title was the one used on the third occasion when put by the Hawke government as Constitution Alteration (Terms of Senators) Bill 1984. That was the correct way to describe it. It was a proposal about the terms of senators. The power of the Senate was going to be weakened because, when you change the tenure of senators, you weaken the power of senators.

Likewise, if you change the tenure of the head of state, you weaken that power. Therefore, I reject this completely, but I would not particularly object if you had the words 'having broadly similar powers.' That the proposed President has broadly similar powers is a correct way of describing it.

Senator ABETZ—I refer to your proposed question in the letter dated 28 July 1999. The last section of the long title tells us 'dismissible by the Prime Minister with the approval of the House of Representatives.' Even if the House of Representatives does not approve, the President is still dismissed. Is not your question inaccurate in that regard?

Prof. Mackerras—I do not mind if you want to change the wording very slightly. I put that to make it clear that the word 'House of Representatives' should go in and the word 'Senate' be conspicuously absent. I thought those words up this morning. If you would like to improve those words very slightly, I do not mind, but the substance of the words is correct.

Mr McCLELLAND—I am just wondering why you have seen it appropriate to refer to the Governor-General being replaced but you have not seen it appropriate to refer to the Queen also being replaced.

Prof. Mackerras—One of the objections put forward to this thing was that the number of words was excessive. Because the number of words was excessive, I cut out two words which had appeared in my original handwritten draft. The words were 'and Queen.' I cut out the words 'and Queen' in order to reduce by two the number of words in this statement which is seen to be excessively wordy.

ACTING CHAIR—Was brevity the only reason?

Mr Mackerras—I have told you that people have said to me, 'Your thing is too long. You have to cut the number of words.' So I thought the appropriate words to cut out were the two words 'and Queen'. I would not object if you put them back in. If you want to cut out that last bit and put back those words 'and Queen', I would not particularly object to that. The ballot paper reads: 'Do you approve the proposed law for the alteration of the Constitution entitled . . . ' You could add this: 'A Bill for an Act to alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and the Governor-General being replaced by a president (having broadly similar powers to those currently exercised by the Governor-General), chosen by a two-thirds majority of the members of the Commonwealth parliament.' If you did that, I would not say that the question on the ballot paper was a dishonest question. I would simply say that I would prefer the question to be the way I am proposing it.

Mr DANBY—I want to go to the substance of some of your arguments, as outlined in the *Australian* newspaper article, and in particular I want to ask you about the third last paragraph:

Under the present Constitution, the prime minister cannot sack the governor-general. All he can do is ask the Queen to do the sacking. In practice, that procedure would likely take about six weeks.

I would like to read you three excerpts from Malcolm Fraser's testimony to this committee in Melbourne. He said:

What you described in your question, Mr Chairman, is the current situation, because a Prime Minister could dismiss a Governor-General. From the moment that is reported to the palace, the dismissal would effectively be in place. Her Majesty would say, 'But I need this in writing; I need reasons; I need this; I need that.' But all it would do would be to buy a little time until something is put to her in writing, which she would be entitled to ask for, but she could not delay it beyond that. Effectively, from the moment of the request going to the palace by conversation, the request would be effective.

I will finish with a couple of other excerpts:

The problem with our Constitution is that, having regard to the powers the Governor-General technically has, in reading the Constitution, the only thing that civilises those powers and makes them acceptable in a democracy is the capacity to be instantly dismissed, and that really is the convention. That is the thing that brings the Governor-General's powers back to a democratic situation and which makes sure that he cannot exercise powers which would appear to be attributed to him in the Constitution unless it is so recommended by the government and Prime Minister.

The last one is not relevant, because it is a small re-emphasis to Mr Causley that the President would have the same powers as the Governor-General has. Mr Fraser says he has that power to dismiss now.

Mr Mackerras—He would say that, wouldn't he? Obviously, he is in defensive mode, trying to defend every aspect of the 1975 situation. So my answer to that is, 'He would say that, wouldn't he?' I do not say that. My basis for not saying that is that, while I do not pretend to have studied these things in very great detail, I have studied them enough to know that what I have written in that article is correct.

Mr DANBY—Do I understand that your reflection on Mr Fraser's views is that this is an ex post facto justification of what he did in 1975 because he is ashamed of what he did?

Mr Mackerras—That is my view, yes. Do you want me to elaborate? I am quite happy to stop at that point. That is my view, yes.

Mr DANBY—I would like to hear your views as well and I would like you to elaborate.

Mr Mackerras—My view is that he would say that, wouldn't he? I do not say that. What I say is this: I do acknowledge—something which a lot of no-voters do not acknowledge—the fact that the Queen does retain one residual power in respect of us. One and only one power is retained by the Queen. The power I am referring to is that, if a Premier or Prime Minister seeks the dismissal of a Governor or Governor-General, she does not have to act immediately.

We saw the case of Kerry Chikarovski when she said—as I am sure you will remember—'If Mr Samuels won't move from Bronte to Government House, we will sack him.' She said that, and she was immediately put down and laughed out of court. Why? Because if Kerry Chikarovski became the Premier of New South Wales and went to the Queen and said, 'This awful Mr Gordon Samuels won't move from Bronte to Government House. You must sack him,' the Queen would say, 'That is a completely trivial reason for my being asked to sack my representative.' That is what she would say. Consequently, Kerry Chikarovski withdrew from the argument immediately.

The fact is that if a Premier asks for the dismissal of a governor or the Prime Minister asks for the dismissal of the Governor-General for some absurd reason like that, the Queen would exercise this one remaining residual power. I go on to say that the Queen and her father are in the same situation regarding Australia. Neither has exercised this one residual power—neither.

Mr DANBY—Would she decline a request to—

Prof. Mackerras—If Kerry Chikarovski had become the Premier of New South Wales and had seriously gone to the Queen and said, 'You must sack Gordon Samuels because he will not move from Bronte to Government House as I think he should', I think the Queen would decline and there would be a terrific controversy. Those defending the Queen would be in the majority because most Australians would think the Queen would be quite right to decline, or at least to delay and delay and delay, to make it clear that she did not approve of this absurd idea that she should force the Governor of New South Wales to move from Bronte to Government House in Sydney.

CHAIRMAN—Mr Mackerras, you would however agree that none of us really knows.

Prof. Mackerras—Precisely so.

Mr PRICE—Do you have any other experts like yourself who concur in that view you have, that ultimately the Queen may, on a decision, decline a request of a Prime Minister or a Premier?

Prof. Mackerras—I cannot cite you chapter and verse. No, I cannot. But then I do not think you can cite authority opposite that, other than the one—

Mr PRICE—We have it on the record a couple of times actually. Could I ask you another question related to the one asked by Mr Danby? Isn't it really a Premier or Prime Minister who provides the workload of a Governor or Governor-General? That is, there are bills to be approved and given the royal assent, or appointments to be made. It is really the Prime Minister, in convening a Legco meeting, who dictates the workload of the Governor-General. Therefore, if a Premier or Prime Minister has rung seeking the dismissal of a Governor or Governor-General, the reason why it can be said to be instantaneous is that having sought his dismissal he or she would then not provide a workload until that dismissal was effective.

Prof. Mackerras—The Prime Minister and Premier can make life very difficult for the Governor or Governor-General—they can certainly do that—which brings me back to the point that Mr McGarvie was discussing as to whether the driver of the Prime Minister could be appointed Governor-General. There was a case in Ireland in 1924 or something where the Taoiseach of Ireland tried, and succeeded, to get a totally unsuitable person made Governor-General. That was done because the Taoiseach of Ireland was trying to discredit the whole system, and he succeeded in doing it.

Mr DANBY—Was that De Valera?

Prof. Mackerras—Yes, I am pretty sure it was De Valera. The answer to your question is yes, a Prime Minister can make life so bloody difficult for a Governor-General, or the Premier for the Governor, that the Governor or Governor-General will, as it were, give it away. The fact of the matter is that I do not accept this instant dismissal argument that people like Malcolm Fraser—

Mr PRICE—I am sorry, I have not expressed myself well. I was trying to make the point that in talking about an instant dismissal, as Mr Fraser did, having sought the dismissal of a Governor-General there would be no Legco meetings called for the passing of bills or appointments until such time as that dismissal became effective. In that sense, in the most important powers the Governor-General exercises, he really ceases to exercise them once he has lost the confidence of the Prime Minister.

Prof. Mackerras—He could fight it the same way as Mr Paul Barrett is fighting his dismissal as the Secretary of the Department of Defence. The situation is quite possible to imagine that he would fight it.

Mr DANBY—Under anti-discrimination legislation the Governor-General could take a case against the Prime Minister.

Mr PRICE—This is why we should really support the proposed legislation because it provides some safeguards.

Prof. Mackerras—No, I would disagree. The present situation gives the Governor-General de facto tenure and the governor of a state de facto tenure, which is not given by

this proposal. It does admit, I do admit, that there is this remaining power handed to the Queen. Some people find it most objectionable that that should be so. I do not find it objectionable, because the Queen has never exercised the power and her father never exercised the power. The last time the power was exercised in respect of Australia was as long ago as 1915, when the King did quibble about the demand by the Premier of New South Wales to sack the then governor. But I am told that it has recently arisen in the case of Nevis and St Kitts, I think it is called—one of the realms of the Queen—when the Prime Minister of Nevis and St Kitts about 15 years ago asked the Queen to sack the Governor-General. The Queen delayed and delayed and there was terrific controversy. Eventually, about five weeks after the request, the Governor-General resigned. You can look that up if you like, but I am informed by someone who knows all about these things that that has in fact arisen. That is precisely why I wrote those words as I did and why I disagree with what people like Malcolm Fraser say. I simply disagree with that view.

CHAIRMAN—You would probably agree that we have a few more people and we are a bit more sophisticated than St Kitts.

Prof. Mackerras—But it is a realm. There are 15 realms; the Queen is the sovereign of 15 realms.

CHAIRMAN—I accept all that, and St Kitts is lovely; it is absolutely magnificent.

Mr PRICE—Where is St Kitts?

Mr DANBY—It is in the Caribbean.

Ms ROXON—Can I ask a quick question again about your wording? Before I do, just for your own reference and because I think you were concerned that we may not have been able to refer you to some other authorities, Mr Fraser was not the only person who was very adamant about this view. In fact, Professor Zines and Professor Saunders, who were here this morning, were very adamant about the view, as was Professor Craven. If you were interested, I am sure you could look up that.

Prof. Mackerras—All sorts of people were very adamant that Sir John Kerr could not sack Mr Whitlam, I might add. There was equal adamancy on that point.

Ms ROXON—That may be the case. The question is about your wording. You have suggested that you would not have a problem if 'and Queen' were added after 'Governor-General'. You have also commented that you were not really fussed whether the last phrase was in there or not. I wonder whether you have a view about the insertion of 'Australian' before 'President'—that is, 'Being replaced by an Australian President (having broadly similar powers to those exercised by the Governor-General)'?

Prof. Mackerras—If you are going to do that, you should add to the number of words and say, 'The Queen of Australia and Governor-General of Australia being replaced by an Australian President.' If you want to add 'Australian President', then you must put 'Queen of Australia and Governor-General of Australia'. I am suggesting we cut out the word 'Australia' appearing three times. We are actually cutting out four words by doing that.

I think that to say, 'Replace the Governor-General,' without putting in 'of Australia' and the same with the Queen, without putting in 'of Australia' and to put in 'an Australian President' turns the thing into propaganda. It then becomes propaganda. If you put in 'an Australian President' without putting in 'the Queen of Australia' and without putting in 'the Governor-General of Australia', you simply turn it into propaganda.

Ms ROXON—I understand that it is a contentious issue, and we could argue forever about whether the Queen of Australia and the Queen of England are the same thing. You would be aware, historically, that there was no requirement that the Governor-General actually be an Australian citizen. In fact, initially, I think it was probably regarded as being more appropriate that the Governor-General was not an Australian citizen.

Prof. Mackerras—Yes, I am aware of that.

Ms ROXON—My point is that, by putting in 'Australian President', you are actually talking about a qualificational requirement, if you like, to be President, which does not exist at the moment for Governor-General under the proposed section 60. I guess that is really what I was wondering about.

Prof. Mackerras—You can argue that if you like.

Ms ROXON—I am not arguing; I am asking your view.

Prof. Mackerras—You can say that if you like but, I am sorry, I do not agree with that view. I think that the Governor-General being an Australian citizen, in practice, is a requirement, although I agree that technically it is not a requirement. In practice it started to become a requirement in 1947, when Mr Chifley demanded that Mr McKell be the Governor-General and the King did not in any way quibble with that. Once that became the case, you established the inevitability that the Governor-General would be an Australian citizen. The only exception to that was during the Menzies period and, of course, as we all know, Menzies was trying to re-establish British Australianism. Apart from that, essentially, we have had this requirement and I therefore do not think that the point you have made is worthy of being made, with great respect. I do insist that if you are going to put 'an Australian President', you should then put 'Queen of Australia and Governor-General of Australia'. I think it is better, in order to save words, to leave out those words all together. For that reason, I do not particularly object to Michael Lavarch's thing, other than the point about the words, 'Having the same powers.' I object to those strongly. But I think the words, 'Having broadly similar powers', would be a sensible way to have a neutral question.

Mr PRICE—Given the view that you have stated, why was it that the palace put out so much speculation that Prince Charles could be, or might be, at one point considered as Governor-General of Australia?

Prof. Mackerras—That was during this period, when Menzies had sufficiently re-established what I call 'British-Australianism' that the palace was, if you like, taken in by this apparent change in attitude. It was not a change in attitude at all; it was simply caused by the fact that one very long-serving Prime Minister had wished to try and change attitudes.

CHAIRMAN—Professor Mackerras, thank you very much for coming to talk to us. As I have told other people, we will table on the ninth and we will send you a copy of our report.

[3.52 p.m.]

BUFFETT, Mr David Ernest, Deputy Speaker, Norfolk Island Legislative Assembly

WRIGHT, Mr Donald Rae, Adviser, Government of Norfolk Island

CHAIRMAN—Welcome. We have received your submission and authorised it for publication. Would you like to speak briefly to your submission and tell us personally the issues which concern you deeply.

Mr Buffett—On my behalf and on behalf of Mr Wright, thank you for the opportunity to come and speak to the committee today. Firstly, I would like to give you a historical preamble to Norfolk Island's position.

A little over 143 years ago, in June of 1856, Queen Victoria, under an imperial order in council, ordered that Norfolk Island shall be a 'distinct and a separate settlement'—those exact words: distinct and separate settlement. The island was removed from the jurisdiction of any of the adjacent Australasian colonies. Queen Victoria took that step to accommodate the fact that, also in June 1856, the entire population of Pitcairn Island moved from that island and was relocated on Norfolk Island. The Pitcairn Islanders, as you all may well know, were descendants of the *Bounty* mutineers and their Polynesian partners. This transfer of the population was undertaken through the good offices of the British government, and ever since then the vast majority of Norfolk Island residents have had a particular loyalty to the Crown, which continues today. The Queen has visited the place, although it is small and remote, and it probably can advantageously be said that *God Save the Queen* is still the preferred anthem on formal occasions.

So you will understand that Norfolk Islanders do feel an interest in the matters that are before this committee, even though you may think us remote from the detail that you are on about, and certainly remote from some of the detail that we have heard whilst we have been in the chamber this afternoon. This is really the first occasion, apart from our written submission, that we have had an opportunity to fully express our views on these questions. Norfolk Island did not participate in the Constitutional Convention and has not been involved by the federal government in what I understand were recent discussions with the states about the implications of moving to a republican system of government. Indeed, up until now our only involvement was to respond to correspondence from the federal Attorney-General about the Constitution alteration bill, at present before this committee.

Our response is set out in our written submission. At the time our submission was lodged with this committee there had not been a reply from the Attorney-General's office, but there has since been a reply from that quarter, which I will ask Mr Wright to speak to in a moment.

On the whole, we believe it is fair to say that Norfolk Island's concern about this bill has not been given serious attention by the federal authorities to date. We are concerned to avoid the bill having unintended consequences that might not be readily apparent to the committee, but which we in Norfolk island are very mindful of. We are concerned that the committee might unknowingly put Norfolk Island in a position that would be difficult and calamitously

disadvantageous to Norfolk Island, a position which you might not want to put us in. Our concerns are really twofold. First, we believe that the people of Norfolk Island should be those who determine whether or not the island remains subject to allegiance to the Queen. Our historical thread and our relationship with the Commonwealth are very different from those in the states and from those in the other territories.

Secondly, and over and above the question of the monarchy itself, there is a concern about the implications for Norfolk Island's constitutional status if Australia were to become a republic. These arguments are really set out in detail in the written submission. Put shortly, the point we seek to make is that there are substantial and credible arguments available to the effect that Norfolk Island is a separate possession of the Crown in the right of Australia and not an integral part of the Commonwealth of Australia. The worry is that, if one abolishes the notion of the Crown in the right of the Commonwealth of Australia, what happens to that separate status? In other words, what happens to us?

No-one in the Commonwealth sphere has given any real attention to this question. Allow me to further elaborate on our situation. In 1979 the Norfolk Island government was granted self-government under a federal act of the parliament. It was the Norfolk Island Act of that same year. At the time it was announced by the federal minister that Norfolk Island was not required to be regulated by the same laws as regulate other parts of Australia.

That political commitment has been repeatedly and comprehensively broken by successive federal governments since 1979. Instead, the island has been subject to ever increasing volumes of inquiries and federal initiatives intended to address what are perceived in the Norfolk Island context as anomalies. The thrust has been to seek to impose what we would call metropolitan standards, values and laws into Norfolk Island. But there is nothing new about this. It is a tendency which has been followed by mainland authorities since shortly after the establishment of Norfolk Island as a separate settlement in 1856. What is new, however, is the scale and pace of such initiatives. In just the last two years or so there have been six federal inquiries on other major federal proposals affecting the island in that period alone.

With that background, we said in our letter to the Prime Minister recently that therefore Norfolk Island now seeks:

> . . . a more durable constitutional understanding with the Commonwealth, which will be less hostage to political fortune than at present.

A copy of the letter that we sent to the Prime Minister is annexed to our written submission. To that end, the Norfolk Island government and the assembly there are at present examining options for the constitutional future of the island. We expect to make some decisions in respect to that and to then seriously talk these through with the Commonwealth government with greater clarity than has been done before.

To come to the legislation that is in front of you, for those reasons we are opposed to any changes to the Australian constitutional arrangements which may be thought to preclude or reduce future options for the governance of Norfolk Island. Our submission, therefore, calls for the insertion of a savings provision intended to secure the status quo. We are asking

you not necessarily to debate some of the issues I have just mentioned and the submission as mentioned, upon which there may be one or more view. What we are asking is to recommend amendments to this bill to preserve the status quo in respect of Norfolk Island, so that the options for resolution are not diminished. That is our position. We are available to try to respond to any queries that you may have.

CHAIRMAN—Is your report unanimous?

Mr Buffett—The submission that we have made? Yes, indeed.

CHAIRMAN—So it is a unanimous report.

Mr Buffett—Yes, of the Norfolk Island parliament.

CHAIRMAN—One hundred per cent?

Mr Buffett—One hundred per cent.

CHAIRMAN—Mr Wright, you had something you wanted to say.

Mr Wright—Thank you, Mr Chairman. Mr Buffett referred to the fact that subsequent to the lodgment of the written submission there was a response from the federal Attorney-General, Mr Williams, which is annexed to the submission. I have copies of that response which I can make available.

CHAIRMAN—I will interrupt you here. Is it the wish of the committee that that be received as evidence? There is no objection, it is so ordered. Please continue, Mr Wright.

Mr Wright—Thank you. It is very short, so I will read the relevant paragraphs into the record. It says:

The Government

—

that is, the federal government—

has taken your comments into account in finalising the Bills for introduction into Parliament.

In response to your comments regarding the relationship between the Territory of Norfolk Island and the rest of the Commonwealth of Australia, I can say that the government has no intention of affecting that relationship as part of any move to a republic. The people of Norfolk Island will have an opportunity to express their opinion on the republic issue at the forthcoming referendum.

That concludes the quote from the Attorney-General's letter of 13 July 1999.

As to that letter, may I by way of elaboration on some of the comments made by Mr Buffett make three brief points. Firstly, as to the assertion that 'The Government has taken your comments into account in finalising the Bills for introduction into the parliament,' I

have compared the exposure draft of the measure with the measure as introduced into the parliament on 10 June 1999 and I do not see anything in it that would disclose the fact that the federal government has taken into account anything which has resulted in any change to the measure. I am aware that there has been a slight alteration of the phraseology of item 4 of schedule 3, the savings provision, but I do not believe that is directed towards the matter to which the attorney refers.

Secondly, concerning the point the attorney makes where he says that the federal government has no intention of affecting that relationship between Norfolk Island and the Commonwealth of Australia, if one accepts, as one does, that that is an accurate statement of the attorney's position, then it would appear that that is itself a further reason why a savings provision should be included to ensure that both the views of the Norfolk Island government and the views of the attorney are properly reflected in the legislation.

Finally, the attorney says:

The people of Norfolk Island will have an opportunity to express their opinion on the republic issue at the forthcoming referendum.

One guesses what he means by that is the forthcoming federal referendum. He is wrong. Under section 128 of the Constitution, the approval or otherwise of the proposed measure must be put before the electors of the states and of the territories. But 'the territories' in that context, of course, means those territories in respect of which there is a law in force allowing for their representation in the federal parliament, and Norfolk Island does not answer that description. Therefore, a referendum which did purport to take the views of the people in Norfolk Island on whether the measure should be approved or not would not be a referendum which is consistent with the terms of section 128 of the Constitution.

CHAIRMAN—Mr Wright, I must admit I was amazed when you gave us this copy of your letter. The Attorney-General says clearly:

The people of Norfolk Island will have an opportunity to express their opinion on the republic issue at the forthcoming referendum.

Mr Danby, are you aware of any provision? I am not aware of any provision that would cause that to happen.

Mr Buffett—There are no provisions.

CHAIRMAN—That is what I thought. During your presentation, Mr Wright—I am sorry I missed it—you talked about some change to one of the clauses of schedule 3—

Mr PRICE—I am confused about the point that you previously made. Aren't they eligible to vote in referendum?

CHAIRMAN—The point I am making is that the Attorney-General says that they will be voting in referendum; my understanding of section 128 is that it gives them no right whatsoever to participate in the referendum.

Mr PRICE—You will not be voting in the referendum?

Mr Buffett—We have no entitlement.

Mr PRICE—Aren't you part of one of the ACT electorates?

Mr Buffett—No.

Mr Wright—No.

CHAIRMAN—They even got their own tax system, for heaven's sake.

Mr PRICE—They have no tax system.

CHAIRMAN—It is a tax system; it works beautifully.

Mr PRICE—I now understand the point. Thank you.

CHAIRMAN—Since the exposure draft to the final provisions of the bill, as we are adjudicating on the bills now, you said that in schedule 3 there was one minor change made to one section. Could you tell me which one it was?

Mr Wright—It is item 6 of schedule 2.

CHAIRMAN—I thought you said schedule 3.

Mr Wright—I did. That is part of schedule 3 to the bill. Schedule 3 to the bill proposes to include a schedule 2 to the Constitution.

CHAIRMAN—Schedule 2, transitional, item 6—unified federal system.

Mr Wright—That is the one. The point is this. The exposure draft had item 6 reading like this:

The alterations of this Constitution made by the *Constitution Alteration (Establishment of Republic) 1999* do not affect the unity of the federal system of government and law established under this constitution.

That has changed.

CHAIRMAN—To continuity.

Mr Wright—Essentially that is right, yes—continuity. The words 'unified system of law' rather than 'unity of the federal system'.

CHAIRMAN—Sure. Are you happy with the word 'continuity'?

Mr Wright—The point I was simply making was that that is the only change that I could see that might in some sense be said to be reflective of the Attorney-General having taken into account the views expressed by the Norfolk Island government.

CHAIRMAN—But have your legal people examined the use of the word in that context? Are they satisfied that you are protected—unless you wish not to be protected?

Mr Wright—No.

CHAIRMAN—They have not? It is not up to me to suggest to you what to do, but I might be.

Mr Wright—The problem is this: neither of those formulations addresses the second issue to which Mr Buffett refers, that is, the issue about the implications of these proposed constitutional alterations on the constitutional relationship between Norfolk Island and the Commonwealth of Australia. That is why in the Norfolk Island government submission there is a proposed further savings provision, which is to be found at page 15 of that submission. I will read it into the record, if I may. The proposed further savings provision is in the following terms:

> The alterations of this Constitution made upon the commencement of the *Constitution Alteration (Establishment of Republic) 1999* do not affect the system of government and law that, had the alterations not been made, would have applied in relation to a territory which, before that commencement, was placed by the Queen under the authority of and accepted by the Commonwealth in accordance with section 122 of this Constitution.

That is the savings provision for which the Norfolk Island government and, as you have heard, the Legislative Assembly contend.

Mr McCLELLAND—I understand your concerns and that you do not want to prejudice your independent status—or the history of that status. I suppose that, from where I am coming from, I would ask: don't you still have that argument, that you are a dependency of the Commonwealth of Australia rather than a part of the Commonwealth of Australia? Doesn't that argument survive on its current merits, whether or not the republic bill gets up?

Mr Wright—It may; it may not. Nobody knows until the High Court tells us what the answer is.

Mr McCLELLAND—That will be the case irrespective of what happens to this bill.

Mr Wright—With respect, Mr Chairman, not necessarily so. As committee members are fully well aware, there is a concept of the divisibility of the Crown. As Sue v. Hill tells us, there are a lot of crowns, and it is very common in federal legislation for provisions binding crowns to say things like, 'This act binds the crown in right of the Commonwealth, each of the states, the Northern Territory, the Australian Capital Territory and Norfolk Island.' Such provisions are a dime a dozen. I ask rhetorically: what, if any, concept of the divisibility of the presidency is imported by this legislation? What of the fairly elaborate savings provisions to be found in the measure in relation to the prerogative, to the continuation of courts, to the continuation of executive governments, to the continuation of the monarchy as it relates to the states on certain assumptions and so forth, when there is no like savings provision in

respect of the point to which the Norfolk Island government submission refers? Couldn't it be said, as a matter of implication from that fact, and as a matter of construction of the Constitution, that the separate status of Norfolk Island as a possession of the Crown in right of the Commonwealth of Australia did not survive the abolition of the Crown in right of the Commonwealth of Australia? If I were Mr Burmester, I would certainly be arguing that quite strongly on the appropriate occasion and before the appropriate forum. What we are contending for is simply a savings provision to make it clear that it does not have that effect and that those implications do not arise, and the inferences to which I have referred are not therefore drawn.

Mr McCLELLAND—It is a bit difficult to understand the argument. It seems to me that if you are right and you are an independent legal entity, Australia could no more change that position than it could, by legislating, take over New Zealand. You are either right or you are wrong.

Mr Wright—Yes and no. I am sorry, I am a lawyer and I cannot help saying that. The answer to that question resides in this fact: in the case of New Zealand, the British parliament has not, as far as I am aware, passed an act saying that it disavows for the future the right to legislate for, relevantly, New Zealand. In the case of Australia and its territories, the UK Australia Act 1986 does that very thing. It says, 'Henceforth, no act of the UK parliament will relevantly form part of the law of a territory.' Further, in Sue and Hill, the High Court has said that, were the United Kingdom to change its mind about that and pass some legislation purporting to repeal the UK Australia Act 1986, then it, the High Court, would take no notice of it. And it clearly said that in Sue and Hill. It said that its obedience would lie to the federal equivalent of that legislation on the assumption—

Mr McCLELLAND—It is right: the United Kingdom parliament has so legislated in the 1986 act that it does not purport to make laws for Norfolk Island. But, in terms of the current argument, so what? Why are you in a different position? The United Kingdom parliament is not making laws for you. Again, you are either right or you are wrong. As a result of that, you are or you are not a part of Australia, and I just cannot see how this bill will affect your argument in that respect.

Mr Wright—All I can say is that views may differ about the extent to which you can foresee what the High Court may do. If I may make one more comment about the Australia Act, the point is that Norfolk Island is not an integral part of the Commonwealth of Australia, but a separate possession of the Crown in right of the Commonwealth of Australia. There is a heap of historical material that goes to that; Sir Robert Garran and a whole pile of other people. The details are in the submission. It may well be that that position could be changed by appropriate federal measures, the federal parliament, as it were, being the successor to the imperial parliament because of the effect of the Australia Act, and maybe at the request and with the concurrence of the states.

Mr McCLELLAND—You are saying that the Australian parliament is a successor to the United Kingdom parliament in respect of Norfolk Island because of the 1986 Australia Act?

Mr Wright—Yes, and I think any commentator who knows about the subject would say so.

Mr PRICE—I apologise. I am not a lawyer, but doesn't the bill preserve all the Crown rights and prerogatives, or isn't there an attempt in the legislation to preserve all the Crown rights and prerogatives? Wouldn't that then carry over to the point you are making about Norfolk Island?

Mr Wright—I suppose one way of putting our point is that it does not do that comprehensively enough to secure the objective for which the Norfolk Island government contends. To take the example of prerogatives, certainly in proposed section 70A it provides for the continuation of what hitherto would have been called Crown prerogatives until the parliament otherwise provides. But prerogatives in that context, I apprehend, are not to be equated with rights of any description. I have been reading the transcript of previous hearings and I believe it has been put to the committee that the four nominated prerogatives are the prerogative to declare war, the prerogative to make peace, the prerogative to make treaties and the prerogative of mercy. There is nothing in there about rights and separate possessions of the Crown.

There are reasonably comprehensive savings provisions in item 4 of proposed schedule 2 to the Constitution, which is in schedule 3 to the bill, to do with the validity of acts of the Governor-General, the continuity of the parliament, the qualifications of senators and members, the continuity of the executive government of the Commonwealth and the continuity of courts and their jurisdiction. In item 5 there is preservation of the Crown in right of each of the states to the extent that they do not avail themselves of the Australia Act route, which I believe they have now virtually done. Finally, and relevant to this discussion, there is the unified federal system clause, which is item 6.

None of those are apposite to dealing with a putative implication that the abolition of the Crown in right of the Commonwealth of Australia abolishes the separate status of any separate possessions there may be of that Crown. We are simply saying that, to preserve the status quo unequivocally, you have to put something in.

CHAIRMAN—Are there any more questions?

Mr McCLELLAND—Was there a referendum in 1988 relating to the bill of rights?

Mr Wright—Yes.

Mr McCLELLAND—Did the residents of Norfolk Island vote in respect of that referendum?

Mr Wright—No.

Mr McCLELLAND—On a reading of section 128, it would seem to be that the residents of Norfolk Island should be entitled to vote.

Mr Wright—With respect, not. The subsections are not numbered in section 128, but the last paragraph of section 128 says:

In this section "Territory" means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

CHAIRMAN—Norfolk Island is only a protectorate; it is not a territory.

Mr Wright—It is not that kind of territory, anyway.

Mr McCLELLAND—You have no representation?

Mr Wright—There is a curious provision called section 95AA of the Commonwealth Electoral Act 1918, along the lines of the itinerant elector provisions, which gives certain Norfolk Island people the optional right to be included in a mainland electorate.

Mr McCLELLAND—Any particular electorate?

Mr Wright—No; electorates with which, broadly speaking, they have some connection. For instance, section 95AA(2), called a cascade provision, says:

(a) the Subdivision in that State for which he or she had an entitlement to be enrolled; or

(b) if he or she never had such an entitlement—a Subdivision in that State for which any of his or her next of kin is enrolled; or

(c) if neither (a) nor (b) applies—the Subdivision in that State in which he or she was born; or

(d) if none of paragraphs (a), (b) and (c) applies—a Subdivision in that State with which he or she has a close connection.

Then there are all kinds of complicated deeming provisions. The fact of the matter is that the territory is not represented in the federal parliament within the meaning of section 128 as is, on the other hand, the ACT and Northern Territory.

CHAIRMAN—We understand your arguments. We have just had verbal advice from the Attorney-General's Department that they believe you are entitled to vote in the referendum, notwithstanding that verbal advice. We will be seeking written advice. Further, we will seek written advice on the issues which you have raised with us. We will treat the issue seriously. I cannot tell you any action that we will or will not take; that is up to the committee. All I can do is confirm to you that we will investigate those issues with responsible legal advice to try to help you know where the heck you are, to make sure that you are dealt with fairly, so far as we have the power to do that.

Mr Buffett—Thank you for that undertaking, Mr Chairman. That will be a great help to us. In that context, I ask that when you receive advice from the Attorney-General's Department you might allow us to have a copy so that it will assist us to know how we stand.

CHAIRMAN—We will put it on the public record; that is not a problem. The chances of us as a committee communicating with you are about zero.

Mr Buffett—If it becomes part of the public record, that will achieve what we are seeking.

Mr PRICE—I will undertake to report personally.

CHAIRMAN—I am happy to come to Norfolk Island to advise you of the outcome; it is a lovely place and I love it dearly.

Mr McCLELLAND—Is it still duty free over there?

CHAIR—No, it is not duty free; all their taxes are 10 per cent.

Mr Buffett—Norfolk Island is not a duty free environment. There are Norfolk Island customs duties. It should be made clear that the customs duty that we ask is significantly lower than you might experience in Australia.

CHAIRMAN—Yes. Anyhow, on behalf of the committee, we will do what we can to help resolve issues you bring to us. I cannot say we will respond to you formally. We turn into pumpkins on 9 August when we table our report and that will be the end of us. We will exist no more after that point. You will have to continue your discussions with the Attorney-General. We will certainly make sure that the Attorney-General's Department is aware of your concerns.

Mr Buffett—Mr Chairman, thank you indeed for the courtesy.

CHAIRMAN—Thank you very much for coming to talk to us; we do appreciate it. We consider that it is serious and it is important. By the way, how many residents are there now?

Mr Buffett—We have just under 2,000 people who live on the island.

Mr PRICE—When you say that the assembly is going to consider the constitutional issue, are you hinting that you are looking at a more independent status or separation from Australia?

Mr Buffett—The process of self-government that commenced in 1979 was seen to be a progressive arrangement. It did not just happen on 10 August 1979, almost 20 years ago next month. It was a point of commencement and there would be a gradual, progressive, devolution of authority from the Commonwealth to Norfolk Island. There was a starting point and there were a bundle of arrangements that were transferred at that date, but there were others that were to be progressively followed, and we are continuing that course.

What we are now saying is that, given that it has been 20 years, we should more clearly see the end of the path and work out an arrangement as to where it will all stand at the end of the day. It is that concept that we are now saying with the Commonwealth government, 'Let's come to it and work it all out and make it tidy.' But not only that, cement it in in a sense that it does not become reversible at change of governments, change of attitudes or whatever, so that we are no longer subject to the winds that blow, Norfolk Island's situation

is more securely placed and we do not have to journey to Canberra to state our cause every time.

Mr PRICE—Are you saying that one of the options about the end of the path may be independence?

Mr Buffett—That has not been projected by the Norfolk Island government. The Norfolk Island government has seriously put forward the view that there should be a significant degree of our doing our own thing in our own backyard, whilst having a continuing relationship with Australia.

CHAIRMAN—You would have a bitch of a time defending yourself, wouldn't you? Thanks very much.

[4.28 p.m.]

WITHEFORD, Ms Anne Myongsook, Convenor, ACT Branch, Australian Republican Movement

CHAIRMAN—I welcome you. We have not received a specific submission from you. Do I understand that you have a brief opening statement that you would like to make to the committee?

Ms Witheford—That is right. I thank you for your time. I realise it has been a very long day for you, so I will keep it very short.

CHAIRMAN—Check.

Ms Witheford—I do not profess to be a constitutional law expert. While I have a background in law, I realise you have heard from the big heavyweights this morning, so I would like to provide the committee with a different perspective. Consequently, I would like to focus my comments regarding the draft bills around the debate in the ACT and around young people's perspectives on the debate.

My two concerns relate to the long title of the bill and the appointment of members to the Presidential Nominations Committee. Turning to the long title, in my view it is critical to amend this title for two reasons—firstly, to indicate the key element of change that voters will be asked to consider in November; and, secondly, to accurately reflect in a non-distorted and unbiased manner the appointment process that was endorsed by last year's Constitutional Convention.

I reaffirm the comments made by the chair of the ARM, Malcolm Turnbull, and I will not go into them further, but I would like to elaborate on them. The main problem, in my view, is that the title does not state what this referendum question is all about. Whether the word 'republic' or the word 'President' is in the wording is beside the point. Stating in an objective and plain way what a republic involves is the point.

The title can only spell out what a republic entails if it states that the Queen, our current head of state, will be replaced by an Australian citizen. Regardless of what else is put in the title, this is the minimum threshold.

With the various debates on methods of appointment, powers, preambles and wider constitutional reform, this central change is being obscured. For example, the ACT is the most informed and engaged state or territory in the country on the republic issue. We had the highest voter turnout in the Constitutional Convention elections, which was a voluntary voting process, as you know. There was a 52 per cent voter turnout compared with the national average of just under 47 per cent. We are also the most strongly republican of the states or territories in this country. Over two-thirds of the electorate in the ACT cast first preference votes for republican groups, which compares with around 27 per cent of first preference votes for pro-monarchy groups.

Yet despite this level of engagement with, interest in and commitment to the republic issue, people in the territory are confused about what they will be voting for in November. Few are familiar with the precise details of the bipartisan appointment model and even fewer, obviously, have read the bills. When reading the proposed question, they think there is no community involvement in the process. This is, of course, wrong. In my view, as an attendee of the Constitutional Convention, it does not reflect what the Constitutional Convention would have wanted to be represented in the question and the long title.

This leads me to my second point, which is that the title is incomplete to the point of misleading the public. While there are four steps in the appointment process, the two underlying principles of those steps are community involvement and bipartisanship. The latter is reflected in the title already, but the former is not. This is despite the nominations committee being expressly contemplated by virtue of section 60 of the Constitutional Alteration Bill.

I note that there has been considerable deliberation by this committee about the balance to be struck between accurately summarising the bill and maintaining a concise title. However, excluding the nominations committee element has the effect of misrepresenting the extent of community participation and overemphasising the role of politicians in that process. This is not merely an academic point. So many young people are already cynical about politicians and the political process. If the government and the parliament allow this title to go ahead without amendment, they will be implicitly encouraging the manipulation of mistrust of politicians within the community.

I am sure that you have all seen this morning's news poll in the *Australian* which demonstrates so clearly the potential effect of this manipulation on young and other Australians. There is a lesson in that. While a lot of young Australians are genuinely interested in the issue, there is great variation in the levels of knowledge. Despite this variation, however, what is common is the sentiment that they want to make an informed choice on the issue. Providing a more detailed title that more accurately reflects the Constitutional Convention's recommendations will allow them and other Australians to do this.

The poll also indicates that the wording of the question will be critical. I urge the committee to keep this in mind when making its report to the parliament. The wording will affect the outcome. This is not me asking you to manipulate the wording to effect a 'yes' or 'no' vote; it is simply about allowing Australians to understand fully what they are being asked to vote on.

My second concern relates to the appointment of members to the presidential nominations committee. The objective stated in the Constitutional Convention's resolutions—I am sure you have heard this before—is to ensure that 'the Australian people are consulted as thoroughly as possible'; that 'this process of consultation shall involve the whole community'; and that 'the composition of the committee should take into account considerations of federalism, gender, age and cultural diversity'.

At the moment, section 9 of the draft bill simply states that 'the Prime Minister must appoint 16 persons to the committee who are not members of Commonwealth parliament or

a state or territory legislature'. I believe that the Prime Minister's appointment of community members to the committee should be as transparent and representative as possible. As it stands, the discretion left to the Prime Minister is broader than that recommended by the Constitutional Convention. In my view, section 9 should be amended to specifically require the Prime Minister to consider the factors of gender, age, cultural diversity and federalism in appointing community members.

While I understand that consideration of these factors cannot be mandated or enforced, they should be included in order to reflect the Constitutional Convention's resolutions and in order to provide guidance to the Prime Minister to this effect. Further, it is important to recognise the need for impartiality and objectiveness on the part of the government and the parliament in this matter. The failure to reflect in the bill these selection criteria has and will be used against the 'yes' case by 'no' voters and 'no' campaigners. It is not morally right and it is not politically defensible for the government or parliament to deviate from the Constitutional Convention's recommendations in a manner which provides ammunition to opponents of the model. They are my preliminary comments. I would be pleased to answer any questions from the committee, if you have any.

CHAIRMAN—I have a question about the codification of qualifications of members of the community. What do you do if we recommend that you write it into the Nominations Procedures Bill, it takes into account gender equity and diversity and all this other stuff, we come to nominate the first potential President and, for a lack of better terminology—you will excuse my lack of precise English—some fruit-loop decides that they were not properly represented in that process? They claim that none of the 16 community members represents their particular place in the sun. They could challenge it all the way through the courts and tie up the whole blessed nomination and election of a President procedurally for months on end.

Ms Witheford—I do not think there is a problem. As you said, it is an ordinary act of parliament anyway. If we add this amendment, it is really just requiring that the Prime Minister consider it. I am not sure whether that would provide a legal basis to challenge all the way, in my view.

CHAIRMAN—I would have thought a legal challenge would force the Prime Minister to prove that he considered it. How he does that is beyond me.

Ms Witheford—I guess consideration is a broader—

CHAIRMAN—That is why I am concerned about codification.

Ms Witheford—'Consider' is a broad word. I imagine that the Prime Minister would be able to demonstrate that he or she has considered the process. I do not think there is a problem. I think the main point is to reflect what the Constitutional Convention went through. There was a real emphasis at the convention on requiring that this process of electing our President have community input and, more than that, that it reflect the diversity of the community. I think it is really important that that is put into this bill. It is enough to consider it and to make reference to consideration in the explanatory memorandum. There is no harm in reflecting the convention's recommendations on that.

Ms ROXON—I apologise if I missed part of your submission at the start. Tell me if you have already done it and I will go back to the transcript. You noted, when I returned, the long title. You thought leaving out the role of community involvement in the process was misleading. Did you suggest to us any particular wording that you thought was preferable for the long title? I note that you are the ACT convenor. It may be that you are simply adopting the wording that has already been put to us by other ARM representatives. It might be helpful if you could perhaps talk to us a little about that.

Ms Witheford—Broadly, I have endorsed the proposal provided by the chair of the Australian Republican Movement. I also note that Michael Lavarch has suggested that powers be mentioned as well. To me, the more detail, the better. However, I understand the balance between maintaining a concise title and reflecting adequately what the model is.

I guess my main concern is to ensure that people who are voting in that ballot booth understand what they are voting for. They will not have a copy of the bill or the convention communique with them. I am not going to die in a ditch over the powers or those sort of things. I really think the central thing that needs to be in there is the replacement of the Queen with an Australian head of state. That is the central thing that needs to be reflected. The nomination process is also a critical element that has to be in there. When it comes to the powers of the President, I think it can go either way.

Ms HALL—I will quickly refer you to the Michael Lavarch long title question. What do you think of that? Do you have any problems with that being the question put to the Australian people?

Ms Witheford—My personal perspective—we do not have a branch position on this—is that we should put in the nomination process because I think it is a critical element for the reasons I have mentioned.

Ms HALL—Thank you.

Mr McCLELLAND—Just briefly, the ARM has put in their earlier submission that they would like, in respect of the dismissal procedure, a specific reference to a disapproval of the Prime Minister's action being a vote of no confidence either in the Prime Minister or the government. We heard today from the task force that prepared the bill that the downside is that you are effectively prescribing to parliament how parliament should act. Parliament always has the power to move such a no confidence motion in any member of parliament or, indeed, in the government itself. In other words, it is not appropriate that the constitution dictate how parliament should act. Do you see any merit in that argument?

Ms Witheford—I think you are right. The reality is that there will be the political resolution of such an issue. It does not need to be in the constitution. But, at the same time, it is what Malcolm Turnbull was referring to as the braces approach. It would not hurt to put it in. I think it would reflect the Constitutional Convention's recommendations to put in that it constitutes a vote of no confidence. At the same time, I think it does not really make much difference because, in the end, it is a political resolution of the issue. The impact of public opinion and political pressure will take care of it, I would imagine, if that is what you are asking.

CHAIRMAN—Thank you very much, Anne. We appreciate it. I thank everybody for appearing today. I thank Hansard, my colleagues, the staff and everybody. I now declare this hearing of the committee closed. We will convene at 10 o'clock on Tuesday until such time as we have a report.

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

That, pursuant to the power conferred by section 2(2) of the Parliamentary Papers Act 1908, this committee authorises publication of the evidence given before it at public hearing this day.

Committee adjourned at 4.41 p.m.