6

Other matters arising from the Republic Bill

Acting President arrangements

6.1 The Constitutional Convention recommended that the Government and Parliament give consideration to the transitional and consequential matters which would arise from the various recommendations of the Convention, including 'provision for an acting head of state in certain circumstances'.[1] Accordingly, proposed s. 63 of the Republic Bill provides:

> **63 Acting presidents and deputies**
>
> Until the Parliament otherwise provides, the longest-serving State Governor available shall act as President if the office of President falls vacant. A State Governor is not available if the Governor has been removed (as acting President) by the current Prime Minister under section 62.
>
> Until the Parliament otherwise provides, the Prime Minister may appoint the longest-serving State Governor available to act as President for any period, or part of a period, during which the President is incapacitated.
>
> The provisions of this Constitution relating to the President, other than sections 60 and 61, extend and apply to any person acting as President.

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1 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 41, paragraphs 41, 44.

6.2 Proposed s. 63 was the subject of some discussion in the evidence before the Committee. For example, the Law Society of New South Wales questioned whether, if some States retain links to the monarchy, it would be acceptable to the Australian people to have a representative of the Queen acting as President, and also whether such an arrangement would be acceptable to the Queen.[2] The two other issues raised concerned the possibility of serial dismissal of acting Presidents and the qualifications of office for acting Presidents.

Serial dismissal

6.3 The primary concern raised before the Committee about this provision was that it would permit a Prime Minister to serially dismiss all acting Presidents, perhaps to ensure that a malleable acting President holds the position.[3] Some witnesses did not see this as a real possibility.[4] Professor Greg Craven described this suggestion as 'ludicrous', and

> … [b]ased on a fundamental misunderstanding of how constitutions work. Some people read constitutions, look at the rules on paper, and they think that is the only thing that actually makes the constitution run. What really makes the constitution run is the rules on paper and the constitutional psychology developed over 100 years. … It is utterly inconceivable that a Prime Minister could … or would [serially dismiss all acting Presidents]. If a Prime Minister ever took it into his head to do that, there is no rule in a constitution that is going to make any difference. … When you assess a constitution, you have to assess it realistically. … When you are assessing two options, if you are going to assess one option unrealistically, you have to assess the other option unrealistically.[5]

6.4 It was suggested that, to prevent this possibility, the Prime Minister should not have power to dismiss an acting President,[6] or at least not before the expiry of the period of thirty days specified in proposed s.62 of the Republic Bill during which the Prime Minister must seek ratification of a prior dismissal from the House of Representatives.

6.5 The Committee notes a fundamental problem with these options. As an acting President would be able to exercise all the powers of the President, including the reserve power to dismiss a Prime Minister, such restrictions

2 Law Society of New South Wales, *Submissions*, p. S509.

3 Mr Harry Evans, *Submissions*, p. S39; The Hon Justice Ken Handley, *Submissions*, p. S54.

4 See, for example, Associate Professor Peter Howell, *Submissions*, p. S468.

5 Professor Greg Craven, *Transcript*, pp. 304–305; The Hon Michael Lavarch, *Transcript*, p. 533.

6 The Hon Justice Ken Handley, *Submissions*, p. S54.

would render the acting President too powerful. If the Prime Minister were to be prevented from dismissing an acting President, either absolutely or for only a specified period, it would be necessary, in order to maintain an appropriate balance of power, to circumscribe the acting President's power to dismiss the Prime Minister. The Committee concludes that the result would be a very complicated provision for questionable benefit.

6.6 Moreover, the Committee notes that the proposed arrangements for acting Presidents to a large extent mirror present arrangements, which appear to have operated satisfactorily. Under ss.4 and 126 of the Constitution, the Queen appoints an administrator when the Governor-General is unavailable. All State Governors hold dormant commissions to act as administrator. The Prime Minister may advise the Queen to dismiss an acting Governor-General in the same way as he or she may advise the Queen to dismiss a Governor-General (see discussion above in Chapter 5). Thus there is, in theory, potential for a 'serial dismissal' scenario in the present Constitution.

6.7 A number of submissions advocated the omission of the words 'until the Parliament otherwise provides' from the first and second paragraphs of proposed s.63, on the basis that to permit Parliament to alter the Constitutional arrangements for acting Presidents could politicise the office.[7]

6.8 In addition, concern was expressed that the list of potential acting Presidents is not inexhaustible, so that, should the Prime Minister dismiss all acting Presidents, or alternatively, if a number of acting Presidents were not 'available', the office of President would be left vacant so that there would be no person available to exercise the powers of the President, and no means of obtaining such a person.[8] A State Governor would not be 'available' if the relevant State Government did not agree to the Governor so acting.[9]

7 Associate Professor Peter Howell, *Submissions*, p. S468. See also supplementary submission.

8 The Hon Malcolm McLelland QC, *Submissions*, p. S628–S629; The Hon Justice Ken Handley, *Submissions*, p. S54.

9 Referendum Taskforce, *Submissions*, p. S91.

6.9 The Hon Malcolm McLelland QC suggested that the pool of potential acting Presidents should be widened to include persons additional to State Governors 'so that there is no real possibility of exhaustion of the supply of potential acting Presidents'.[10]

6.10 The Committee rejects the concern expressed about the inclusion of the words 'until the Parliament otherwise provides'. It does not believe that such a mechanism would have potential to politicise the office of President. Indeed, the Committee considers that to permit the Parliament to enact legislation to put in place other acting arrangements is the most sensible mechanism for inclusion in a Constitution to take account of the various possibilities discussed during hearings. For example, it would allow Parliament to enact appropriate legislation in the unlikely event of the pool of acting Presidents being exhausted, either because the Prime Minister had serially dismissed them all, or because some were 'unavailable' for other reasons.[11]

Qualifications of office

6.11 Under proposed s.63, an acting President would not be subject to the same qualifications of office as a President.[12] A number of witnesses suggested both a President and an acting President should be subject to the same qualification requirements, particularly the requirement relating to citizenship.[13] In this regard, the Referendum Taskforce stated:

> It has not been seen as necessary to provide that an acting President or presidential deputy meet the eligibility requirements for appointment as President. Subject to the scope for future legislation, the proposed arrangements provide only for State Governors to act as President. At present, there is no reason to expect State Governors would not be suitable. In the event that the field of potential acting Presidents is extended beyond State Governors by future legislation, that legislation could specify eligibility requirements.[14]

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10 The Hon Malcolm McLelland QC, *Submissions*, pp. S628–S629.

11 The Hon Malcolm McLelland QC, *Submissions*, pp. S628–S629. See also *Transcript*, p. 85.

12 See third paragraph of proposed s.63.

13 See, for example, Associate Professor Howell, *Submissions*, p. S468; Law Society of New South Wales, *Submissions*, p. S509.

14 Referendum Taskforce, *Submissions*, p. S92.

6.12 The Committee notes that proposed s.60 of the Republic Bill will apply to a President the same qualification requirements as those applying to member of Parliament by virtue of s.44 of the Constitution. One of these is that a member cannot hold an 'office of profit under the Crown'. The Republic Bill would amend this to read 'office of profit under the Executive Government of the Commonwealth, a State or a Territory'.[15] The Committee expresses concern that difficulties could arise if acting Presidents were required to satisfy this element of the qualifications of office for President, as it is not clear whether a State Governor in a republican State would hold such an office.[16]

6.13 However, the Committee agrees that there is merit in the suggestion that an acting President should be an Australian citizen, although it notes that it may be that such a provision would exclude some presently incumbent State Governors.[17]

Recommendation 12

6.14 **The Committee recommends that, subject to any constitutional objections, consideration be given to amending the Republic Bill so that an acting President would be required to satisfy the same citizenship requirements as those applicable to the President.**

Deputy president arrangements

6.15 The Constitutional Convention did not make any specific recommendation on the subject of deputy presidents, although it did recommend that consideration be given to 'transitional and consequential matters' arising out of the proposed amendments to the Constitution.[18]

15 See item 18, Schedule 2 of the Republic Bill.
16 Professor Cheryl Saunders, *Transcript*, p. 735.
17 The Rt Hon Sir Ninian Stephen, *Submissions*, p. S320.
18 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 41, paragraph 41.

6.16 The Republic Bill provides, in the fourth paragraph of proposed s.63:

> …Until the Parliament otherwise provides, the President may appoint any person, or any persons jointly or severally, to be the President's deputy or deputies, and in that capacity to exercise during the pleasure of the President (including while the President is absent from Australia) such powers and functions of the President as the President thinks fit to assign such deputy or deputies.

6.17 At present, s.126 of the Constitution provides for the appointment of deputies for the Governor-General to perform the functions, and exercise the powers, that the Governor-General assigns to him or her. The Referendum Taskforce explained that:

> It is usual practice for two State Governors to be given standing appointments as deputies to exercise formal or ceremonial powers when the Governor-General is unavailable, including the power to assent to bills, authorise expenditure and sign subordinate legislation with Federal Executive Council advice. In practice, it would be now extremely rare for the Governor-General to request a deputy to exercise any of the powers or functions assigned under standing appointments. Advances in transport and communications since Federation have almost eliminated the need for the Governor-General to rely on deputies. …
>
> Section 126 of the Constitution refers to the appointment of persons to be deputies 'within any part of the Commonwealth'. The proposed new provisions would not include the phrase 'within any part of the Commonwealth'. It is no longer desirable or necessary to appoint a presidential deputy in respect of a particular geographical location.[19]

6.18 Various concerns relating to the office of deputy were expressed in the evidence before the Committee. The Australian Council of Trade Unions suggested that there should be a specific obligation upon the President to consult the Prime Minister before appointing a deputy.[20] However the Committee agrees with the view expressed by the Referendum Taskforce that under proposed s.59, the President would be obliged to exercise the power to appoint a deputy only on advice.[21] Hence, there is no need to make specific provision to this effect.

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19 Referendum Taskforce, *Submissions*, p. S91.

20 Australian Council of Trade Unions, *Submissions*, p. S367.

21 Referendum Taskforce, *Submissions*, p. S91.

6.19 Another suggestion was that deputies should be appointed by the same process as that applicable to a President[22], and that the same qualifications of office should apply to a deputy as apply to the office of President.[23] However, the Committee believes that these suggestions would make the office of deputy overly cumbersome.

6.20 Some witnesses felt that due to modern communications, the powers of deputies should not be as extensive as those of the President. It was suggested therefore, that the 'exercise of powers could be limited to circumstances where the President is sick or on recreation leave and in some instances, particularly ceremonial duties, when the President is out of Australia'.[24] In this respect, the Committee notes that under the fourth paragraph of proposed s.63, the President would be empowered to assign specified functions and powers to a deputy, during 'the pleasure of the President'. As this power would be exercisable only on advice, the government of the day would be able to ensure that the use of deputies was confined as it saw fit.

6.21 The principal objection to this aspect of the Republic Bill was that it is unnecessary to make provision for deputy presidents. [25]It was argued that the office of deputy Governor-General was established for a particular historical purpose, and in particular historical circumstances, which no longer apply. The obstacles of communication that existed in 1901 have now been overcome.[26] Furthermore, it was suggested that the provisions in the Republic Bill relating to acting Presidents would be sufficient to cover all circumstances in which a President is unable to perform his or her duties—for example, where the office of President is vacant, or where the President is incapacitated or on leave or otherwise unavailable to act. [27]

6.22 In this regard, the Referendum Taskforce noted that the position of deputy is not obsolete, pointing out that the ceremonial duties performed by the Chief Justice of the High Court at the opening of Parliament provide one current example where a deputy still performs a function for the Governor-General. The Taskforce argued that 'the proposed provisions

22 Dr Baden Teague, *Transcript*, p. 280.

23 Law Society of New South Wales, *Submissions*, p. S10.

24 Law Society of New South Wales, *Submissions*, p. S10.

25 Australian Council of Trade Unions, *Submissions*, p. S367; Dr Gavan Griffith QC, *Submissions*, pp. S395–S397; Professor Peter Howell, *Submissions*, p. S468; Dr Baden Teague, *Transcript*, p. 280.

26 Professor Peter Howell, *Submissions*, p. S468; Dr Gavan Griffith QC, *Submissions*, pp. S395–S397.

27 Dr Gavan Griffith QC, *Submissions*, pp. S395–S397.

broadly preserve the scope for appointment of deputies. There is no expectation that reliance on deputies would increase in practice.'[28]

6.23 While recognising the fact that the position of deputy is something of an historical curiosity in the late twentieth century, the Committee does not agree that the provisions of the Republic Bill allowing for deputy presidents should be omitted, as they provide a useful additional mechanism to take account of unforeseen circumstances.

The scope of section 117 of the Constitution

6.24 Section 117 of the Constitution presently provides:

> **Rights of residents in States**
>
> **117.** A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

6.25 The Constitutional Convention Communique does not specifically recommend an amendment to s.117. However, the Convention recommended that:

> The Commonwealth Government and Commonwealth Parliament give consideration to the transitional and consequential matters which will need to be addressed, by way of constitutional amendment or other legislative or executive action… (41).[29]

6.26 Items 38 and 39 of Schedule 2 of the Republic Bill would amend s.117 so that 'an Australian citizen' rather than 'a subject of the Queen' would be protected from discrimination on the basis of residence.

6.27 There were a few concerns raised in the evidence before the Committee relating to the proposed alterations to s.117, including that the proposed amendment would leave the definition of 'an Australian citizen', and hence the beneficiaries of the protection of s.117, to Parliament.[30] Thus, the extent of the protection provided by s.117 would not be constitutionally entrenched, but could be altered by ordinary legislation.

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28 Referendum Taskforce, *Submissions,* p. S91.

29 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 41, paragraph 41.

30 Mr Jeremy Buxton, *Submissions*, p. S304.

6.28 The Committee considers that it is appropriate for Parliament to be able to define the term 'citizen'. It noted that this mechanism is the most appropriate way to ensure that the constitutional provision keeps pace with community values, which would be reflected in legislation.

6.29 However, the main objection was that the substitution of the term 'Australian citizen' for 'subject of the Queen' effectively narrows the scope of s.117 in its present form. Mr Jeremy Buxton stated that the

> amendment apparently fails to recognise those 'subjects of the Queen' who enjoy such rights of citizenship as voting in State and Commonwealth elections but who are not formally Australian citizens. These people will presumably lose the protection of s.117 that they currently have through this amendment.
>
> It is now a fact of history that some 15 years ago UK migrants lost the automatic privileges of citizenship unless they formally applied to become Australian citizens. This was a timely reform, but those non-citizen 'subjects of the Queen' already on electoral rolls were able to remain there. They are in effect 'citizens of Australia' but not 'Australian citizens'…. most people would concede that a right once recognised should not be lightly removed, especially from a necessarily ageing component of the population. [The proposed amendments] should not risk depriving any category of citizen of the protection of section 117.[31]

6.30 This concern was echoed by Ms Kim Rubenstein of the Women's Constitutional Convention Steering Committee.[32] Moreover, she expressed the view that the protection from discrimination afforded by s.117 in its present form is too narrow, and referred to judicial dicta to this effect. She suggested that it would be preferable to amend s.117 by replacing the term 'a subject of the Queen' with the term 'a permanent resident.'[33] Professor Cheryl Saunders agreed with this suggestion.[34]

6.31 The Committee notes that arguably the closest republican equivalent of the term 'a subject of the Queen' is the term 'Australian citizen'.

31 Mr Jeremy Buxton, *Submissions*, pp. S304–S305.

32 Ms Kim Rubenstein (Women's Constitutional Convention Steering Committee), *Transcript*, p. 162.

33 Ms Kim Rubenstein (Women's Constitutional Convention Steering Committee), *Transcript*, p. 162.

34 Professor Cheryl Saunders, *Transcript*, p. 731.

6.32 The Committee acknowledges that the proposed amendment to s.117 may marginally narrow the scope of present s.117, although it notes that a number of decisions of judges of the High Court have effectively equated the notion of 'a subject of the Queen' with that of 'Australian citizen.'[35] In *Street v Queensland Bar Association,* Deane and Dawson JJ remarked that the phrase 'a subject of the Queen' in s.117, used in contemporary circumstances, means Australian citizen.[36]

6.33 On the other hand, if the notion of 'permanent resident' were to be substituted for 'a subject of the Queen', a considerably wider group may enjoy the protection of s.117. While this result is probably not in itself undesirable, the Committee is of the view that such an amendment is more than a merely 'consequential matter' and thus not within the ambit of the recommendations of the Constitutional Convention. The Committee therefore concludes that the amendment proposed in the Republic Bill to s.117 of the Constitution is appropriate.

6.34 However, in order to ensure that no person who currently enjoys the protection afforded by s.117 is deprived of that protection, the Committee supports the inclusion of a transitional provision to 'grandfather' such people.

Recommendation 13

6.35 **The Committee recommends that the Republic Bill be amended so that no person who currently enjoys the protection from discrimination on the basis of residence afforded by s.117 of the Constitution would be deprived of that protection as a result of the amendment to s.117 proposed in the Republic Bill.**

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35 See, for example, *Nolan v. Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 185-186, where a majority of the High Court decided that the term "a subject of the Queen" is the antonym of "alien" in s.51(xix) of the Constitution.[35] In *Street v Queensland Bar Association* (1989) 168 CLR 461 the High Court endorsed the decision in *Nolan.*

36 *Street v Queensland Bar Association* (1989) 168 CLR 461, 525, 541. However, other judicial statements suggest that the precise scope of the protection conferred by s.117 in its present form is yet to be determined. In *Street v Queensland Bar Association* (1989) 168 CLR 461, 553, Toohey J said that "[w]hether a person living in Australia, but not a natural born or naturalised Australian citizen, is entitled to the protection accorded by s.117 is a matter to be considered when the occasion arises".

The position of the States under the Republic Bill

The ability of States to retain links to the Crown

6.36 Any constitutional alteration which would transform Australia at the federal level into a republic has significant implications for the States. This was recognised by the Constitutional Convention, which recommended:

> That the Commonwealth Government and Parliament extend an invitation to State Governments and Parliaments to consider:
>
> > The implications for their respective Constitutions of any proposal that Australia become a republic; and
> >
> > The consequences to the Federation if one or more States should decline to accept republican status.
>
> That any move to a republic at the Commonwealth level should not impinge on State autonomy, and the title, role, powers, appointment and dismissal of State heads of state should continue to be determined by each State.
>
> While it is desirable that the advent of the republican government occur simultaneously in the Commonwealth and all States, not all States may wish or be able to move to a republic within the timeframe established by the Commonwealth.
>
> That the Government and Parliament should accordingly consider whether specific provision needs to be made to enable States to retain their current constitutional arrangements.[37]

6.37 The Republic Bill gives effect to this resolution, by providing in cl.5 of proposed Schedule 2:

> **5 The States**
>
> A State that has not altered its laws to sever its links with the Crown by the time the office of Governor-General ceases to exist retains its links with the Crown until it has so altered its laws.

6.38 Clause 9 of that schedule provides:

> The reference to the Crown in clause 5 of this Schedule shall extend to the Queen's heirs and successors in the sovereignty of the United Kingdom.

37 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 37, paragraphs 14–16.

6.39 The Republic Taskforce states in its submission:

> The Government is firmly of the view that, if change to a republic is endorsed at the referendum, the change should occur simultaneously at Commonwealth and State levels on 1 January 2001. While it is constitutionally possible to have an arrangement with a republican form of government at Commonwealth level but with some or all States retaining links to the Crown at State level, such an arrangement is less than ideal.
>
> …The Government has indicated that it would consider it inappropriate to make changes to State constitutions through a national referendum to impose a republican form of government. …The Government sees it as appropriate for the States to manage their own processes for considering change at State level. … Some States would require State referendums to change their State constitutions to sever links to the Crown and establish republican arrangements. In this context, the proposed provisions must cover the possibility that one or more States will not change by 1 January 2001.[38]

6.40 Various witnesses were supportive of this provision.[39] However, some witnesses felt that, within the framework of the Constitutional Convention's recommendations, the Commonwealth could do more to ensure that all jurisdictions in Australia move simultaneously to a republican system, if the referendum is successful. It was suggested that the Constitution could be amended to allow States where a referendum would be necessary to institute republican arrangements, to make the transition to republican status other than by holding a referendum.[40]

38 Referendum Taskforce, *Submissions,* pp. S96–S97.

39 For example, Associate Professor Peter Howell, *Transcript*, p. 248; Professor Brian Galligan, *Transcript*, p. 203.

40 Mr George Williams, *Submissions,* p. S224.

6.41 This provision also attracted some criticism from those particularly concerned with the rights of States in the federal system. It was suggested that it is:

> not only unnecessary, but implies that the States require the permission of the Commonwealth to retain the integrity of their own Constitutions. … [Clause 5] can be interpreted as not merely recognising State constitutional responsibilities, but actually permitting and authorising their exercise … The ability of the States to determine the future of their links to the Crown should not be seen to depend upon an Act of the Commonwealth Parliament.[41]

6.42 Other witnesses did not consider it likely that cl.5 would be so interpreted.[42] The Referendum Taskforce noted that s.106 of the Constitution already deals with the continuation of State constitutions, subject to the Commonwealth Constitution, and stated that 'the proposed provision does not effect any change to State constitutions but reinforces the position that the States would be able to make their own decisions about whether to change.'[43]

6.43 In addition, it was questioned whether it is in fact possible, as a matter of law, for a State or States to remain constitutional monarchies if Australia were to move to a republican Constitution at the federal level. In particular, Dr Gavan Griffith QC questioned this assumption, arguing that:

> It is a constitutional aberration to contemplate that the head of a foreign state may have any constitutional status in the government of a State forming part of a Commonwealth Republic.[44]

6.44 The Committee notes that this view is not shared by other constitutional law experts, such as Mr Dennis Rose QC and Professor George Winterton.[45]

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41 Mr Jeremy Buxton, *Submissions,* p. S302.

42 Mr Brad Selway QC, *Transcript,* p. 265.

43 Referendum Taskforce, *Submissions,* p. S98.

44 Dr Gavan Griffith, *Submissions,* p. S402.

45 Mr Dennis Rose, QC, 'Acting Solicitor-General's advice' in the Report of the Republic Advisory Committee, *An Australian Republic – the Options,* 1993, vol. 2 pp. 305–306; Professor George Winterton, *We the people* 1994, p. 46; Professor George Winterton, 'An Australian Republic', (1988) 16 *Melbourne University Law Review*, 467, 470.

6.45 The Committee considers that there are clearly persuasive legal and policy grounds for including cl.5, in particular the need to dispel any argument that the amendments to the Constitution are intended to affect links with the Crown at state level. These considerations outweigh the concerns expressed about cl.5. Further, the Committee does not agree that, as a matter of abstract principle, a State could not retain links to the Crown even if at the Commonwealth level, a republican system were to be adopted, although it notes the point made by a number of witnesses that the Queen may choose not to continue as monarch of a single State within a republican Federation.[46]

Other provisions relating to the federal system

6.46 The Constitutional Convention recommended that 'the Commonwealth Government and Commonwealth Parliament give consideration to the transitional and consequential matters which will need to be addressed, by way of constitutional amendment or other legislative or executive action'.[47]

6.47 Clause 6 in proposed Schedule 2 provides:

> **6 Unified federal system**
>
> The alterations of the Constitution made by the *Constitution Alteration (Establishment of Republic) 1999* do not affect the continuity of the federal system, including the unified system of law, under this Constitution.

6.48 In relation to this clause, the Referendum Taskforce stated:

> The intention in developing the Bills has been that the changes would not affect the continuity of the federation of the Australian system of law. Proposed cl.6 has been included for avoidance of doubt and as a clear expression of that intention. It would overcome any suggestions that arrangements between the Commonwealth and a State, or between one State and another, would be affected by the proposed changes.
>
> A particular concern raised with the Taskforce was that, without such a provision, there may be unintended consequences for the common law of Australia. In particular, it was suggested that there may be cross-jurisdictional issues where one jurisdiction has retained links to the Crown and the other has not. … Without

46 For example, Law Society of New South Wales, *Submissions,* p. S509.

47 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 41, paragraph 41.

> accepting that these concerns are well founded, proposed clause 6 has been included in the interests of caution.[48]

6.49 Clause 6 attracted some comment in submissions to the committee and in hearings. Mr Jeremy Buxton expressed a concern that the term 'unified system of law' in the text of cl.6, and the heading to cl.6 ('Unified federal system') could in the future 'result in a far more centralised federalism than was originally envisaged in 1900 or is wanted by Australians today'.[49] It was suggested that cl.6 was unnecessary, but if it were retained, it should refer to the 'coordination' of the system of law, rather than concepts of 'unity'.

6.50 Other witnesses rejected this concern. The South Australian Solicitor-General, Mr Brad Selway, expressed satisfaction with the use of the phrase 'unified system of law', saying:

> South Australia asked for it to be a unified federal system and a unified system of law … we ended up with 'continuity' of the federal system. What is unified is the system of law … I would say, though, that the clause says it does not affect it. If there is not a unified system of law, it is not affected. All that is happened is that we have not affected anything. The status quo is maintained. … I have no problem myself with 'a unified system of law'. I am not at all certain that it was under much threat by these changes, but I am not at all concerned about those words.[50]

6.51 The Committee notes that in ***Kable v Director of Public Prosecutions for NSW,*** the High Court indicated that 'there is a common law of Australia as opposed to a common law of individual states'.[51] Thus, cl.6 clearly has a role to play in maintaining the coherence of Australia's legal system in the event of a change to a republican system of government. The Committee concludes that no change to cl.6 is warranted.

48 Referendum Taskforce, *Submissions,* p. S98.

49 Mr Jeremy Buxton, *Submissions,* p. S303. See also Dr David Mitchell, *Transcript,* p. 371.

50 Mr Brad Selway QC, *Transcript,* pp. 265–266.

51 (1996) 189 CLR 51.

Amendment of the Australia Acts

6.52 Clause 7 in proposed Schedule 2 was also the subject of discussion in the evidence before the Committee. Clause 7 provides:

> **7 Amendment of Australia Acts**
>
> The Commonwealth Parliament may, at the request of a State Parliament, amend section 7 of the *Australia Act 1986*, and section 7 of the Australia Act 1986 of the United Kingdom to the extent that it forms part of the law of the Commonwealth or that State, to provide that those sections do not apply to the State.
>
> Nothing in this clause prevents the amendment of section 7 of the *Australia Act 1986,* or section 7 of the Australia Act 1986 of the United Kingdom to the extent that it forms part of the law of the Commonwealth or a State, in accordance with subsection 15(1) of the *Australia Act 1986.*

6.53 Subsection 7(1) of the Australian and United Kingdom Australia Acts provide that 'Her Majesty's representative in each State shall be the Governor'. It is arguable that these provisions entrench state links to the Crown. It is therefore sensible to amend these provisions to avoid this potential difficulty.

6.54 Section 15 of the Australia Acts provides two mechanisms for their amendment:

- by a law of the Commonwealth passed at the request or with the concurrence of all the States (s.15(1)); or
- by the Commonwealth Parliament if it is given power to do so by an amendment of the Commonwealth Constitution (s.15(3)).

6.55 Clause 7 would give the Commonwealth Parliament power to amend s.7 of the Australia Acts by picking up the procedure provided for in s.15(3).

6.56 The proposed reliance upon s.15(3) of the Australia Acts attracted criticism in the evidence before the Committee. The view was expressed that only the mechanism provided in s.15(1) should be employed, as it would "be politically and ideologically undesirable to force a change on a state" using the s.15(3) procedure.[52]

6.57 The Referendum Taskforce indicated that proposed cl.7 is 'only a fall back'. Its submission states:

52 Associate Professor Peter Howell, *Transcript,* p. 247. See also Professor Howell, ***Submissions***, p. S470; Mr Jeremy Buxton, ***Submissions***, p. S304.

> During consultation on the exposure draft of the Republic Bill … States indicated their concern about an approach based on s.15(3) and their strong preference for reliance on the mechanism under s.15(1). The Government has indicated to the States that it is prepared to rely on s.15(1) instead of s.15(3) if all States are able to pass legislation in time (by about mid 2000). In this context, the s.15(3) provision in proposed cl. 7 is only a fall back. Proposed cl. 7 would make it clear that the inclusion of a s.15(3) provision as a fall back does not prevent reliance on s.15(1) if possible.
>
> Further, the Government has indicated it will consider removing that fall back provision if all States have their legislation in place by the time the Republic Bill is debated. However, it would not be appropriate to remove the fall back provision if one or more States are still to secure passage when the Commonwealth's legislation is passed.[53]

6.58 At the time the Committee deliberated on its report, all State Parliaments had passed legislation requesting the Commonwealth Parliament to enact legislation pursuant to s.15(1) of the Australia Acts ('the Request Acts'). Under these Request Acts, the States have requested the Commonwealth to amend s.7 of the Australia Acts so that each State Parliament is empowered to appropriately amend s.7 of those Acts.[54]

6.59 The Committee understands that, in light of the fact that all States have enacted appropriate legislation pursuant to s.15(1) of the Australia Acts, the Government will consider removing cl.7 from the Republic Bill before it is passed by the Commonwealth Parliament.

6.60 A number of witnesses expressed concern that, should the November referendum fail, the Commonwealth would, by relying upon these State Request Acts, nevertheless be able to amend the Constitution to institute a republican form of government.

6.61 The Committee notes this would clearly not be the case, as the Request Acts only empower amendment by the Commonwealth Parliament of s.7 of the Australia Acts, and not amendment of the Constitution. Moreover, these Request Acts would not permit the Commonwealth Parliament to give itself power to amend s.7 of the Australia Acts. Rather, the Commonwealth Parliament would be limited to amending the Australia Acts to allow State Parliaments to appropriately amend s.7 of the Australia Acts.

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53 Referendum Taskforce, *Submissions*, pp. S99–S100.

54 See *Australia Acts (Request) Act 1999* of each State.