COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Reference: Inquiry into an Australian Republic

THURSDAY, 29 JULY 2004

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SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Members: Senator Bolkus *(Chair)*, Senator Payne *(Deputy Chair)*, Senators Greig, Kirk, Ludwig and Scullion

Participating members: Senators Abetz, Barnett, Bishop, Brandis, Brown, Buckland, Carr, Chapman, Crossin, Eggleston, Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Humphries, Knowles, Lees, Lightfoot, Mackay, Mason, McGauran, Murphy, Nettle, Sherry, Stott Despoja, Tchen, Tierney and Watson

Senators in attendance: Senators Bolkus, Kirk, Payne and Stott Despoja

Terms of reference for the inquiry:

To inquire into and report on:

(a) the most appropriate process for moving towards the establishment of an Australian republic with an Australian Head of State; and

(b) alternative models for an Australian republic, with specific reference to:

(i) the functions and powers of the Head of State;

(ii) the method of selection and removal of the Head of State; and

(iii) the relationship of the Head of State with the executive, the parliament and the judiciary.

WITNESSES

Committee met at 9.04 a.m.

BRODSKY, Ms Juliette, Bill Drafting Committee

HAMMOND, Mr Jack David QC, Chair, Bill Drafting Committee

CHAIR—Welcome. This is the seventh hearing of the Senate Legal and Constitutional References Committee's inquiry into an Australian republic. The inquiry was referred to the committee by the Senate on 26 June 2003, and it is being conducted in accordance with the terms of reference determined by the Senate. The committee has received over 700 submissions for this inquiry. The terms of reference for the committee to consider are the most appropriate process for moving toward an Australian republic and alternative models for an Australian republic. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses do have the right to request to be heard in private session. It is important in those circumstances that the committee be given notice. Is there any specific capacity in which you are appearing this morning, Mr Hammond?

Mr Hammond—Yes, I am representing the bill drafting committee. A list of the members of the committee is set out on page 1 of our submission. I also appear on behalf of the co-author of our submission, Ms Juliette Brodsky.

CHAIR—You refer to your submission—it is submission No. 719. Is there any need to make amendments or alterations to it, or would you like to start with an opening statement?

Mr Hammond—I do not believe there is any need to make any changes to that written submission. I assume that the submission that is in front of the members of your committee includes all of the attachments.

CHAIR—It does indeed, Mr Hammond.

Mr Hammond—Thank you. If it meets the senators' convenience, I can commence now.

CHAIR—Please do.

Mr Hammond—The first point we would make in this very short opening statement is that there is a need—which we understand has been highlighted previously—to distinguish between process and model. We have sought to identify a process which, in our respectful opinion, will enable members of the Australian public to determine, if they so wish, whether the links with the monarchy ought to be severed. The model that we support is the McGarvie model, but we see the principal task as one of first putting in place a process to allow any model that meets the criteria which we have set out in our paper to be investigated and reported upon. The process that we have suggested in our submission does not assume that there will be any change to the existing constitutional provisions. In other words, it does not presume that Australia ultimately will sever its links with the monarchy but, if it does wish to, then one would move into a particular model.

Attachment A, at page 17 of our submission, sets out in text the process that we advocate. As one can see by the paper, it essentially suggests two committees: one committee at the state level and another committee at the federal level.

On page 24 of our submission there is a diagram entitled 'How the overall process works'. As the committee can see there, we are submitting that the Council of Australian Governments should coordinate and oversee the process. There are then two committees to be set up: one is a state or territory committee set up by the respective state or territory parliament and the other is a committee set up by the federal parliament. Each is an all-party committee and has a representative from the Liberal Party, from the Labor Party, from the National Party and from the Australian Democrats, as well as a person representing any independents, plus one member of the public. There are six members of each committee. The federal committee also comprises a representative from each of the state or territory committees, which means another eight members, so the federal committee would constitute 14 people. The role of that committee is to investigate and report upon the various models.

I take the committee now to page 3 of our submission, on which is the executive summary. There is an underlying assumption there that any model that recommends change would need to observe two fundamental principles, as set out in the submission:

i) the model which would best preserve or improve our democracy if the federation separated from the monarchy, and

ii) the method of deciding the head of state issue that would least strain the federation.

We see those as two principles that would underpin any debate on the issue. Australians subscribe to the need to retain or enhance our democracy and whatever is put in place should not strain the federation, so our federal structure remains. As the committee can see, we propose that:

Each state or territory committee is to invite submissions and hold hearings in its regional areas and capital city, and prepare reports. The federal committee is to consider those reports, and report on them.

It is intended that both major and minority supporters of a model have to describe it, give full reasons for preferring it and then distribute the reports widely—to parliaments, to the presiding officers of parliaments, on the net and the like. Subsequent to the federal report we then suggest that there be a national plebiscite at which the voters in each state or territory would vote on the model they prefer for their unit. They would also mark a ballot paper, showing their preference for a Commonwealth model.

Finally, assuming that the plebiscite does give a reasoned basis to move forward to a referendum, all electors would vote in one referendum on the one question—namely, whether the whole federation should separate from the monarchy. If that referendum is supported by the majority set out in section 128 of the Australian Constitution and a request from each state parliament—to satisfy the constitutional issues that may arise under the provisions of the Australia Act—then the whole federation would separate from the monarchy at the same time, with each state and territory and the Commonwealth converting to the model electors chose in the plebiscite. If that support were not obtained, there would be no change. We have also, as part

of our paper, attached a copy of a draft bill, and that follows page 24. May I be permitted to take the committee to that?

CHAIR—Go ahead.

Mr Hammond—The committee will note that the bill is drafted for the purposes of placing it before the parliament of Victoria. The only reason that parliament has been chosen is that we are a Melbourne based bill committee and we thought that was a good starting point. The committee will note that it is the sixth draft, dated 18 December 2002. As noted elsewhere in the submission we have given copies of this draft to both state and federal members of parliament, in government and opposition. I should add that the drafting of that bill was assisted by a former Chief Parliamentary Counsel of the Victorian parliament, Miss Rowena Armstrong QC, and we have drawn on other acts of the Victorian parliament for that purpose. We see this bill acting as a template for other states and territories and the Commonwealth.

CHAIR—Thank you.

Mr Hammond—We have endeavoured to ensure that the bill is crafted in such a way that it is democratic, non-partisan, publicly consultative and allows for any debate to take place as widely as possible. I do not propose to go through the whole bill but I will take the committee to page 5, clause 7, of the bill. I have not called it a section: it is not yet an act so I will not presume that. Clause 7 of the bill sets out the functions and powers of the committee. It says:

(1) The main function of the Committee is to investigate whether the Commonwealth of Australia and the States should sever their constitutional links with the Monarchy and to report on that investigation.

Clause 7 goes on:

(2) The Committee must also–

(a) investigate–

(i) models for the appointment, tenure, duties and powers of a Head of State for the Commonwealth of Australia;

(ii) models for the appointment, tenure, duties and powers of a Head of State for the State of Victoria–

and here are the key words:

that would preserve or improve the democracy of Australia or the State, as the case requires, and not place undue strain on the Australian federation if the Commonwealth of Australia and the States severed their constitutional links with the Monarchy; and

(b) report on the models so investigated that, in the opinion of the Committee, or of at least one member of the Committee, would best preserve or improve the democracy of Australia or the State, as the case requires, and would place least strain on the Australian federation.

I will take the committee to page 6 of the bill. Clause 9 sets out the minimum number of meetings. It is proposed that there be at least three in the metropolitan area of the city of

Melbourne and at least one meeting to be held at the locations shown: Ballarat, Bendigo, Dandenong, Geelong, Horsham, Mildura, Sale, Shepparton, Traralgon, Wangaratta, Warragul, Warrnambool. For non-Victorians, they are major regional cities in the state of Victoria. The intention is that the state and territory committees be funded and supported by their respective parliaments—so it is a parliamentary committee not a private committee or anything of that nature—and the Commonwealth committee would be funded and supported by the Commonwealth parliament. I would like to take the members of the committee to page 25.

CHAIR—Yes, page 25.

Mr Hammond—We have set out the explanatory memorandum. It follows the form with which, no doubt, senators are more than familiar. As we have said in our submission, in which we gave a background brief to the bill, we are also in a position, if it becomes necessary, to draft a second reading speech. It is probably convenient, now, to take the committee to page 23, which is attachment C.

CHAIR—Yes.

Mr Hammond—The committee is no doubt more than aware that we have set out, in the first paragraph, what we understand is the most recent public polling on the issue, which throws up the anomaly that a very high proportion of Australians seem to want an Australian head of state but on the last opportunity to have one—at the referendum—that was not passed. We are submitting that that is an unhealthy predicament: that is, that most people want a different head of state but they are not prepared to change. It was as a result of our concern that it could create a destabilising effect in due course, as has occurred to a certain extent in Canada, that we suggested that the resolution that the late Dick McGarvie and I put forward at Corowa—suitably modified on a couple of issues, particularly relating to the constitutional majorities being met before the referendum is passed—be adopted as a process to bring in any change. We say in the third paragraph:

The Bill does not presuppose that there will be change. However, it is crafted to ensure a democratic, non-partisan, publicly consultative means of investigating and reporting on the head of state model that would best preserve or improve our democracy if the whole Australian federation separated from the monarchy. Moreover, it is a politically feasible method of resolving the head of state issue that would least strain the Australian federation.

CHAIR—Mr Hammond, I wonder if we could pause there for a moment. There might be some questions from this side of the table, unless there is anything specific you want to address before we go to questions.

Mr Hammond—I have only one short point. In our view it is inevitable that Australia will sever its links with the monarchy. It is a question of when rather than if at all. That, we submit, is evidenced by the history of Australia from 1788 to today. One by one the links have been severed. An analogy we sometimes use is a ship leaving a pier: one by one the streamers break and we are almost down to the last streamer. We think that that is what will probably happen. We take the view that the most likely external catalyst for that will be the death or abdication of the present Queen. That will inevitably create the very debate that we are embarking upon at the moment with the committee. We submit that a process should be in place, given that inevitable debate. It is quite obvious that we do not support a view that is being promoted at the moment

that there should be two plebiscites and then a referendum, but we can come back to that in a moment if the committee wishes.

CHAIR—The ship may have left port but how many times do we have to go around the world to get to where we need to go? In that context you are proposing something like nine committees which, given the well-known creative ability of the republican movement to come up with different refinements of models and different models, could very well end up with a whole range of different preferred models across the states. Do you propose that consensus be achieved before the models are put to the public or do you anticipate that all models can be put to the public?

Mr Hammond—In our view, providing the models meet the two prerequisites that we have suggested—namely retention or improvement of our democracy while not putting too much strain on the federation—and that they obtain majority or minority support of the respective committees, they are the models that should be put to the public. It is possible—and we recognise this in our proposed process—that different models may be chosen between the states and territories and between those and the Commonwealth.

That is possible, but, as the committee is no doubt aware, even at present the states and territories have different parliamentary provisions. There are unicameral parliaments and bicameral parliaments. Different states have different voting systems. In Tasmania, you have the Hare-Clark system. In other states, you have a different one. Different states have their constitutions entrenched in different ways. In WA I believe their constitution still cannot be amended, save by referendum. In Victoria, by way of example, certain provisions of the Constitution Act 1975 can be amended by a simple majority of parliament. Other provisions, doubly entrenched, can only be amended by an absolute majority of both houses on the second and third reading speeches.

Most Australian states and territories have either a governor or an administrator who finally has to give assent to bills. As the committee is no doubt aware, that is not the case in the ACT. The ACT has no governor or administrator and laws passed by the Legislative Assembly take effect without the assent or approval of the Crown or its representative, although there is a power for the Governor-General to disallow laws by the Legislative Assembly. I should go back to the original letters patent, which the Crown issued in respect of the governors. I have not checked them recently, including the royal instruction, but certainly the letters patent were not identical between the states.

But, broadly speaking, notwithstanding those differences, we have a federal structure that has worked. In each state and territory we obviously have a constitutional legislative framework which those who live and vote in that state find acceptable. So we do not see any great problem if people do choose different models for different states and territories and for the Commonwealth, although we do suspect it will be the case that, whatever model an elector chooses for their respective state or territory, they will seek a similar model for the Commonwealth. There is likely to be less conflict or difference in those circumstances than there may be between the states and territories—which, as I said earlier, have not troubled Australia to date.

Senator PAYNE—Thank you for your submission and your remarks this morning. One of the aspects of community concern which has come out in this inquiry process is the need for the engagement and involvement of the Australian community—the Australian people—in any future process that discusses this particular aspect of constitutional change. While you have described your proposition as democratic, non-partisan and consultative, I must admit I am having some difficulty seeing where we would actually achieve the engagement and involvement of the Australian people. I would be interested in your comments on that.

Mr Hammond—If I may say so, to a very large extent this committee has demonstrated the interest and involvement of the Australian community. True, it is from people who are interested in any event. I recollect the chair saying there were over 700 submissions. We had a constitutional change here in Victoria a year or so ago. I think they were flat out emptying one pot of tea at the public meeting, because nobody turned up. But those changes have gone through in any event. It is clear that there needs to be some catalyst that will excite people's interest. At the moment, and probably in the foreseeable future, there may not be an internal catalyst—by that I mean one which is generated internally—save by one or more governments, be they Commonwealth, state or territory, taking the lead on the issues and, as it were, running with it.

But, as I said earlier, in our respectful opinion the major external catalyst will probably be the death or abdication of Her Majesty the Queen. That, we would submit, would create among the Australian public an interest in determining whether or not the successor to Her Majesty—Prince Charles or somebody else—should also be the monarch of Australia or whether there should be a change. Our concern is that Australia needs to have a process in place, if not engaged in, if and when that occurs. It is inevitable, although it may be regretted, that Her Majesty will die or abdicate one day. Therefore it is inevitable that that debate will take place. In our respectful opinion, there is an opportunity—and, dare we say, it is the duty of those who lead us in our parliament—to have a process ready for that eventuality. It may be that the internal catalyst will be earlier. For example, if there is a change in government, the federal government will create the catalyst, as we understand the present Labor Party policy.

We understand that not everybody who is going to be affected by this will go to meetings. Not everybody will put in submissions. But there are a lot of people interested. The late Dick McGarvie and I were delighted and surprised to see that between 400 and 500 people paid their own way to go to Corowa in December 2001 for a debate on process. That, we submit, demonstrates that there is the interest there.

Senator STOTT DESPOJA—I wish to clarify something. I understand your point about the time line, but, while you are suggesting legislators should have some kind of process in place before there is, say, a change in the monarchy, however that is brought about, are you suggesting that that should be the time line or is there any other specific time line you would like to give us, within which we can operate at the next election, for example? I am just wondering how long you think this process will take and whether or not, for example, your idea of a time line—that is, a change in the monarchy in the United Kingdom—might actually be skewed somewhat if the Australian public got quite excited at the thought of Prince William, maybe, taking over the throne.

Mr Hammond—That might be the case, but either way a debate will take place. Our view is that the process should commence as soon as politically possible. Senators will see that in the

bill we have drafted we have proposed that the bill should go before the parliament in one session, lay over and then be debated and passed in the next. That is at state level. We take the view that it will take time. It might take a number of years for all these steps to take place. It may even take more than one state or federal parliamentary term, but Australia can live with that, as it lived with creating the federation over many years.

But, whether we start soon or not, when Her Majesty dies or abdicates we feel sure that there will be a national debate into this whole issue. In our view, it would be far better if this process were under way. It would then act as an impetus for this debate and this process, rather than a catalyst. But we focus on the English monarchy because we feel that is inevitable. Whatever anybody says about whether there is interest in the issue at the moment, we submit they will not say that when the English monarch dies or abdicates.

Senator STOTT DESPOJA—Thank you, I understand your point. Lastly, there are no specific criteria for a head of state that you have laid down here. In accordance with the McGarvie model, only Australian citizenship is the qualification, but I note that the McGarvie model says:

There is advantage in appointing persons who, while still physically and mentally fit enough to carry out the demanding duties, are towards the end of their working life.

That sounds like a criterion to me. I wonder whether that is something you specifically endorse or whether citizenship is a significant criterion.

Mr Hammond—We do endorse it. The reason for that insofar as that model is concerned is that it has been the experience in Australia that the person who occupies the position of Governor or Governor-General should be a person who has established themselves in the community. That can happen when people are very young—we do not deny that—but it would be a person, one would hope, who has an established reputation and an understanding of the needs and desires of the Australian public. There were young governors in the early days of the governor-generals, but generally speaking they are middle-aged or in their later years.

As you would probably be aware, our Governor here in Victoria, John Landy, is 74 and has just been reappointed for a short term. Ultimately the intention is to leave it up to the Prime Minister or the Premier of the day to select the person and then ask the constitutional council to formally appoint them, so the judgment as to who should be the Governor-General or Governor would be, as it is now, left up to the judgment of the leader of the government of the Commonwealth, the state or the territory, as the case may be. They wear the political kudos or brickbats arising out of their selection. I would like to make one last point before we conclude if there are no other questions.

CHAIR—Please go ahead. It might have to be the last point.

Mr Hammond—We are content for it to be the last point. It is the issue, which we understand has been raised, about the nature of plebiscites and the referendum. The committee would note that we suggest having only one plebiscite, and we describe the nature of the plebiscite in our paper, and then a referendum. It is, as we understand it, Labor Party policy to have two plebiscites—the first plebiscite to be the question of whether Australians want a republic, yes or

no. Presumably if the answer is no, that is the end of the matter. If the answer is yes, you move to the second stage, which is models, a plebiscite on the particular model and then ultimately a referendum.

In our respectful submission, the first question that is proposed for a plebiscite—namely, whether voters want a republic, yes or no—is an easy question. It is one that would mainly provoke an emotive response. In our respectful submission, it is not the question that is appropriate for this issue. It is our submission that such a question seeks to predetermine the outcome. It would be perceived by those who are keen to have a republic as persuading people that they just have to say yes and we will have a republic. It would equally seem to appeal to those who are totally opposed to the republic because they will simply say to Australians, 'Well, you're going to buy a pig in a poke—or, as Greg Craven says, sign a blank cheque. How do you know what sort of republic you're going to get? Vote no.' It will also, no doubt, elicit those prepared to throw up the worst possible republic, as they see it, as a possible ultimate outcome. They will then suggest to the Australian public that they need to vote no. It is our submission that the models should be put before Australians first so that when they vote in the plebiscite they are voting on either what they see will remain or what will take the place of that which presently exists.

CHAIR—Thank you. There are obviously a number of different views on that point as well. On behalf of the committee, I thank you and also your associates in Melbourne for the work that you have done on this. I am sure it is going to assist the committee in forming some views as to processes and models as well.

Mr Hammond—Thank you for providing this opportunity. As the committee is aware, we were unable to attend when you were in Melbourne and we thank you for this opportunity.

[9.41 a.m.]

SMITH, Sir David Iser, (Private capacity)

CHAIR—Welcome. You have lodged submissions 20, 20A and 20B with the committee. Do you need to amend or clarify those, or would you like to go to an opening statement?

Sir David Smith—I have a short opening statement. Although I am a supporter and active member of Australians for Constitutional Monarchy, my two submissions, 20A and 20B, are my own and were made in my capacity as a private citizen. I should add that what has been listed as submission 20 is merely a letter in which I foreshadowed the other two submissions. Submission 20B invites the committee's attention to the way in which the Australian Electoral Commission deals with referendum ballot papers, and the submission speaks for itself.

In my other submission, 20A, I have invited the committee to consider the question of just who is Australia's head of state. The evidence I have provided suggests that it is not the Queen but the Governor-General. If I am right and we already have an Australian as our head of state then this presents a problem to those republicans who wish to argue that we must become a republic in order to have an Australian as our head of state. I note that the committee's last three witnesses on today's list all take issue with the view that the Governor-General is Australia's head of state. Although they disagree with that view, none of them has explained away the views of the legal and judicial authorities whom I have cited in my submission: constitutional scholars cited in my submission, such as Andrew Inglis Clark and W. Harrison Moore; lawyer and High Court justice Dr H.V. Evatt; the Lord Chancellor Lord Haldane; Australian solicitors-general and second law officers of the Crown Sir Kenneth Bailey and Sir Maurice Byers; and finally the actions of prime ministers Sir Robert Menzies and Bob Hawke, in accepting and acting on the advice of these two eminent solicitors-general.

One of your witnesses has even sought to invoke Sir Anthony Mason in support, but this former chief justice of the High Court claimed to have discovered a constitutional convention that does not exist and based his so-called discovery on precedents that have never occurred. The same submission reminds you that the 1988 Constitutional Commission described the Queen as head of state, but the commission was merely accepting the traditional view without giving any evidence, argument or reason other than that it was 'proper' to regard the Queen as head of state. This is not, I suggest, a convincing rebuttal of the contrary evidence cited in my submission. It should also be noted that the same Constitutional Commission saw a clear distinction between the role of the Governor-General as the Queen's representative and his separate and independent role in the exercise of his constitutional powers and functions. Here it found that he is no sense a delegate of the Queen but the holder of an independent office.

The additional matter which I now wish to mention arises from the proposal announced by Mr Latham, the Leader of the Opposition, in April and particularly his proposal for a directly elected president of an Australian republic. During the 1999 referendum campaign, many Australians who described themselves as conservative republicans were strongly opposed to a directly elected president. I refer to such people as Sir Zelman Cowan, Sir Anthony Mason, Sir Gerard Brennan, Gough Whitlam, Paul Keating, Malcolm Turnbull, Bob Carr, Neville Wran, Professor

Greg Craven, Professor George Williams and Professor George Winterton, among many others. In 1990, Irish President Mary Robinson asserted:

As president, directly elected by the people of Ireland, I will have the most democratic job in the country. I'll be able to look [the Prime Minister] in the eye and tell him to back off if necessary because I have been directed elected by the people as a whole, and he hasn't.

In commenting on Mary Robinson's assertion, Professor George Winterton, Professor of Law at the University of Sydney, has said:

The concern is that a directly elected President will challenge government policy in speeches, perhaps addresses on television, and by meeting foreign and domestic leaders both at home and abroad, leaving both the Australian people and foreign governments confused regarding government policy, destabilising government, and jeopardising the political neutrality of the presidency ... [F]or better or worse, such a 'checking' President would amount to a significant departure from the present role of the Governor-General; if the Australian people really favour such a development, they should be fully aware of the possible consequences of governmental deadlock and instability.

This committee took evidence in Perth from Professor Greg Craven, Professor of Government and Constitutional Law at Curtin University of Technology, about his support for what he described as 'our excellent Constitution', about his objections to a directly elected presidency and about his objections to Mr Latham's plebiscite proposals. Although Professor Craven and I are on different sides of the monarchy/republic divide, I share his views on these three matters. I hope that this committee will be able to persuade Mr Latham to have second thoughts about the kind of presidency he wants for Australia and about his methods for achieving it. As Bob Carr once put it, a good monarchy is better than a bad republic.

CHAIR—Thank you, Sir David. Much of the evidence that has come before us has put the proposition that a republic is inevitable. Do you share that view? If not, why not?

Sir David Smith—No, I do not. I thought that you would get plenty of submissions about models and process—over 700, you said. My two submissions are a little different. I thought I would leaven the lump. Others have given you and will give you their views about whether or not a republic is inevitable. I will leave my evidence to you at the two submissions you have before you.

CHAIR—One part of your evidence that I found a little bizarre was your concern that a popularly elected president would have the power to sack a Prime Minister. Don't we have that now, without the prerequisite of a popularly elected Governor-General?

Sir David Smith—Yes.

CHAIR—So you do not have concerns about that?

Sir David Smith—Concerns about what?

CHAIR—About the fact that at the moment, under our current system, a non-elected governor-general can sack an elected prime minister.

Sir David Smith—I have no problem with that.

CHAIR—But you do have problems with a popularly elected president having the capacity to sack a Prime Minister?

Sir David Smith—No, I have not said that, have I?

CHAIR—You raised concerns about the Mary Robinson situation.

Sir David Smith—Sorry?

CHAIR—You raised concerns about the Irish situation and you quoted President Mary Robinson.

Sir David Smith—But she did not speak about sacking; she spoke about confronting on policy. That is a different matter altogether, surely.

CHAIR—I would have thought sacking was an even greater concern, but you do not think so?

Sir David Smith—Mary Robinson did not say that. She spoke—and so did Professor George Winterton—about having two people with two different mandates, both with an authority to speak for the nation on government policy. That is the point of my concern. Sacking is not an issue—

CHAIR—I would have thought that, if a President in those circumstances had a capacity to rebut a Prime Minister on policy, then I would be more concerned if a President in those circumstances had the capacity to sack a Prime Minister.

Sir David Smith—I do not have that concern.

CHAIR—What do you then define as the role of the Queen under your perception of the current constitutional system we have in Australia?

Sir David Smith—The constitutional role of the Queen is to approve the Prime Minister's recommendation to appoint the person who is the head of state or, if necessary, to remove such a person.

CHAIR—But you say the Queen 'is our Sovereign but we are sovereign'?

Sir David Smith—Yes.

CHAIR—Recognising the indivisibility of the Crown concept, how do you distinguish between the Queen being our Sovereign and us being sovereign? I would have thought that when you said Australia is a sovereign independent nation that would mean that you were implying that the Queen is not part of that independence and sovereignty.

Sir David Smith—That was a finding of the 1988 Australian Constitutional Commission, of which Gough Whitlam was a member.

CHAIR—That does not explain it to us.

Sir David Smith—It explains it to me.

CHAIR—Can you explain it to us? What is the role of the Queen according to your perception?

Sir David Smith—The role of the Queen is that of the monarch, the Queen of Australia, and the Governor-General is the head of state. They are two separate and distinct positions. Our founding fathers gave us a constitution which was different from every other constitution in the then empire, in the now Commonwealth. What I am concerned to do is point out as best I can that our founding fathers drafted very wisely and that we have at last, in the actions of Prime Minister Bob Hawke in 1984 in revoking the letters patent and royal instructions that were not properly issued in 1900, a proper recognition of the constitutional role of the Governor-General under our Constitution. That is my point.

CHAIR—I have got to admit that I am finding it hard to get consistency through this, because you say the Governor-General is our head of state but you also say the Governor-General is representative of the Queen.

Sir David Smith—He has two separate and distinct roles.

Senator STOTT DESPOJA—On that point, Sir David, does not the Queen have the power under our Constitution to annul any law that the parliament passes?

Sir David Smith—The Constitution states that in section 59, but that is an otiose provision—it has never been used.

Senator STOTT DESPOJA—I acknowledge that.

Sir David Smith—And now it could never be used, because it could only be used on the advice of the government.

Senator STOTT DESPOJA—In that case you would argue her power as Sovereign is diminished or filtered in some way as a consequence of that?

Sir David Smith—It is a constitutional role: she acts on the advice of her ministers, as does the Governor-General. That provision—section 59—has been there and no government has bothered to waste time and money in having it removed. I wish they had. But it has no effect, it never has had any effect and since 1926 it could no longer have any effect.

Senator STOTT DESPOJA—Considering our political differences on this issue, you have made my day by suggesting that that should be deleted from the Constitution. I am quite happy with that.

Sir David Smith—I would vote for that one, certainly.

Senator STOTT DESPOJA—Fantastic. I just think there is a symbolism there that concerns me. I do acknowledge that it has not been employed, but the fact that it exists—

Sir David Smith—Certainly, it is there.

Senator STOTT DESPOJA—sends a very strong message about the powers and responsibilities of the Queen to members of the legislature as well as to the population.

Sir David Smith—The Constitution also empowers the Governor-General to refuse to give assent, but no governor-general could or would do that either. That gives you the supremacy of parliament under the Constitution.

Senator STOTT DESPOJA—Indeed.

CHAIR—Sir David, you acknowledge the Queen has a role under our Constitution—she is a constitutional monarch.

Sir David Smith—No, I did not say that. I said she has a role and that role is to approve the appointment of the head of state on the advice of the elected Prime Minister. That is an important constitutional role. The republicans have been arguing for 13 years as to how they would replace that role and still have not come up with a single conclusion—but I will not talk about models; I said I would not do that.

CHAIR—You say she does that on the advice of the Prime Minister.

Sir David Smith—Yes.

CHAIR—Are you telling us there is no discretion residing in her to not accept that advice?

Sir David Smith—I do not believe so. There is provision in the arrangements that the Prime Minister will first have informal discussion with the Queen before making the actual recommendation. That enables discussion and exchange of views. But formal advice from the Prime Minister is advice which would be accepted.

CHAIR—In the same way that advice from the Prime Minister to the Governor-General is accepted?

Sir David Smith—Yes.

CHAIR—But the Governor-General does have discretion.

Sir David Smith—The Governor-General exercises the reserve powers of the Crown. And I remind you that even the republican model that was put to the people in 1999 proposed that the president would continue to have, as well as the constitutional powers of the Governor-General, the reserve powers of the Crown—that they would continue, that they would be passed to the president. So there is no difficulty about the exercise of reserve powers by the head of state.

CHAIR—The Queen is our Sovereign.

Sir David Smith—Yes.

CHAIR—Inherent in our Constitution are the reserve powers of the Crown.

Sir David Smith—Yes.

CHAIR—The Governor-General is her representative.

Sir David Smith—And the head of state. He has two separate roles. Section 2 says that the Governor-General is the Queen's representative. That is for the exercise of the royal prerogatives and the reserve powers. But his role as the head of the executive government of Australia comes to the Governor-General by virtue of section 61 and the following sections. The Queen plays no part in the administration of those sections, and the Governor-General's role there is an independent one which he does not exercise as the Queen's delegate. That was said by the 1988 Constitutional Commission.

CHAIR—Sure. But, in any event, you tell us that the Governor-General is the Queen's representative in Australia.

Sir David Smith—Yes.

CHAIR—So is it appropriate for Australia's head of state to be the representative of another person, a sovereign, a link to another country?

Sir David Smith—That is what the Constitution provides. I do not have a problem with that.

CHAIR—You do not have a problem with that. Okay. I suppose I have a bit of a problem. Under your view of the world, I am trying to work out why I swear allegiance to the Queen.

Sir David Smith—The Constitution requires you to do that.

CHAIR—That is what we are talking about, isn't it: the Constitution?

Sir David Smith—Yes.

CHAIR—Should we do away with that? Should we change that part of the Constitution?

Sir David Smith—I do not believe so. You are free to have a different view.

CHAIR—I am then required on entering parliament to swear allegiance to a foreign power.

Sir David Smith—I do not have a problem with that. I have sworn allegiance to the Queen many times, as a public servant and as a CMF soldier. I do not have a problem with that.

CHAIR—I am pleased you do not. But I do.

Senator PAYNE—Sir David, if we accept your proposition—and to take the point that Senator Bolkus has just made—that the Governor-General is our head of state then why aren't people in our position or people in the CMF swearing allegiance to our head of state, rather than to the Queen?

Sir David Smith—Because the Constitution has a different provision in it. If you want to change the Constitution, go ahead.

Senator PAYNE—We could talk about changing the Constitution—

CHAIR—That is what we are talking about.

Senator PAYNE—at some length, Sir David. But I must say that one point on which we vehemently agree is the point you make on page 24 of your submission about the role of section 128: that is, not to frustrate or prevent constitutional change but to encourage public discussion—

Sir David Smith—That is right, yes.

Senator PAYNE—and ensure that when change comes about it is well informed—

Sir David Smith—I am all for it.

Senator PAYNE—and, as you say, desirable, irresistible and inevitable—back to that word.

Sir David Smith—Quick and Garran said that. I do not claim credit for the words.

Senator PAYNE—As your submission says.

Sir David Smith—They were their words, not mine.

Senator PAYNE—Indeed. But I still have the confusion that Senator Bolkus alludes to. You disagree quite strongly with Sir Anthony Mason in your submission but I do not think you take up the argument, for example, of Professor Winterton that the Queen is our head of state, not the Governor-General. Do you have any view on Professor Winterton's contention in that area?

Sir David Smith—He has never taken up my point of view, either. He has not argued against the legal authorities whom I have cited. It has been terribly easy in this debate to say: 'David Smith doesn't know what he's talking about. David Smith's not a lawyer.'

Senator PAYNE—I have never said that, Sir David.

Sir David Smith—No, you have not, but others have. I am not a lawyer. I am just a mere political scientist. All I have done is put together a body of evidence in our constitutional and legal history which many people have either ignored or forgotten or have never known about. I have put it on the table, and it has been there for the last seven or eight years, published it in many forms. No-one at all has ever put the evidence that any of the authorities I have quoted were wrong. I have a friend in Sydney who, much to my embarrassment, takes up this issue

every time he sees a reference by an individual or an organisation that the Queen is the head of state. Over the past few years he has written 2,000 letters bringing my submission to people's notice and inviting them to come back with contrary evidence.

Senator PAYNE—Do you mean Philip Gibson?

Sir David Smith—I mean Philip Gibson. You have all heard of him.

Senator PAYNE—I have not just heard about him.

CHAIR—We have received all the letters, too.

Sir David Smith—Two thousand letters he has written. Other than former Attorney-General Daryl Williams, no-one has come back to Philip Gibson to say that the evidence in my submission is wrong 'because'. The only one who has come back has been Daryl Williams, who said, 'It is appropriate and proper to describe the Queen as head of state.' If that constitutes a constitutional lawyer's rebuttal of what I have put in my document then I will go he.

CHAIR—Sir David, thank you very much for your submission and your evidence and obviously your continuing interest in this area.

Sir David Smith—I simply want the Australian people to recognise what our founding fathers did and what the role of the Governor-General is. Whatever else you do with all 700 submissions, I wish you joy of it.

CHAIR—So you do not mind what we do with the Queen so long as we protect the Governor-General!

Sir David Smith—I want you to protect both. You will do what you want to do. All I want you to do is to read what I have written and take it seriously. By the way, before I leave, can I make a comment about my 20B, the Australian Electoral Commission. I do not want to say anymore about it now. I have said all I can say about it. I believe I have raised a serious issue, not for the immediate future, but before the next referendum I hope someone with better legal authority than I can claim will have a look at what the Electoral Commission is doing in interpreting the referendum legislation because I believe it is not carrying out the wishes of the parliament. I hope you will have a good look at that too, Senator.

CHAIR—Thank you very much.

[10.01 a.m.]

BRASCH, Ms Sarah Louise, National Convenor, Women for an Australian Republic

CHAIR—Welcome. Do you have any comments to make about the capacity in which you appear here today?

Ms Brasch—I am also an employee of the Australian government but I am appearing in a private capacity today. The subject matter of the inquiry has no connection or conflict with my official duties.

CHAIR—You have lodged submission No. 476 with the committee. Does that need to be amended or altered, or would you like to start with an opening statement?

Ms Brasch—I do not need to make any amendments to our submission, so I will begin with a statement. Thank you very much for inviting the Women for an Australian Republic to appear before the committee today. We are so pleased to be here and to boost the number of women appearing before the committee. This is a very important inquiry for the republic and for republicans.

I will start by providing a bit of background information about Women for an Australian Republic. We are a group that exists online, so all the action with us is on our web site. We get a couple of thousand hits per year and we are linked to all the major republic sites in Australia and many overseas. Since 1999 we have provided a place for women writing speeches, commentaries and articles on all aspects of the republic. We are still collecting, regularly updating and publishing. Our web site is archived once a year in the Pandora online repository at the National Library. Our approach to the republic is both political, and by that I mean we believe in the art of the possible, but also managerial because it is about finding solutions to hard problems, working out ways to implement change, communicating and being efficient.

I would like to also talk about the process of the republic because that is the principal interest of this inquiry. We would prefer there to be one single referendum when it comes time for the vote. However, we realise that this would be impractical after the experiences of many voters in the lead-up to 1999 and the outcome of the 1999 referendum. So we support as many plebiscites and constitutional conventions as it is going to take, allowing always for maximum participation by women. We fully support Australia becoming a republic with a new constitution which recognises the equality of women and men but also recognises our Indigenous peoples. The process must allow women to fully participate in the debates, to be fully represented in decision-making forums and to have the same opportunities as men to become head of state. Women for an Australian Republic is not locked into supporting one model for selecting the head of state. However, at present we do think that direct election has the greatest chance of success, but of course that choice should be made by the people.

We have put forward practical and simple proposals in our submission to advance the republic and to propose solutions to things that seem to be such huge sticking points. That is one of the reasons that we have suggested that voting for head of state using a direct election model should

be voluntary voting. For the first plebiscite we favour modified Corowa A with significant wording changes. We suggest that the first question should remove the notion that only an Australian head of state is being introduced. We propose that the question should directly ask should Australia become a republic. In this respect we agree with some of the comments made by Mark McKenna in his submission, and he will be appearing later this morning. We think the questions in the first plebiscite should give proper prominence to the direct election option for selecting the head of state and should ask the people to provide clear direction on whether the powers of head of state should be codified or not.

We remain very enthusiastic about the coming republic and we will work very hard to ensure it gets up the next time. We are extremely encouraged that it will be high on the political agenda if there is a change of government at the next election. There is always a lot of talk that women are very conservative and will not vote for the republic, but we believe they will vote for the republic if the proposal is simple, attractive—and by that I mean that it is also good to look at—innovative and if they can participate in it and—I have to say this because it represents the majority women's view—it is a safe proposal. We think all that can be done.

CHAIR—In that context why is it that at the moment and probably over recent years we have consistently found fewer women than men supporting a republic?

Ms Brasch—The numbers are always very concerning. I think the polls were showing before the referendum that the 'strongly in favour' women's vote was only about 36 per cent, and it consistently runs about 10 points behind the men's preference in polling. I think it is precisely for this reason, I think women saw, particularly in the lead-up to the 1999 referendum, that there was too much conflict and too many different ideas about what the republic should be. Perhaps many of them did not understand or did not have the background and could not really see that the proposal that went forward in 1999 was going to do much for them. That is one of the reasons why they have been more reluctant than men to support the republic.

CHAIR—You mentioned safety in terms of a model. It has been put to us that, were we to have a plebiscite asking the very general question: 'Do you support an Australian republic?' it would lend itself to a 'don't trust them with a blank cheque' type campaign.

Ms Brasch—Yes, and we are very concerned about that, particularly if there is going to be a series of plebiscites. We think the first one may in fact become the de facto referendum if it contains only a single question. We certainly believe that the first plebiscite should ask whether Australia should become a republic and then should follow questions about whether the powers should be codified and what model we should have for electing the head of state. We think the order of the Corowa questions should be changed to put direct election first. We have set that out in answer to question 30 in our submission.

CHAIR—You also state that simplicity needs to be a characteristic of the proposals. Conventions are in themselves very complex and detailed. To ask people whether to codify conventions or to specify when they can be used leads to complex arguments. Is there a way that we can best approach that?

Ms Brasch—I think complexity can be presented in a simple way. I look at things like the 1998 Constitutional Convention. There was huge public interest in what was going on at the

1998 Constitutional Convention and people then generally did not understand all the issues. Maybe they were really taken with the theatre of the event and the fact that it went on for two weeks so they could pick up things as it went along. But there was huge interest in that. I was extremely struck by the comments made by Louise Houston, who appeared before the committee in Adelaide. She said she did not know how to vote but when she was going into the polling booth she thought, 'What do I need to do to advance Australia?' I think those are the ways in which we can actually get the republic vote up. It will not be essential for every voter to understand every aspect of constitutional law—I do not think they could—but if there is enough passion and if there is enough belief that it is the right thing to do for the future then women will vote for the proposal.

Senator PAYNE—Ms Brasch, you said in your remarks that 'proper prominence' should be given to the direct election question. Does that mean that the Women for an Australian Republic have determined that that is their view—that they prefer direct election?

Ms Brasch—At the moment we are prepared to say that we support a direct election model. Let me be clear about this. One of our main key interests is that women have a chance to become head of state. We certainly believe that the two-thirds parliamentary appointment model presents the best opportunity for a woman to become head of state in the shortest possible time. However, we think the chances of that model being successful are becoming slimmer by the day. We have to be practical in what we are prepared to support so, at the moment, direct election seems best to us. From everything we hear, people do want to vote for the head of state. Of course they do—they are voting for all sorts of things all the time. They are voting people off reality TV shows and they are voting for Classic Catches. People are used to being able to make a choice. This is a change which we want to be able to make in this case. Having said that, I think we would actually be dragging the chain a bit if we said that we simply were not prepared to consider direct election because that is not the best way for a woman to become head of state.

Senator PAYNE—Personally, I would be happy to vote reality TV shows off television. What chance do you think then, in your educated view, does direct election give of seeing a woman as Australia's head of state?

Ms Brasch—I think that, as long as 50 per cent of the candidates are women—and we also want provision in there for Indigenous representation as well—at least 50 per cent of the head of state selection committee is female, 50 per cent of the elected delegates to conventions have been women and women are seen to be participating in constitutional issues, we think a woman has a reasonable chance of getting up. Of course, the women candidates will be very good so they will be appealing to the electorate.

Senator PAYNE—Certainly. In other evidence we have received during our Melbourne hearing, Professor Kim Rubenstein suggested that it was her view that the gender of the position of head of state should be required to alternate. What is your organisation's view of that?

Ms Brasch—We do not have a problem with that at all. That suggestion has been around in women's circles since the time of the 1999 referendum. It is a very typical way that women's organisations work. Certainly in organisations that I have been a member of, if there have been tied votes, elected committee positions have been shared or alternated.

Senator PAYNE—Based on gender, though?

Ms Brasch—No, not on gender, because the members are all women. But it is a way that women have of sharing jobs around. In this case it would be natural that they would suggest that the head of state position should be alternated. We would really like to see the first head of state be a woman. Whether that becomes legislated or not I think would be extremely contentious.

Senator PAYNE—The point I put to Professor Rubenstein in Melbourne at our hearing was the difficulty that might arise if we could not find a suitable male candidate to take the alternate position on occasion.

Ms Brasch—That is fine with us—we could have another woman.

Senator PAYNE—It is one of life's challenges, really. Just in relation to one other aspect of your submission, you have a mix of support for compulsory and voluntary voting at different stages of the process. Could you expand on your reasons for that?

Ms Brasch—We propose compulsory voting for the plebiscites and the referendum. That would be understood to be the normal procedure now. Especially for referendums, voting is compulsory. Our suggestion is based on the idea of trying to deal with the head of state issue, particularly with the issue that the head of state could be seen to have a rival mandate to the Prime Minister or the elected government of the day. It is simply something that we put out there on the table as something that could perhaps be considered. It would be the only occasion on which we would be proposing that there be voluntary voting. Also, with increasing use of technology, these things do become more feasible. If people are able to vote from their home computers or on their mobile phones, that does start to raise other possibilities for voting.

Senator PAYNE—The process for voting for the Constitutional Convention—excluding the postal aspect of it, which is another issue completely—was voluntary, as I recall.

Ms Brasch—That is right.

Senator PAYNE—How did you regard the effectiveness and success of that as a process?

Ms Brasch—I think the highest take-up was in the ACT, like for the republic. I think we had a 40-something per cent return on that vote. That really does not concern me. If we are looking at a very ceremonial head of state, with many of the powers eventually stripped away from that job, then perhaps it is not necessary for that person to be compulsorily elected.

Senator STOTT DESPOJA—I might pick up that point because compulsory and voluntary voting is a theme we have dealt with throughout the submissions. I am unashamedly a strong believer in compulsory voting, and the reason I support that is because I get very nervous that those who are disenfranchised are more likely to be less powerful, less wealthy et cetera—and often women fall into that category. I wonder if it concerns you that we might be not deliberately excluding women but providing an excuse for women not to vote or for them to be encouraged not to vote because they have more pressing things or responsibilities with which to deal. Do you see some sense in making a blanket rule or standard that it is either compulsory or voluntary

to vote for either the plebiscites or referenda? Does it not make sense to have the same voting system throughout?

Ms Brasch—It does; it is less confusing for people. The point you raise about whether that would cause or encourage women to vote less is an interesting one and one that we have not fully addressed. This is related, though, to another point we made in our submission, and that is that to the maximum extent possible where attendance at a polling booth would be required—and we are talking about our traditional ways of voting—the election for head of state would actually take place at the same time as other elections, even if there were separate registration. That would mean that the person would already be at the polling booth, and that would suggest to me that they probably would register to vote for the head of state, even if it were voluntary, if there were two votes on there. A very important part of our submission is reducing costs, and we see it as absolutely necessary for elections for head of state to be conducted at the same time as other federal elections.

Senator STOTT DESPOJA—That is a good point. I am curious as to whether, through the committee, we could obtain a gender breakdown at least of the voting in 1999. It might be interesting to know what impact, if any, that voluntary system had. I am curious about your views on the ConCon in 1998. It was voluntary voting; it was half appointed, half elected. Do you have a strong view of whether or not women were fairly represented and given a good deal and whether or not it was good for women?

Ms Brasch—We would prefer, of course, that all delegates to constitutional conventions were elected, given also that they would have groups of experts available to work with the delegates. I think there has been some commentary in this committee about the usefulness of the constitutional lawyers who were invited delegates to the Constitutional Convention. That seemed to work quite well. I am dredging back in my memory here—you were there, weren't you, Senator?

Senator STOTT DESPOJA—Yes.

Ms Brasch—I think about a third of the people at the Constitutional Convention in 1998 were women.

Senator STOTT DESPOJA—Yes.

Ms Brasch—Sometimes it looked more, because you could see the colours more clearly in pictures and on television. But it would have been better if it had been closer to 50 per cent.

Senator STOTT DESPOJA—In your submission you talk on behalf of the organisation. In your opening comments today—forgive me if I am wrong—I think at one stage you referred to a majority of women in a numerical sense. I am wondering what polling or research you have done, if any, or whether your submission is a representation of the views of the Women for an Australian Republic organisation.

Ms Brasch—We have chosen to simply have an online presence, so we do not have members. What we know about the republic and women's views on the republic is from our collections of material. They are very varied. They come from women from all walks of life. For instance, we

have an extensive collection—a lot of which is not published elsewhere—of women's work on the preamble, leading up to the first referendum. From that we get a pretty general view about what women are thinking and feeling about the republic. Albeit, we certainly would have a bias towards those women who are giving speeches and writing articles, including journalists, where we can see that evidence. Even in the lead-up to the 1999 referendum, apart from what was appearing in the daily newspapers, there was not a lot available on what women in the community generally were thinking about the republic. One could point to certain themes that the journalists were coming up with, but I really could not put my finger on it and say whether or not those things were accurate.

Senator STOTT DESPOJA—I have one last question. The issue of a time line is one that is starting to gnaw at me and preoccupy me. In your comments about how many constitutional conventions, plebiscites or referenda does it take, I sensed your attitude was to take as long as is needed to make sure that people make an informed decision, and that is okay. I support very strongly the sentiment of that, but I am also wondering how long we have to wait. Do you have a preferred time line in which this process could get under way? Does the organisation have a preference for when we next revisit this issue in either a plebiscite or a referendum form?

Ms Brasch—We would like to see it revisited as soon as the political will is there to do so. I think probably what is going to happen is that there will be two plebiscites and then the referendum. We think that could happen in a three-year period. I am very encouraged by the fact that South Africa managed to come up with a completely new constitution within two years. That is a monumental undertaking. I think we can do it. As I said, we are managerial in our approach. We should be saying: 'Yes, we've got three years to do this. Let's pull out all stops to do it.' I have been concerned by some younger women republicans saying, 'It's going to be many years, perhaps even 50 years, before we have a republic.' For those of us who are older, the idea that the republic may not be realised within our lifetimes is a very serious concern. We would like it to be rapidly accelerated.

In some ways I think that will be dictated by what comes out of the plebiscites and what the feeling is around the plebiscites. If they go through smoothly, the process can go through quickly. If they do not, and we keep hitting snags, it will not be so fast. We also have to deal with issues like the states—an issue that was raised in question 25 in the discussion paper that was put out by the committee. I would like to say that that paper was very good. We got a lot out of it. It made us think a lot and very hard about the issues. We also had to think about a lot of issues that we had not thought about before. This issue about dealing with the states is a very complex one. I think that will have to go to constitutional conventions, joint parliamentary committees and probably joint Commonwealth-state committees before it is ironed out. Those issues are sitting at the side of the simple question, 'Do you want to be a republic?' I am not a constitutional lawyer. I am not at all clear as to how long it might take to actually sort those things out. As I said, we would hope for a three-year process and absolutely by 2010 at the latest.

Senator KIRK—Ms Brasch, thank you very much for your submission. In your answer to question 29, which deals with the best way of formulating the details of an appropriate model, you talked about the establishment of another constitutional convention. You said that all delegates should be elected and that at least 50 per cent should be women. I think that sounds like a very good idea, but how would that be achieved, given that they would be elected positions? How would you ensure that 50 per cent were women?

Ms Brasch—I am not sure whether or not constitutional conventions are subject to legislation; I do not think they are. If the government decided that 50 per cent of delegates should be women, it would depend on the voting system that is used. Presumably, it would be preferential voting. That would simply mean that the delegates would be the top 50 per cent of male candidates who have put themselves forward and the top 50 per cent of women candidates who have put themselves forward, presumably from each state and territory.

Senator KIRK—So would you have that breakdown between states and territories? Would the representation be 50 per cent of both females and males from all the states?

Ms Brasch—Yes.

Senator KIRK—I imagine that would be something that the AEC would have to work out. It seems to me it is quite a difficult process but certainly something that is desirable. I also was looking at your answer to question 30, which you mentioned earlier, about the process for moving towards a republic. You say that you think there should be two plebiscites, then the referendum and then the election. Again, I think that that most probably is quite a good process, but it did concern me when I looked at the questions you were looking to propose in the first plebiscite.

Whereas questions Nos 1 and 2 seem quite straightforward, once you start getting into questions like 'Should the head of state have clearly defined powers?' and the fourth question you have—that is, the method of selection of the head of state—we are really getting into quite complicated territory there. I am concerned about how Australians are going to be able to make an informed choice and how you are actually going to be able to determine what the majority position is. I wondered whether or not you had thought through that.

Secondly, just how much lead time would you need on something like this in order to educate and inform the public about these issues? What methods of education do you envisage—literature, brochures? Over what period of time? Because, as I think you would agree with me, some of those questions are quite complex.

Ms Brasch—I think we have said in our submission that we actually see the republic process as a continuation of the latest wave of republicanism which started in the early 1990s. I must say that, in speaking to people, I do not ever run into anyone who does not have an opinion on the republic. Most people were around all the way in the run-up to the 1999 referendum; they are across the issues. I did some quick calculations yesterday and worked out that we have about 750,000 newly enrolled voters since 1999. Some of those are people taking out citizenship.

I am constantly astonished by the level of knowledge of school students. The 18-year-olds who have been coming on were 13 years old at the time of the referendum. School students these days are participating in constitutional conventions of their own—mock parliaments. They are extremely well informed on these issues. We get a lot of hits on our web site from school students. I am aware of that. Teachers use this in their teaching material. The Australian Republican Movement has a very good kit which is available to schools on how to conduct a constitutional convention, have a bit of a deliberative poll and come to a decision about the republic.

So I am actually not so concerned about that. It will be very important to have a very good public education campaign, but we are not starting from scratch here. As I said, most people have an opinion on the republic. Those people who want a republic are going to vote yes: they are going to vote yes in the plebiscites and they are going to vote yes in the referendum. We just need to get that number up a bit. As I said, we are very enthusiastic. We think nine out of 20 in 1999 was quite a good result. I was quite concerned beforehand that it was going to be a lot less. We only have to get it up to 10 plus one and we have got it over the line, although we do need to get the majority in the four states.

CHAIR—Thank you very much, Ms Brasch. I am sure everyone would agree that that was quite useful. Thank you.

[10.28 a.m.]

PEPPERDAY, Mr Michael Edward, (Private capacity)

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

Mr Pepperday—I am a political scientist. I have a masters degree in political science and I am currently an enrolled student in the Research School of Social Sciences at ANU.

CHAIR—You have lodged submission No. 621 with the committee. Do you wish to alter or amend that?

Mr Pepperday—I have already given a couple of amendments to the secretariat. They are minor references; that is all.

CHAIR—They will be circulated. Would you like to start with an opening statement?

Mr Pepperday—I do not have a prepared statement, but in my submission I address both process and model. There has been a lot of talk about having plebiscites. I have a very different suggestion. I have a suggestion for consultation, whereby an Internet forum site is set up and research scholarships are offered for people to come up with models. You said earlier that there had been lots of models. There has been only the one actual, worked-out model, hasn't there? Nobody has come up with an elected president model, with all the accompanying changes to the Constitution and that sort of thing that there would be, or with any other model for that matter. I pressed McGarvie and asked, 'How do you want to change the Constitution?' because I was interested in how he would really bring effect to the committee he wanted, but even he was not prepared to answer that. He thought it distracted from the debate but I felt the opposite.

I would like to see some sort of discussion. I came up with this idea after the 1999 referendum. I thought it would be a fine way to get the public interested. I am suspicious of these attempts to re-educate the whole Australian public, as one of your people put it in a previous hearing. I thought, 'Hear, hear,' to that. My feeling is that through the years I have not had a chance to contribute to the debate, so I am very grateful to be here. My feeling is that ordinary people do not get a look-in. The ARM, for example, runs a forum site but the last contribution to that was made in April last year by one of the directors of the ARM. There is no discussion on that forum site. I asked myself, 'Why would there be?' After it was announced that the Senate was holding an inquiry, you got over 700 submissions. I was quite surprised at that. The RAC got 400 submissions, and the Senate inquiry did not get anything like the publicity that did but got over 700. I was very surprised at that. It just shows you that, if you have a prestigious sort of arrangement, you will draw the people.

I am suggesting that you have a board of directors that is fairly prestigious, that they run this Internet forum for a couple of years and that they offer research scholarships of significant money—10 grand or so—paying them in instalments as the outlines and details come through. The forum would discuss this and people would argue over it. At the end of this process, you

would have a conference and perhaps decide on a winner or perhaps not. That is what I suggest for a process.

The trouble with plebiscites is that they are held to get the opinion of the public, as said, but we already know the opinion of the public as well as we can know it. As Sir Humphrey Appleby put it: the answer you get to an opinion poll depends on the question you ask. The plebiscite is an opinion poll, although it is a massive one. If it is hyped up—that is, if it has a second agenda to concentrate minds and if there is plenty of high-profile contribution—then it will concentrate minds. I asked around in the department and nobody could suggest any academic support for the idea that the process of taking an opinion poll ever influenced an outcome, but people thought it plausible. A lot of people talk about the result of opinion polls: is there a bandwagon effect or is there an underdog effect? There seems to be a bandwagon effect. In other words, to translate it here, if the opinion poll came out positively then you would expect more people to climb aboard. That is what that would say. However, that goes to opinion polls on very clear questions, like elections. Greg Craven's contribution to this committee painted a very different picture and, it seemed to me, a very realistic one. That is the way I felt.

We had a plebiscite before on the national anthem, but the question on the national anthem was different. It was actually a de facto referendum, wasn't it? It did not ask: do you want to change the national anthem? It asked: which of the following four would you have? That is very different thing. That is a de facto referendum. If you wanted to get people thinking about something, you could ask their opinion or you could ask them to make a decision. When will they really think—when they are asked their opinion or when they are actually deciding what is going to happen? I think it is the latter.

So much for process. If such a forum existed, I would submit my non-model, as I might call it. My suggestion is that we do nothing but get the republic—that we do not mix up changes to the Constitution with this emotive business of a republic. The republic is a matter of identity. It is not a rational thing per se. If we are going to modify the Constitution then I will have my wish list and plenty of suggestions to make, but I do not think we should mix it up with a republic. The whole argument is about the appointment of a governor-general or president. That is what it has been about for 10 years. Whether the Queen has the option of refusing is a bit academic. The Queen appoints the Governor-General now. The Constitution says she does, and it seems the people of Australia are standing back and saying, 'We're concerned about that aspect.' The Queen does play a role. You heard Sir David Smith this morning saying that there are informal conversations before the appointment, so the Queen is actually playing a role here. The Queen's appointment power is set out in sections 2 and 4 of the Constitution. It says that the Queen shall appoint a governor-general at the pleasure of the Queen—or words to that effect. Section 4 mentions the person appointed by the Queen and it has to do with whether a replacement is needed. That is all there is about appointment in the whole Constitution.

If you have a monarchy and you want to turn it into a republic, what is a republic? A republic is a place where the people are sovereign, so surely the logical thing to do is take the powers of the monarch and give them to the people. Our Queen has only one power—and it is a dubious power at that—and that is to appoint the Governor-General. It is there in sections 2 and 4. If you take sections 2 and 4, strike through the word 'Queen' and write the word 'people' in its place, you have solved the problem of the argument of the last 10 years. You have not got a republic, of course. Getting a republic is mechanical. You would go through the rest of the Constitution,

strike out 'Queen' or 'Her Majesty' and write in 'people'. There are a few occasions where the context would require a little bit of word manipulation but nothing very complex. It would be a fairly straightforward process.

How would it work? You would just carry on with the same conventions. The Prime Minister, who exists by convention, would continue to exist, obviously. The Prime Minister would write a letter to the Sovereign and the Sovereign would reply. If the Sovereign were the people then it would be a postal ballot. There would be no election and no campaign. There would be no participation by parliament. All conventions would remain as at present. The person so appointed would have no mandate to interfere in day-to-day politics. The person so appointed would have the authority to continue to exercise the reserve powers. In 1975 the Governor-General sacked the government in the name of the Queen. If you do away with the Queen, how is the Governor-General going to sack the government? Only in the name of the people. Do not get the idea that I am in favour of this. What I am in favour of is not reforming the Constitution while we are getting a republic. I am offering a very simple and pretty well complete suggestion on what to do to change the Constitution to get a republic.

CHAIR—Thank you. You said at one stage: 'We know the view of the public.' I suppose if you go on the best measures we have available to us being some of the more respectable polls, you would say that the public wants direct election. Why don't we just do that?

Mr Pepperday—I am not sure that that is really true, is it?

CHAIR—Well, if you are looking at the return from polls.

Mr Pepperday—All right. I am not sure about that, but you can try it. Did more than 50 per cent of the public actually say they want an elected? I think more than 50 per cent want a republic; then, of them, I think the majority is for an elected. Isn't that the case?

CHAIR—That is right.

Mr Pepperday—Yes. That is not really a majority wanting an elected—so that is a bit dubious.

CHAIR—When you say, 'We know the view of the public,' what do you think that view is?

Mr Pepperday—The way I just stated it, I guess. I am not an expert in this area but I do know this: if you want to know the view of the public, just ask an opinion poll. They will ask the question of a sample, that will be very cheap, and you will get an answer.

CHAIR—There are two problems with that. It does not necessarily give us the best workable approach and, secondly, the view of the public can change very quickly.

Mr Pepperday—That is the same problem with a plebiscite, which is only a 100 per cent opinion poll, isn't it? You can ask them, and you have got those same problems there. That is just an opinion poll asked of 100 per cent of the public.

CHAIR—If we take your approach and replace the Queen with the people, that does not really give us the answer. We are still left with quite a few questions: when do you involve the people, how do you involve the people, are they consulted, do they have a right of veto? In your scenario, where you seek their approval, what happens if you do not get their approval?

Mr Pepperday—Then that person is not appointed. That is very clear. That is the whole point. The thing about it is that at the moment we think, we assume, in fact we are confident, the Queen does not have any power to refuse the person so nominated. Before 1935 the situation was different. In the case of Isaac Isaacs, he was knocked back. Prime Minister Scullin went off to Britain and talked the Crown into his nomination. Since that date we have assumed that the Prime Minister has got the say-so and the Queen has to do as he says. You have got to modify that by what Sir David Smith said this morning about prior consultation.

Also, there is one that people do not know about. In 1946 the Premier of New South Wales, William McKell, wrote, not to the Dominions Office but to some equivalent lieutenant-governor or something, and suggested a Captain Armstrong as Governor of New South Wales. They knocked it back. The letters went back and forth, and they got quite snippy, but they knocked it back. Eventually General Northcott became the Governor of New South Wales. So it is not that clear even now that the Crown does not have the right to refuse.

What my proposal does is give the people the right to refuse, so the people would gain a little bit of power. But there would be no power change with the Prime Minister and parliament or the Prime Minister vis-a-vis the Governor-General. Those power situations would remain.

Senator KIRK—Thank you for your submission, Mr Pepperday. I have a number of questions. For starters, you talk about a republic model search and the granting of research grants for people to investigate and research models. How many such scholarships did you have in mind?

Mr Pepperday—In that back-of-envelope sort of budget that I put in there, I said 20. I cannot really believe there are 20, but how will we know unless we ask people? This sort of thing has got a head of steam. These five models you have in your discussion paper are basically the ones that have been around forever and ever—and honestly, take my word for it, nobody else gets a look-in. I have been published twice since 1998.

Senator KIRK—You are right, there are four or five models out there, but does it really help to add 20 models to those four or five existing ones?

Mr Pepperday—Yes, I would say so. Of those models, the McGarvie model and the electoral college model have no reasonable chance of ever getting up. I do not think anybody takes them seriously. They are put up all the time. They are given the respectability and the cachet of being there, but I do not think anybody believes they have a snowball's chance in hell. If the people knocked back parliament, why would they go for those options? It seems to me to be absurd.

At the other end of the scale you have the elected models—you have two in there. I find those politically inconceivable. Either has to get through Labor Party policy, and there are going to be some dead bodies there like Neville Wran, Bob Carr and Barry Jones, it has to get through the caucus and the cabinet—a Labor cabinet I am assuming here—and then it has to get rubber-

stamped by the lower house, over Liberal howls of outrage. The minor parties or independents in the upper house may then make some amendments to this incredible model. It is incredible the statutes that are going to codify the powers. This is a staggering thing.

As Justice Brennan said in your first hearing, it is clear what the reserve powers are but how to codify them is very daunting. It is a colossal program. Finally, somehow or other it gets through—it gets amended, goes back and is rubber-stamped again in the lower house—and goes to the people, and what happens? There is the mother of all scare campaigns. That is my scenario. I do not see that an elected president model can ever get over the line. That is my feeling. So, Senator Kirk, where are we? We are left with a parliament-appointed model.

Senator KIRK—I want to go back to your model and the idea that at the end of the scholarship time period we could well have a further 20 models on the table.

Mr Pepperday—I doubt it, really. I was just being conservative and allowing lots of room.

Senator KIRK—Okay, well we may have lots of new ones. As I understand it, you suggest that there would be an Internet forum to allow for public discussion and comment on these models. I wonder how you envisage us encouraging and actually engaging Australians to participate in this process—the republic model search. It is kind of like the search for a new *Australian Idol*. How would you also facilitate the involvement of people who do not have access to the Internet?

Mr Pepperday—Everybody does—libraries have got computers. Everybody has access to the Internet.

Senator KIRK—Well, some more than others.

Mr Pepperday—I would also say that everybody who is interested in contributing has their own access. Certainly you can go to any public library and get access to the Internet. That is not a problem. It is cheap these days.

Senator KIRK—Yes, but how will you actually encourage people to go to the library to participate in this Internet forum.

Mr Pepperday—There are two encouragements. You are not going to encourage people who do not want to be encouraged anyway, but there are two clear encouragements here. One is the prestige of the operation. For example, look at the response this Senate committee drew. The other is $10,000. I also suggested there that there could be subsidiary merit prizes of $500 or something like that to encourage other people who are interested. What I am really talking about here is getting people in who have a model in their bottom drawer and cannot get it out there. I sympathise with them.

Senator KIRK—Finally, and we have talked a lot about the appointment of the head of state, you suggest that the removal of the head of state should also be put to the Australian people to vote on.

Mr Pepperday—Yes.

Senator KIRK—That sounds quite frightening to me. Could you tell us how and on what grounds you propose that such a question be put to the Australian people?

Mr Pepperday—I do not think it would ever happen, but what I am interested in is not altering the Constitution when you get a republic. We have had 150 years of governors and governor-generals in this country. Not one of them has ever been dismissed. This matter is not urgent. Even if it came up, all I am saying is do not reform the Constitution while we are getting a republic. If that is what the Constitution now says—at the pleasure of the people, not the Queen—it would require the people to express their displeasure, as it were. But if the Governor-General resigned at the Prime Minister's request, as could happen and as has happened recently, then that is that. I am sure that is the practical way such a thing would ensue.

Senator KIRK—But you would have to have such a mechanism in place for possible removal or dismissal. You cannot just move forward without that in place. I wonder who would decide when the question is put to the Australian people.

Mr Pepperday—The Prime Minister goes to the Sovereign and asks the Sovereign to dismiss the Governor-General—that is the present convention. The conventions would remain, so that the Prime Minister would have to go to the people in this extreme—somewhat fantastic but nevertheless quite possible—situation.

Senator KIRK—What would be the nature of the question that would be put?

Mr Pepperday—He would write a letter to the people which would say, 'I ask you to dismiss the Governor-General on the grounds of such and such,' and people would respond accordingly.

Senator KIRK—And then the people would vote?

Mr Pepperday—Yes, via a postal ballot. I suppose that this would be such an issue that it would be totally dominating. It would be a huge issue, wouldn't it?

CHAIR—And if the people did not agree then the Prime Minister would resign?

Mr Pepperday—I would say that he would have to. I would say, Chair, if the people knocked back his choice when the Prime Minister was appointing the Governor-General the embarrassment to the Prime Minister would be great enough for him to resign—that is a guess.

Senator STOTT DESPOJA—Thank you, Mr Pepperday, I have really enjoyed your submission. If anything you have probably bowled us over with the simplicity of your submission, hence our desire to ask you lots of tricky questions about it now. I understand exactly what you are doing, and I love the fact that a sovereign is the underpinning of your popular appointment model. The question that Senator Kirk asked you about dismissal was one of the two key questions I had, and I was then going to ask you about the appointment process—in particular, the possibility of rejection. In your footnote No.12 you actually say that rejection should never happen, but obviously in your last comment you acknowledged that it is certainly possible. If the people are sovereign and they reject the Prime Minister's suggestion, regardless of whether or not that would be a huge embarrassment to a Prime Minister and he or she would therefore have to resign or what have you, would that not get into territory that is dangerously

similar to direct election territory, given the problems that accompany that? I am talking about the negatives that are associated with direct election—in that it can become a popular campaign. It could result in a very strong campaign being run through the media and elsewhere against the Prime Minister's nominee.

Mr Pepperday—My feeling on that is that it would proceed as in the past. Any public poll like that is an opportunity for the opposition party to make political capital, isn't it? I think it would be clear that the Prime Minister would do as we presume he does now, and talk to the opposition leader about the proposed candidate. I would say it would be certain that the candidate would check up with the opposition leader that he or she was a satisfactory candidate according to the opposition. I think we can rule out opposition countercampaigning.

What if you got some people who had a complaint that in a previous life the candidate had not conducted himself or herself in a manner that is appropriate to a governor-general? Wouldn't we be glad that that came out before the appointment rather than after, as in the case of Hollingworth?

Senator STOTT DESPOJA—I understand your point, but I also know the nature of the populist and sensationalist media in this country. They could make a mountain out of any molehill.

Mr Pepperday—They would campaign against the person—

Senator STOTT DESPOJA—I think there would be a lot of Australians who would not subject themselves to that level of scrutiny or process; there would be great dangers for them, would there not?

Mr Pepperday—A lot of people would. I would suggest that Peter Hollingworth would probably not stand—I agree with you; he would not subject himself. You say it could be a rah-rah campaign. I do not know. I do not know that the media is quite that gross.

Senator STOTT DESPOJA—Trust me.

Mr Pepperday—The media could do that to anybody—any politician who stands. We know that the media does not really report too much on private lives. It leaves them alone, basically. My answer to that is that I do not think it would really happen in a serious way. If it did, the potential for its happening would prevent unsuitable candidates standing.

Senator STOTT DESPOJA—Don't get me wrong: I am not suggesting that the model of direct election in itself is bad because of some of those features to which I referred. What concerns me about this process—and I hope that this committee will draw this out before we get to the point of a plebiscite, referendum or whatever kind of constitutional change—is that, instead of relying on convention or on the whim of a Prime Minister to consult with the opposition leader of the day or on a whole range of things, we must have some formalised outline of what has to happen in relation to either the appointment or the election of a head of state. That is my concern. I love the simplicity of this, but I think that there are a few gaps that need to be filled in and that there is nothing wrong with formalising some of those aspects.

Mr Pepperday—Let me ask you this: why not formalise them later? Why not get the republic first, on the basis that I am suggesting, and then formalise these problems later? If I can anticipate your answer to that, it is that we should use the moment to get the momentum to do it. My response to that is that these other things are interfering with the republic. They are not getting us the republic. As for these improvements to the Constitution, I do not argue with what you are suggesting—I agree with you—but I am saying you are complicating the issue: you are starting on a slippery slope. The one I thought of—my improvement to it—would be to say just one term—a five-year term. It is a convention at the moment, but that would be my improvement. I feel that if I were to put that forward it would start that slippery slope: 'We could do this and we could change that and we could do this. So what I am suggesting is that we just get the republic first and perhaps then you have got an incentive to start formalising these arrangements.

Senator STOTT DESPOJA—In which case, could we not simply have a plebiscite that gauges popular support for a republic? I think you could argue a blank cheque argument in what you are saying too. When you anticipated my response, I was not going to have a go at you for saying, 'Let's use the momentum to get as much done as we can.' In fact, I was going to employ the argument that has been oft employed here—that is, the blank cheque one that there is not enough detail in a submission such as this for people to feel confident about it. In fact, opponents would be able to exploit some of those potential deficiencies. If you want to gauge it or move towards a position where the people are so-called 'sovereign', would not an initial plebiscite—perhaps with qualification—achieve the same thing? By 'with qualification' I mean: do you want an Australian republic that is obviously contingent upon the Australian people determining a model? Is that not achieving the same thing?

Mr Pepperday—I am a bit like Professor Craven: feeling the hot breath of the devil on my neck at even admitting to one plebiscite. It lacks propriety in my view. If Labor wins the election, I think Labor is committed to having a plebiscite, so we are going to see it. It will be very interesting to watch how the 'do you want a republic' question is phrased. Isn't every responsible Australian's answer to that, 'Yes, it depends'? You are going to put that condition on it, so it will be interesting to watch the parliamentary debate about how that question gets phrased.

Senator STOTT DESPOJA—Yes. I knew there was a reason my private member's bill had not been debated. Thank you for your time, Mr Pepperday.

CHAIR—Mr Pepperday, thank you very much for your submission and thank you for your time with us this morning.

Mr Pepperday—Thank you very much for having me.

[11.03 a.m.]

HARRIS, Dr Bede (Private capacity)

CHAIR—Welcome. You have lodged submission No. 93 with the committee. Do you need to make any amendments or alterations, other than what is in the circulated addendum to the submission?

Dr Harris—Yes. There is a slight amendment to the addendum now. My answer to question 17, 'Who or what body should have the authority to remove the head of state from office?' should read, 'The courts on application are any person enrolled as a voter,' to be consistent with the rest of the submission.

CHAIR—Thank you. Would you like to start with an opening statement?

Dr Harris—Yes. I have a few essential points. As appears from my submission, I was one of the co-authors of the Corowa process and that suggested procedure for putting the question of an Australian republic before the people. I concur with all the other co-authors in relation to that question of process, with the plebiscite and referendum that it suggests.

In relation to the substantive issue of whether or not Australia should have a head of state who is elected, at the outset I would like to validate the need to ask that question. I have noted some of the submissions made by supporters of the status quo—principally Professor Flint—putting forward this idea that in fact we already have an Australian head of state in the form of the Governor-General. Constitutionally, that is nonsense. The constitution mentions the Queen in several places. It is quite clear that the Governor-General is merely the agent of the Queen. The Governor-General, as has sometimes been said, is recognised as head of state when he goes overseas, but of course he is being recognised as an alter ego of the Queen in that circumstance. Judges, members of the armed forces and other people take an oath to the Queen, not to the Governor-General. Even on a purely superficial level it is quite clear that the Queen is head of state. It is quite clear under the Constitution: section 61 vests executive power in the Queen and merely indicates that the Governor-General is exercising that power as her representative.

The other key point that I would like to emphasise is my view that codification is a very worthwhile endeavour. Whether we retain the status quo or move to a republic, I think it would be a very valuable constitutional exercise to codify the powers of either the Governor-General or, if we had one, the president. I disagree with those people who think that codification is a vain endeavour. One only has to look at a number of constitutional provisions from countries in the Commonwealth. In my submission, in footnotes 14 to 18 I indicate certain Commonwealth countries that are still under the monarchy and have governor-generals, but with those governor-generals power is codified. Then there are republics that are members of the Commonwealth, like Malta and Mauritius, that have presidents with codified powers that are the same as those exercised by our Governor-General currently. And of course there are numerous examples of countries outside the Commonwealth.

I think codification is an important and certainly an achievable outcome. I think that, if you do have codification, the principal objection against direct election is removed, if everyone is clear from the outset that the president is subject to what were conventions and are now constitutional laws in the exercise of his or her powers—and, it having been removed, I think one does not need to fear direct election and the competition that might arise between an elected president and a Prime Minister. For me, codification and direct election really go hand in hand.

The only final point I would make is that I think that the question of dismissal of a president has to be put on a footing of law rather than politics. At the moment, of course, effectively the power to dismiss the Governor-General rests in the hands of the Prime Minister. Formally speaking, of course, it is done by the Queen on advice. But my view is that the Queen would never demur when faced with that request. Therefore you effectively have the situation where the Prime Minister and the Governor-General can dismiss each other. Under the model that I propose, the president would be removable for incapacity or misconduct in office on application to the High Court. It would become simply a legal rather than a political question. That is all I have to say as an opening statement.

CHAIR—Can I start off by referring you to a suggestion made by Sir Gerard Brennan. He focused not on codifying the actual powers but on codifying when they could be used. Has that sort of approach been considered by you, and do you find that attractive? If not, for what reason?

Dr Harris—Yes. In my submission, on page 5, I do make the point that there are two ways of speaking of this. You can either say that there are reserve powers which the Governor-General can exercise other than on advice or you can say that some of the instances or circumstances in which the Governor-General can exercise powers are the following. I really do not know if that is that crucial a distinction, frankly. In the case of any power, you lay down the circumstances in which it may or may not be exercised and subject to what conditions. That is really a question of semantics. The key thing is to say what the powers are and under what circumstances they can be exercised.

CHAIR—But is it semantics when you are suggesting that one of the things you have to say is what the specific powers are? It has been put to us that there is a capacity for those powers to evolve.

Dr Harris—I think the powers of the Governor-General, as the office currently is—or President, as it might become—are reasonably clear. The only dispute would seem to be, if one consults academic texts, on the question of whether or not a governor-general can ever refuse dissolution: if there has been an election in the recent past, can a governor-general ever validly refuse a request for dissolution? I am philosophically averse to a Constitution that grows unregulated, and I know I am different from many people in this regard. I do not like the uncertainty of conventional powers developing in either substance or the circumstances in which they can be exercised. I differ from Sir Gerard Brennan in that regard. I think that the powers should be stated and the circumstances in which they should be exercised should be stated, and I do not think there is that much disagreement on exactly what those powers are.

CHAIR—I suppose I agree with you that direct election should come with a codification of powers, but in terms of options to be made available for the public to consider, should there be

two—should there be direct election with codification and direct election without? Should people be given a choice?

Dr Harris—I would think not. I think that there is very great danger in direct election without codification. I am a supporter of direct election, but I do concede the danger of two separate foci of power emerging if you have direct election without codification. I think it is vital to remove the temptation of a directly elected President to exercise powers in an unconstitutional manner by circumscribing them through codification.

CHAIR—Thank you.

Senator STOTT DESPOJA—Is there a particular reason you have chosen that figure of 500 people for the purposes of nominating someone—is it arbitrary?

Dr Harris—Yes. It was a difficult figure to choose. I was trying to balance the need for the process to be as accessible as possible to potential candidates against the danger of having thousands of candidates with eccentric platforms—and I suppose all electoral laws have to strike that balance in relation to nomination for election to parliament and any office. So, yes, I think one would have to be guided in that by expert evidence from the Electoral Commission as to what an appropriate number would be. That is not a vital figure in my mind.

Senator STOTT DESPOJA—Sure. What is your preferred time line for this process to begin and be resolved?

Dr Harris—I would hope that it would be resolved within the next three years or so. If a government had the will to implement it, I do not see why we should not be able to have a plebiscite in 2006 and a referendum in 2007.

Senator STOTT DESPOJA—Finally, were you here for Sir David Smith's evidence this morning?

Dr Harris—No.

Senator STOTT DESPOJA—Have you had an opportunity to see his supplementary submissions?

Dr Harris—No.

Senator STOTT DESPOJA—I note that Sir David is still here. He put forward some very compelling evidence in relation to the case for regarding the Governor-General as the head of state, including various legal findings and political events, a list to which he refers as an impressive one. I would not dare to disagree. This may be better as a question on notice to provide you with some of his evidence and ask for your response to that. At the risk of misrepresenting Sir David he argued very strongly that there is no reference, of course, to the head of state in our Constitution and indeed it is an acceptable notion that the Governor-General is indeed our head of state.

Dr Harris—First of all, the term 'head of state' does not appear in the Constitution. It is more a term of international relations really where people refer to the head of state as the person who embodies the sovereignty of a particular country. It is to that that the deference is given when that person travels et cetera. I do not like the term 'head of state'. I prefer to use the term 'who is the person in whom executive authority is vested?' It is quite clear from section 61, which states:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative ...

I do not think you can have a clearer and more definitive statement than that. We live in a situation where, of course, the Queen is the source of executive power in many countries and she is represented in those countries by a governor-general. The pure physical incapacity of the Queen to be in multiple places at once dictates the need for that. I do not think that anyone should be under the illusion that the Governor-General is acting as anything other than an alter ego of the Queen.

Senator STOTT DESPOJA—I am very satisfied with that answer but would you be willing, if the committee were to provide you with today's submission, to have a look at the examples that are provided and see if you wish to respond to any of those cases?

Dr Harris—I would be very happy to do so.

Senator KIRK—Dr Harris, thank you for your submission. I understand that your submission supports the Corowa resolution, which, of course, proposes an initial plebiscite and then following that a constitutional convention with elected delegates to actually draft the constitutional amendment. Could you give us some more detail on how you envisage that constitutional convention being elected, how it would operate and how it would actually go about drafting the requisite constitutional amendment.

Dr Harris—I think that the role of the constitutional convention would be a very limited one, frankly. Probably, of all the elements of the Corowa proposal, that is the least crucial to its functioning. I would envisage that once the plebiscite had indicated that the voters had selected one or other of the models—and, of course, that question would only be relevant in the event that they would want a republic in the first place—the convention would be directly elected. It would be elected on the same basis as parliament is elected and its function would be simply to, if you like, debate and vote upon a model provision embodying the model which had been chosen by the people.

I would hope, frankly, that the role of the convention would be one that would be very easily discharged. That would depend of course upon the level of detail that was contained in the choices in the plebiscite. If in your plebiscite under each of the models of republic you had a fairly detailed statement of what each model would contain then the convention's role would be proportionately diminished. Its role would be one of simply putting that into the form of a bill. Some people have commented to me: 'Do you really need a convention? Couldn't the models put before the people in the plebiscite contain sufficient detail to form the bill that would go before them in the section 128 referendum?' I concede that that may well be the case: it may be that the convention is a redundant aspect of the plan.

Senator KIRK—I think the convention is quite a good idea, because I have some concerns that, if you were to put the detail in the plebiscite to the people, it just might be overwhelming and too much information.

Dr Harris—It could be, yes.

Senator KIRK—That is just my view. You said that you would like to see the delegates directly elected. Would you see a similar sort of process to that which occurred in the 1998 convention?

Dr Harris—I must confess that I have forgotten what the method for election for the 1998 convention was. I would imagine that it would be entirely suitable to have election by people perhaps on electoral divisions within the states, proportional to the states' populations. But, yes, it should be elected in as proportional a way as possible.

Senator KIRK—Yes, it was along those lines in 1998—based on representation from each of the states. Would you envisage that the delegates would be advised by constitutional experts in the field? I am just concerned that a number of the delegates would not have the information they require.

Dr Harris—I think that would be all to the good, if they were.

Senator KIRK—Over what period of time would you see the convention sitting to deliberate?

Dr Harris—A month or so.

Senator KIRK—I just wonder, in light of the most recent experience, during which we had just two weeks, whether or not there might be some benefit in what was done during the 1890s—that is, having a week or so and then taking the time to go back to the constituency to get further information, and having it as an ongoing process over, even, 12 months.

Dr Harris—Yes; although I think people's minds tend to be concentrated if they know they have a more limited space of time in which to complete a task, but that process of reflection between sessions would have advantages too.

Senator KIRK—Finally, you say that in your opinion the removal of a republican head of state should be by the High Court and that removal by the legislature would be undesirable. Could you elaborate on, firstly, why you think removal by the legislature would be undesirable and, secondly, who or what body would be empowered to go to the High Court to ask for the removal of the head of state.

Dr Harris—I think removal by the legislature would be undesirable because there might well be circumstances in which the question of whether or not the Governor-General should be removed could become politicised. For that reason, I think it should be in the hands of the courts. Secondly, I think the standing to bring an application, obviously with evidence of misbehaviour or incapacity, should be as wide as possible and, basically, any enrolled voter should have that standing to bring an action. I imagine that it would be a very rare occurrence that someone

would have such evidence, but I do not really see any solution other than that to the issue of standing in cases of bringing an application for impeachment to the High Court. There may well be circumstances in which frivolous applications are brought, but then of course people would have the deterrent of the costs of doing that. But the key thing is that it must be on legal rather than political grounds that the application is brought, and that is why I think the courts are the proper forum for that to be addressed.

Senator KIRK—You do not think it would unduly or undesirably politicise the role of the High Court if it were given that power?

Dr Harris—No, I think they are capable of dealing with it as a purely legal question. In fact, in most countries questions of impeachment are addressed that way—by a constitutional court or by the ordinary court system.

Senator KIRK—Thank you for those comments.

CHAIR—You are not concerned that the hothouse environment of direct election would deter the sorts of people we have been getting in the past and who have been performing well?

Dr Harris—That is a possibility, but I look to the example of Ireland where they have direct election. In fact, up until the 1990s it was difficult to get people to stand for election because the process was bland; it was very unemotive. I think that for any public office, particularly the one of President, if people want to stand for election to it then they should be prepared to expose themselves to the scrutiny of the voters. That is what a republic is all about—that you have survived the rigours of a process of election. I know there are negatives associated with that, but I think that is one of the costs of democracy.

CHAIR—I want to raise with you the concept of an initial plebiscite. It has been put to us that in that initial question formulation there needs to be some reference to a legislative guarantee of a next step, of a capacity for the people to choose the actual model, rather than just tick the question of whether they want an Australian republic or a republic.

Dr Harris—The Corowa model was drafted on the basis that both questions would be put simultaneously and that the legislation establishing the plebiscite would say that the second question would only be relevant if there was an affirmative vote in relation to the first. But if you are having two plebiscites then clearly it must be signalled to people that voting for a republic in the abstract does not seal their fate, as it were, and that they will have a further opportunity to vote on the precise model.

CHAIR—Thank you for a very thoughtful submission and presentation.

[11.27 a.m.]

McKENNA, Dr Mark Bernard, Australian Research Council Fellow in History, Australian National University

CHAIR—Welcome to the hearing. You have a lodged a submission numbered 201 with the committee. Do you wish to make any amendments or alterations to it?

Dr McKenna—No.

CHAIR—Would you like to make an opening statement?

Dr McKenna—Yes. Thank you for the invitation to be here today. In my opening remarks I want to address the second part of the submission which deals with the rationale for a republic. I am more than happy to answer questions about the comments I have made on process and models. However, I think the issue of the rationale for a republic is crucial. I suppose that, after more than a decade of debate over the prospect of a republic, we have come to accept that the rationale for a republic is given. That rationale, of course, is the instalment of an Australian head of state.

But if we think more deeply about what a republic means and we dwell for a moment on the fact that the declaration of a republic does require the removal of the sovereignty of the Crown, one fact becomes clear. The instalment of an Australian head of state is a consequence of becoming a republic. It is not its rationale. A republican constitution is where the Australian people become explicitly the sovereign power. Under a republic it is not our head of state who is the Sovereign, but the Australian people. That is why a republican constitution does need to declare, in a new preamble, the principles that bind us as a sovereign, free and democratic people.

But even before we get to thinking about what those principles are, I think there is one more fundamental rationale for a republic. Anyone who has lived in Australia over the last three decades cannot any longer claim ignorance about the true aspects of frontier history in Australia. We may disagree about the way in which dispossession occurred but we cannot disagree that the result of Europeans arriving in Australia was in many cases dispossession of Aboriginal people and culture. Given what we now know, it is very hard to believe or accept that in 2004 we can proceed towards a republic whilst pretending that Indigenous issues are separate—a separate issue or a separate problem.

I think one of the starting points for process in an Australian republic, especially after the experience of the nineties, is that we must negotiate with Aboriginal people at every step of the way. That means we negotiate now over the issue of process, just as we would negotiate further down the track in a constitutional convention. Why is that? The republic, of course, is the most powerful promise of constitutional renewal we have got before us today; and constitutional renewal is not simply a matter of rebranding Australia or of airbrushing anachronisms from the constitutional text. In order to begin anew, constitutional renewal does take us back to our origins. If the Crown is no longer sovereign and we the people are sovereign, it is inconceivable

to imagine that we could lay claim to that sovereignty in a new republican constitution without acknowledging the undeniable fact that, when the Crown claimed sovereignty over Australia, there were other people who were sovereign and their sovereignty was usurped in the name of the Crown. Those people and their cultures were dispossessed in the name of the Crown and its governments. Their lives and families were torn asunder. In that light, to remove that Crown as the sovereign power, we have the opportunity and the responsibility to make constitutional recognition of Aboriginal people the first fundamental plank of the platform for an Australian republic. That should be the one principle that cannot be watered down or traded away. It is the one fundamental change on which republicans, regardless of their preferences on models or process, should be able to strike agreement.

I am here today with not only my own words but those of Djerrkura, a former chair of ATSIC, who died tragically in May at the age of 52. I had the privilege of knowing him for the first time only two weeks before his death. In his last public address, here in Canberra, he explained the importance of a republic to the Aboriginal people. Djerrkura's words are, I think, the most eloquent expression of the case that I have tried to put to you in both the submission and here today. He said:

> Symbolism matters because it is a reference point for all Australians. The symbols of our nation embody our ideals. They speak to us and other nations of our identity and beliefs. Symbols can also be a sign of change, a beacon of hope and a declaration of intent. When they reflect our aspirations, they are empowering. And there is no more fundamental symbolism, no more fundamental reference point, than the Australian Constitution.

And that is especially the case for Indigenous people. Djerrkura continued:

> If we want to break away from the colonial past, and begin anew, then we have to walk together—hand in hand and side by side—as a truly reconciled nation. A republic that does not make the first concrete gesture towards reconciliation is a republic that walks in the footsteps of the Crown. Is this the impoverished vision of a republic we want? My answer is No. Our vision must be more substantial. My dream is of Australia as a reconciled republic.

Finally, I think we should always keep in mind that in 1901 Australia federated under the Crown without consulting or including Aboriginal people. An Australian republic cannot afford to make that same mistake. Those are my opening remarks and I am happy to answer questions about any aspect of my submission.

CHAIR—Thank you. What do you specifically mean by 'including' Indigenous people? You can include in process, you can include in a specific reference in constitutional change: what is your preferred approach?

Dr McKenna—Do you mean in terms of negotiations or of outcomes?

CHAIR—You say to us that we have to include Indigenous people. On the one hand people could say that by removing the symbol of the colonial power you are redressing some of that injustice of the past that you refer to. On the other hand, you can include in the process discussions to factor their views in. Thirdly, you could have a proposal that goes before the people, you could work through it, which in some way changes the Constitution to do something in respect of Indigenous people. I am trying to work out which of those three and what, in particular, you are referring to.

Dr McKenna—Certainly all of them. In terms of process it is essential. For example, Aboriginal leaders have not appeared before this committee. It is a shame that certain Aboriginal leaders have not been able to appear. I have looked at the submissions on the web site. I know that ATSIC did put a submission in. I am not sure whether any other Indigenous people did.

CHAIR—Seven hundred others have.

Dr McKenna—Sure. I am not here to attack the committee.

CHAIR—I am not here to defend the committee. The point I am making is that if it was within the capacity of so many active people to access this process, what does it say about—

Dr McKenna—Are you suggesting that we should infer through silence that they are not interested? I do not accept that because a significant percentage of Aboriginal people have not made a submission that therefore they are not interested. If you asked how many non-Aboriginal Australians are aware that these proceedings are taking place today you would find a very small minority of people would be aware of it. Their position in that respect is not any different. Because they are the first people of this country their position in terms of negotiation is different. It is a historical fact that they were not consulted throughout the formation of both colonial state constitutions and the federal Constitution in Australia. In going down the road of creating a republican constitution we must negotiate with them at every step so that we do not make the mistake that was made in 1998-99 when we were talking about them in a preamble but not sitting around the table talking with them about the words we were going to use.

Regarding what I want in terms of outcome, constitutional recognition of Aboriginal people should be the one fundamental point upon which republicans of all persuasions can agree. After all, this is what the Liberal government was trying to achieve in 1999. There are many people within both parties who would strongly support the insertion of that principle in the Constitution. I see it as something which has the potential to provide bipartisan support.

CHAIR—You are talking preamble?

Dr McKenna—Yes. Having in the preamble constitutional recognition as one unnegotiable—one thing that is just so fundamental that we should be able to strike agreement about that principle. To imagine that we would end up with a republican constitution that says nothing about the constitutional position of Aboriginal people would be a great tragedy, a lost opportunity.

CHAIR—You say we should be able to. We have tried once and it is fair to say that people on all sides of the debate were not happy with the outcome in terms of what was proposed.

Dr McKenna—Are you talking about the preamble in 1999?

CHAIR—Yes. No matter how soft the proposal was, it was still not accepted by the public.

Dr McKenna—In 1999 the level of support for the preamble was, shall we say, lukewarm from its proponents and there was silence from the republican side because they were fearful that they did not want to damage the second question. The level of support was not strong from the

preamble's proponents. The preamble is a by-product of the whole republican debate over the last decade. With that in mind, we do not want to get ourselves into a situation where we think we cannot ask the Australian people a question similar to that which we asked in 1967. Have we come to a point where we now stand and say, 'We can't ask certain questions because it might be rejected or give rise to racist elements,' for example? I have heard this argument. I do not accept that is a valid reason.

If you look at the way the 1967 referendum was won, as an appeal to fairness and equality and the way it has been remembered—which is often quite different to what actually happened—you can see that it is possible to put that question and achieve bipartisan support on that one fundamental issue. It is political will. And I think we have also lost a lot of the optimism that was there in the early nineties around the republic. Constitutional law is so crucial to a republic, but if you listen to constitutional lawyers for too long you are liable to become disillusioned because you have to ask yourself, 'How does that touch ordinary people?' And of course the only way the republic will touch ordinary people is if they feel they have a connection, and that is through, to my mind, a constitutional convention, a preamble and the issue of reconciliation.

Senator STOTT DESPOJA—I am not sure if this is the place to get into a discussion of what happened in 1999. I suspect at some point it would be useful, because I think that Senator Bolkus makes an important point. Dr McKenna, I am sure that you would recall that there were those of us who were extremely strong proponents of a change to the preamble, and I say that across the political and party spectrum. I worked very closely with Gareth Evans and others to come up with a preamble which was then not supported in favour of another one that actually went to the people for a vote. I do not think anyone is suggesting that you cannot put up additional questions in this area or any other in relation to constitutional change simply because it will impact on the outcome of a referendum debate. I am certainly not arguing that, but I should acknowledge that some have. Hence we get back to the debate about whether you have a minimalist, maximalist or whatever position.

If we are talking about inclusion, what is the next step that you would recommend for this committee? If there is a deficiency in this process, I do not think it is a deficiency of which the committee is guilty. We have certainly tried very strongly—and I am talking across the board—not only in terms of Indigenous Australians but in terms of having diversity and difference reflected and represented through this committee in every sense. Regional, rural and remote areas, for example, have been another particular challenge. Is there some specific advice or recommendation that you make to this committee on the issue of participation and inclusion of Indigenous people in determining the outcomes of this committee's recommendations?

Dr McKenna—Is it true that this is the final public hearing?

CHAIR—We are not planning any others at this stage. They have been going for quite a while.

Dr McKenna—One solution would be to have another hearing where Indigenous leaders were invited to attend and make their comments. The other solution is a political one, which is to make reference in the committee's recommendations to the fact that this issue is something which should not be forgotten in future negotiations over process. That is really all you can do, I think. If you are not having another public hearing then you can only state that we should be

mindful of the issue of negotiation with Aboriginal people at every step. Of course, politically at the moment the profile of Indigenous leaders is not as it was in the early nineties. That is undeniable.

Senator PAYNE—You should not assume, Dr McKenna, that no invitations have been issued. It may be that they are not taken up.

Dr McKenna—Yes, I should not assume that. I have no knowledge either way.

Senator PAYNE—No, indeed. I make the point.

Senator KIRK—Thank you for your submission, Dr McKenna. My understanding of your submission is that you are suggesting that a fully elected convention is something that ought to be contemplated following the first plebiscite.

Dr McKenna—Yes.

Senator KIRK—Could you inform the committee how you see that fully elected convention working: firstly, how would the delegates be elected; secondly, what sort of process would they engage in; and thirdly, would they be advised by constitutional experts?

Dr McKenna—Firstly, I think it is essential to look at the experience of 1998. One of the great mysteries of the 1998 convention was the fact that there was extraordinary public theatre around the convention. People were very enthusiastic about it. People were lining up outside Old Parliament House, it was televised on the ABC and it created a real buzz of excitement around the country. Yet, when we got to the referendum in November 1999, if you said to people, 'The reason we are voting on this question is that it came out of the Constitutional Convention in 1998,' they did not accept the legitimacy of the convention. Part of the reason for that is that the convention was not fully elected and it was not elected by compulsory vote.

Also, there is a strong case for arguing that the convention needs time to convene, adjourn and reconvene so that the public have time for deliberation—time to consider the convention's recommendations and the debates within it. I know that is an expensive process, but my belief is that a constitutional convention is crucial to the legitimacy of whatever question comes to the referendum in future. If people can see that they have been consulted openly and that we have had an open and democratic process all the way through, they are more likely to accept the outcome of that convention. If it is a constitutional committee of experts or politicians that provides the model that goes to referendum, you are going to lend your opponents the possibility of saying, 'This is another Canberra-hatched scheme for a republic,' and so on. In terms of legitimacy, the convention is crucial. It also has quite profound historical traditions in Australia. The fact that we federated as a democracy through the process of constitutional conventions is unique, and I think that is a tradition we should encourage in becoming a republic as well.

Senator KIRK—What about the role of constitutional experts? Are you suggesting that there should not be any role for appointed experts and that they should just advise?

Dr McKenna—I think that is very important. Because of the complexity of constitutional issues, it is essential that delegates at a convention be advised by constitutional experts.

Senator KIRK—Would you see the election process as being similar to that undertaken in 1997?

Dr McKenna—I see state based representation but certainly a compulsory vote and a fully elected convention. If it could be done in the 1890s, it can be done in 2004, 2005 or 2006.

Senator KIRK—I think that is right. In their submission ATSIC said to us that the process for moving towards an Australian republic should be open, accessible and also clearly explained to Indigenous people. Given that we do not have the benefit of speaking to ATSIC and given your interest in the area, perhaps you could inform the committee about how the process could be explained to the Indigenous people.

Dr McKenna—You would have to build on the existing networks of the Indigenous bureaucracy. You would have to appoint certain Indigenous people who had a public profile within certain communities to go and talk to their own people about what was going on. Of course, you could not do that in every case. But you could at least do it in each state in two or three of the largest communities so that there would be some sort of mediation which would involve Aboriginal people in taking, for example, the results of a convention to their people and discussing them.

Senator KIRK—Would you see Indigenous people being represented at the convention? Given that it would be a fully elected convention, do you envisage that there should be any positions set aside for Indigenous people?

Dr McKenna—If you want my personal view, the way I would do it is to have a certain percentage of seats guaranteed for Aboriginal people. But, given that that state of affairs does not exist in state or federal parliaments, I think the political issues around doing that would probably suggest that it would be more ideal if Aboriginal people could stand as candidates and be elected—so, if I can, I would like to have it both ways on that one.

I also have a comment about the Governor-General being Australia's head of state. You might have noticed that in my submission I suggested that the first plebiscite question should not be, 'Should Australia have an Australian head of state?' I think it is very important, if you look at the experience of 1999, to take the phrase 'Australian head of state' out of the plebiscite question, because people might try to muddy the waters by saying that we already have an Australian head of state and that is the Governor-General. If you are in any doubt as to who is Australia's head of state, look at what happens when Her Majesty actually sets foot on our shores and look at what the Governor-General must do when the Queen is physically here. There is no doubt that the Queen is the head of state of Australia.

So, with that simple fact in mind, not to mention the constitutional provisions that were quoted earlier, this idea that the Governor-General is an Australian head of state is a complete furphy. However, in the context of a referendum it is crucial to avoid, politically and strategically, giving people the opportunity to make that case and muddy the waters. So you would simply ask the question: 'Should Australia become a republic with a republican head of state or should it remain a constitutional monarchy?' That means that people cannot argue that the Governor-General is a republican head of state. If they can manage that, they will weave magic of a kind I have not seen.

CHAIR—It is not beyond them.

Dr McKenna—Yes, it is not beyond them. But I think that would be a sensible move strategically.

CHAIR—Thank you—thank you for your submission and thank you for your advice also on Indigenous input. We have made a number of attempts, but I think probably the best thing to do at this stage is to signal it as an ongoing issue which has not been resolved from the last process and needs to be resolved before this is adequately covered in the next process. I thank all the witnesses and other participants here this morning.

Committee adjourned at 11.53 a.m.