FINAL REPORT OF THE CONSTITUTIONAL COMMISSION

1988

Volume One

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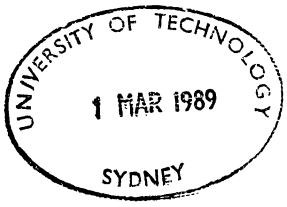

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30 June 1988

Hon Lionel Bowen, MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General,

In accordance with our Terms of Reference, we present our Final Report on the revision of the Australian Constitution.

Yours sincerely,

Sir Maurice Byers, CBE, QC
Chairman

Professor Enid Campbell, OBE

Hon Sir Rupert Hamer, KCMG

Hon EG Whitlam, AC, QC

Professor Leslie Zines

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TABLES

LIST OF ABBREVIATIONS

The abbreviations used most often in this Report are listed below.

Publications

Australian Constitutional Convention

ACC Proc, Adelaide 1983	*Proceedings of the Australian Constitutional Convention,* Adelaide (1983) Government Printer, South Australia
ACC Proc, Brisbane 1985	*Proceedings of the Australian Constitutional Convention,* Brisbane (1985) Government Printer, Queensland
ACC Proc, Hobart 1976	*Proceedings of the Australian Constitutional Convention,* Hobart (1976) Government Printer, Melbourne
ACC Proc, Melbourne 1975	*Proceedings of the Australian Constitutional Convention,* Melbourne (1975) Government Printer, Melbourne
ACC Proc, Perth 1978	*Proceedings of the Australian Constitutional Convention,* Perth (1978)
ACC Proc, Sydney 1973	*Proceedings of the Australian Constitutional Convention,* Sydney (1973) Government Printer, New South Wales

Constitutional Commission

Executive Report	*Executive Government,* Report of the Advisory Committee to the Constitutional Commission (1987) Constitutional Commission
Judicial Report	*Australian Judicial System,* Report of the Advisory Committee to the Constitutional Commission (1987) Constitutional Commission
Powers Reports	*Distribution of Powers,* Report of the Advisory Committee to the Constitutional Commission (1987) Constitutional (Commission
Rights Report	*Individual and Democratic Rights,* Report of the Advisory Committee to the Constitutional Commission (1987) Constitutional Commission
Trade Report	*Trade and National Economic Management,* Report of the Advisory Committee to the Constitutional Commission (1987) Constitutional Commission

Other

Conv Deb, Sydney 1891	*Official Record of the Debates of the Australasian Federal Convention* (1891) Acting Government Printer, Sydney
Conv Deb, Adelaide 1897	*Official Record of Debates of the Australasian Federal Convention* (1897) Government Printer, Adelaide
Conv Deb, Melbourne 1898	*Official Record of the Debates of the Australasian Federal Convention* (1889) Government Printer, Melbourne
ICCPR	International Covenant of Civil and Political Rights (1966)
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
PP	Parliamentary Paper (Cth)
Quick and Garran	J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth* (1901, reprinted 1976) Legal Books, Sydney
1929 Report	*Report of the Royal Commission on the Constitution* (1929) Commonwealth Government Printer, Canberra
1959 Report	*Report from the Joint Committee on Constitutional Review, 1959* (1959) Commonwealth Government Printer, Canberra

Advisory Committees

Executive Committee	Advisory Committee to the Constitutional Commission on Executive Government
Judicial Committee	Advisory Committee to the Constitutional Commission on the Australian Judicial System
Powers Committee	Advisory Committee to the Constitutional Commission on the Distribution of Powers
Rights Committee	Advisory Committee to the Constitutional Commission on Individual and Democratic Rights under the Constitution
Trade Committee	Advisory Committee to the Constitutional Commission on Trade and National Economic Management

International bodies

ILO	International Labour Organisation
UN	United Nations

Titles of judicial officers

ACJ	Acting Chief Justice (eg Mason ACJ is Acting Chief Justice Mason)
CJ	Chief Justice (eg Gibbs CJ is Chief Justice Gibbs)
J	Justice (eg Deane J is Justice Deane)
JA	Judge of the Court of Appeal, Supreme Court of New South Wales (eg Samuels JA)
P	President of the Court of Appeal, Supreme Court of New South Wales (eg Kirby P)

Law Reports and Courts

Australia

ACTR	Australian Capital Territory Reports
ALR	Australian Law Reports
ALJR	Australian Law Journal Reports
CLR	Commonwealth Law Reports
Fam LR	Family Law Reports
FLR	Federal Law Reports
HC	High Court
Legge	Legge's Supreme Court Cases, New South Wales
NSWLR	New South Wales Law Reports
SASR	South Australian State Reports
SR (NSW)	State Reports (New South Wales)
SRQ	State Reports, Queensland
VR	Victorian Reports
WAR	Western Australian Reports

Canada

ACWS	All Canadian Weekly Summaries
Alta CA	Alberta Court of Appeal
Alta LR	Alberta Law Reports
Alta Prov Ct	Alberta Provincial Court
Alta Prov Ct (Fam Div)	Alberta Provincial Court (Family Division)
Alta QB	Alberta Queen's Bench
AR	Alberta Reports
BC Co Ct	British Columbia County Court
BC Prov Ct	British Columbia Provincial Court
BCCA	British Columbia Court of Appeal
BCSC	British Columbia Supreme Court
CA	Court of Appeal
CCC	Canadian Criminal Cases
CPR	Canadian Patent Report
CR	Criminal Reports (Canada)
CRR	Canadian Rights Reporter
DLR	Dominion Law Reports

DTC	Dominion Tax Cases
FCTD	Federal Court Trial Division
Fed CA	Federal Court of Appeal
Man CA	Manitoba Court of Appeal
Man Prov Ct	Manitoba Provincial Court
Man QB	Manitoba Queen's Bench
MVR	Motor Vehicle Reports
NBQB	New Brunswick Queen's Bench
NBR	New Brunswick Reports
Nfld CA	Newfoundland Court of Appeal
NSCA	Nova Scotia Court of Appeal
NSR	Nova Scotia Reports
NSSC	Nova Scotia Supreme Court
NWTSC	North West Territories Supreme Court
Ont CA	Ontario Court of Appeal
Ont Co Ct	Ontario County Court
Ont Dist Ct	Ontario District Court
Ont Div Ct	Ontario Divisional Court
Ont HCJ	Ontario High Court of Justice
Ont Prov Ct	Ontario Provincial Court
Ont R	Ontario Reports
Que CA	Quebec Court of Appeal
Sask CA	Saskatchewan Court of Appeal
Sask QB	Saskatchewan Queen's Bench
Sask R	Saskatchewan Reports
SCC	Supreme Court of Canada
SCR	Supreme Court Reports
UFCt	Unified Family Court
WCB	Weekly Criminal Bulletin
WWR	Western Weekly Reports
YTCA	Yukon Territories Court of Appeal
YTSC	Yukon Territories Supreme Court

Europe

ECHR	European Court of Human Rights
EHRR	European Human Rights Reports

India

AIR	All India Reports
SCR	Supreme Court Reports

New Zealand

NZLR	New Zealand Law Reports

United Kingdom

AC	Appeal Cases
App Cas	Appeal Cases
Ch	Chancery Division
Ch App	Chancery Appeals
Ch D	Chancery Division
E & B	Ellis and Blackburn

ER	English Reports
HL	House of Lords
Jebb & S	Jebb and Symes
KB	King's Bench
P	Probate Division Statutes
PC	Privy Council
QB	Queen's Bench
QBD	Queen's Bench Division
Raym	Lord Raymond
Stark	Starkie
TLR	Times Law Reports
WLR	Weekly Law Reports
WR	Weekly Reporter

United States

F	Federal Reporter
F Supp	Federal Supplement
NE	North Eastern Reporter
NW	North Western Reporter
S Ct	Supreme Court
US	United States Reports

SUMMARY OF RECOMMENDATIONS FROM THE FINAL REPORT OF THE CONSTITUTIONAL COMMISSION

We have been closely guided by our Terms of Reference which emphasise the need for the Constitution to:

(a) adequately reflect Australia's status as an independent nation and a Federal Parliamentary democracy;

(b) provide the most suitable framework for the economic, social and political development of Australia as a federation;

(c) recognise an appropriate division of responsibilities between the Commonwealth, the States, self-governing Territories and local government; and

(d) ensure that democratic rights are guaranteed.

From the outset it has been our clear intention not to propose an entirely new Constitution. We have sought to ensure that any proposals for change would preserve the framework and principles contained in the Constitution. In particular, we have been conscious of the need to retain in form and spirit the federal framework of government in Australia, parliamentary government and democratic institutions.

There are, however, some significant problems, and we have sought to identify ways in which the Constitution should be improved. The recommendations made in this Report have that objective.

We list our recommendations in the same order as they appear in this Report.

CHAPTER 2. THE TERMS OF REFERENCE

We recommend as follows:

(i) It is unnecessary to alter section 51(xx.) of the Constitution so as expressly to prohibit discrimination against State statutory corporations. (para 2.36, 2.240)

(ii) The Constitution should *not* be altered so as to provide expressly that every legislative power of a State shall, subject to section 109, extend to the Commonwealth. (para 2.61, 2.240)

(iii) Section 117 of the Constitution should be omitted and the following provision substituted:

> 117. (1) A person who is resident, temporarily resident or domiciled in any State or Territory shall not be subject in another State or Territory to any disability or discrimination on the ground or substantially on the ground of that residence, temporary residence or domicile.
>
> (2) Sub-section (1) of this section is not infringed by a law that imposes reasonable conditions of residence as a qualification for an elector.

(para 2.91, 2.240)

(iv) The enacting clause of the *Commonwealth of Australia Constitution Act 1900* should be repealed. (para 2.149. 2.240)

(v) The words 'the United Kingdom' and the 'the United Kingdom of Great Britain and Ireland' should be omitted from covering clause 2 of the *Commonwealth of Australia Constitution Act 1900* and the Note to the Schedule to the Constitution, respectively. The word 'Australia' should be substituted in each case. (para 2.156, 2.240)

(vi) There should be added to section 51 of the Constitution the following paragraph:

> (xxxviiiA.) Succession to the Throne, and regency, in the sovereignty of Australia:

(para 2.166, 2.240)

(vii) Section 58 of the Constitution should be omitted and the following provision substituted:

> 58. (1) Subject to sub-section (2), when a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, the Governor-General shall, on being so advised by the Federal Executive Council, assent to it in the Queen's name.
>
> (2) The Governor-General in Council may return to the House in which it originated a proposed law so presented to him and may transmit with it any amendment that the Governor-General in Council recommends and the Houses may deal with the recommendation.

(para 2.172, 2.240)

(viii) Sections 59 and 60 of the Constitution should be repealed. (para 2.172, 2.240)

CHAPTER 3. PREAMBLE AND COVERING CLAUSES

Preamble

We recommend:

(i) against altering or repealing the preamble to the *Commonwealth of Australia Constitution Act 1900;* and

(ii) against the inclusion of a preamble to the Constitution proper.

(para 3.2)

The covering clauses

We recommend that the covering clauses of the *Commonwealth of Australia Constitution Act 1900* be altered as follows:

(i) covering clause 5 should be altered by omitting all words appearing after the words 'laws of any State'; and

(ii) covering clauses 7 and 8 should be repealed.

(para 3.47)

We recommend that, with the repeal of covering clause 8, whatever further action is necessary be taken to repeal the *Colonial Boundaries Act 1895* so far as it applies to the Commonwealth of Australia, and that the legislation to repeal the *Colonial Boundaries Act 1895* should include a suitable savings clause with respect to certain pre-Federation instruments. (para 3.92-3.94)

CHAPTER 4. THE PARLIAMENTS

The right to vote

We recommend that the Constitution be altered to provide that:

(i) the laws made by the Federal and State Parliaments or by the legislature of a Territory prescribing qualifications of electors shall provide for enfranchisement of every Australian citizen who has attained the age of eighteen years;

(ii) the Federal and State Parliaments and the legislature of a Territory may make entitlement to vote dependent on compliance with reasonable conditions as to:

- residence in Australia or in a part of Australia or in a Territory, in the case of federal elections; or
- residence in the State or Territory, or a part thereof, in the case of State and Territorial elections; or
- enrolment;

(iii) the Federal and State Parliaments or the legislature of a Territory may make a law disqualifying from voting Australian citizens who have attained the age of eighteen years who:

- are incapable of understanding the nature and significance of enrolment and voting by reason of unsoundness of mind; or
- are undergoing imprisonment for an offence;

(iv) in choosing a member of a House of a State Parliament or of a legislature of a Territory, each elector shall vote only once; and

(v) section 41 of the Constitution be repealed.

(para 4.16)

We also recommend that section 25 of the Constitution should be repealed. (para 4.146)

The recommendations we have made in relation to the qualification of electors preserve the present constitutional requirement that each elector shall vote only once in elections where senators and members of the House of Representatives are chosen.

One vote one value

We recommend that the Constitution be altered to provide as follows:

(i) The number of enrolled electors in the electoral divisions where members of the House of Representatives or the legislatures of a State or Territory are chosen shall not vary by more than 10% above or below the relevant quota prescribed for that division (That is, 'one vote one value').

(ii) Federal, State and Territorial electoral divisions shall be determined at such times as are necessary to ensure that the principle of one vote one value is maintained.

(iii) A federal electoral division shall not be formed out of parts of different States. A division may be formed out of different Territories, out of parts of different Territories or out of a Territory and part of another Territory.

(iv) In the absence of an applicable law for a federal or Territorial electoral division, a particular State or Territory respectively shall be one electorate. Where State electoral divisions do not comply with the prescribed quota, the

State shall be one electorate and the method of choosing members of a House of a legislature shall be, as nearly as practicable, the same as the method of choosing senators for the State.

(v) A formula shall be prescribed in the Constitution to ensure that the principle of one vote one value is maintained for elections for the House of Representatives and State and Territorial legislatures for electoral divisions where two or more members are to be chosen.

(para 4.102)

We also recommend no change to the existing provision:

(vi) in section 24 that each Original State is entitled to representation by at least five members in the House of Representatives; and

(vii) in section 7 that each Original State is entitled to equal representation in the Senate.

(para 4.102)

Direct elections

We recommend that the Constitution be altered to provide that:

(i) each House of a Parliament of a State shall be composed of members directly chosen by the people of the State;

(ii) the legislature of a Territory shall be composed of members directly chosen by the people of the Territory; and

(iii) this requirement shall not apply to the filling of casual vacancies.

(para 4.160)

The recommendations we have made in relation to election of senators and members of the House of Representatives preserve the present constitutional requirements that senators and members of the House of Representatives shall be directly elected. (para 4.161)

Citizenship

We recommend that section 51 of the Constitution be altered to give the Federal Parliament an express power to make laws with respect to nationality and citizenship. We recommend that this alteration be by the addition of the words 'nationality, citizenship' to section 51(xix.) so that this paragraph would read:

(xix.) Nationality, citizenship, naturalization, and aliens: .

(para 4.177)

Enforcement of democratic rights

We recommend that the Constitution be altered to provide that any person who claims that his or her rights have been infringed by a breach of, or a failure to comply with, section 8, 30, 107B or 122D of the Constitution may apply to a court of competent jurisdiction for an appropriate remedy. (para 4.199)

Meetings of Federal Parliament

We recommend that section 5 of the Constitution be omitted and the following section be substituted:

5. (1) The Governor-General in Council may appoint such times for holding the sessions of the Parliament as the Governor-General in Council thinks fit.

(2) The Governor-General in Council may, from time to time, by Proclamation or otherwise, prorogue the Parliament.

(3) The Governor-General in Council may, subject to this Constitution, in like manner dissolve the House of Representatives.

(4) After a general election of the House of Representatives, the Parliament shall be summoned to meet not later than seventy-five days after the day fixed for polling at the election.

(para 4.214)

If this proposal were adopted, the alterations to the Constitution which would be effected would be as follows:

(i) The power of the Governor-General to appoint times for holding sessions of the Parliament, to prorogue Parliament and to dissolve the House of Representatives would be vested instead in the Governor-General in Council. The power to dissolve the House would, however, be subject to proposed section 28. This section would allow the Governor-General to dissolve the House within the first three years of its term, but only if the House had resolved that the Government did not have its confidence and the Governor-General was satisfied that it was not possible for a Government having the confidence of the House to be formed.

(ii) The present provision on the first meeting of the Parliament after the establishment of the Commonwealth would be omitted.

(iii) The time within which the Parliament would be required to be summoned after a general election would not be, as at present, 30 days after the day appointed for return of writs, but 75 days after polling day.

(para 4.215)

We further recommend that the following sections be added to the Constitution:

110A. After a general election of the more numerous House of the Parliament of a State (or, if there is only one House of the Parliament of a particular State, after a general election of that House), the Parliament of the State shall be summoned to meet not later than seventy-five days after the day fixed for polling at the election.

122B. After a general election of the legislature of a Territory, the legislature shall be summoned to meet not later than seventy-five days after the day fixed for polling at the election.

(para 4.216)

Composition of the Federal Parliament

We recommend as follows:

(i) The nexus between the size of the House of Representatives and the Senate should be broken, subject to the inclusion in the Constitution of provisions expressly limiting the size of both Houses of Parliament.

(ii) The number of senators for each Original State should be fixed at 12.

(iii) The power of the Parliament to determine the number of members of the House of Representatives should be qualified by providing that the number of people represented by a member of the House of Representatives shall be not fewer than 100,000, subject to the present guarantee that, 'five members at least shall be chosen in each Original State' (section 24) and to our recommendations on the representation of Territories and new States.

(iv) The entitlement of Territories and new States to representation in the House of Representatives and the Senate should be prescribed in the Constitution.

(v) The Australian Capital Territory and Jervis Bay Territory should be treated as one Territory for the purposes of representation.

(vi) A Territory should be entitled to its own representative in the House of Representatives when its population is in excess of 50,000.

(vii) The number of members of the House of Representatives chosen in each new State and in each Territory which is entitled to be represented should be in proportion to the population of the new State or Territory, provided that at least two members of the House of Representatives should be chosen in the Australian Capital Territory and at least one member in a new State and in the Northern Territory.

(viii) Residents (being persons qualified to be enrolled as electors) of a Territory that is not entitled to be represented in the Parliament should be entitled to vote at an election of senators or members of the House of Representatives for or in a Territory on the mainland of Australia, as the Parliament provides.

(ix) Each new State and Territory should be entitled to representation in the Senate on the basis that it returns one senator for every two members whom it is entitled to return to the House of Representatives, subject to the following:

- a new State, the Australian Capital Territory and the Northern Territory should each be entitled to representation in the Senate by at least two senators
- no new State or Territory should be entitled to be represented in the Senate by more than twelve senators.

This formula would produce the following results:

(a) *New States, Australian Capital Territory, Northern Territory*

Number of members of House of Representatives	Number of senators
1, 2, 3, 4 or 5	2
6 or 7	3
8 or 9	4
10 or 11	5
12 or 13	6
14 or 15	7
16 or 17	8
18 or 19	9
20 or 21	10
22 or 23	11
24 or more	12

(b) *Representation in the Senate of Territories other than the Australian Capital Territory and the Northern Territory* would be the same as in the above table except as set out below:

Number of members	Number of senators
1	0
2 or 3	1

(x) Section 26 should be repealed.

(para 4.250)

Casual vacancies in the Senate

We recommend no change to the procedure set out in section 15 of the Constitution for filling casual vacancies in the Senate except that special provision should be made in terms similar to section 15 for Territorial senators. (para 4.326)

We recommend that the last four paragraphs of section 15, being transitional provisions, now be repealed as expended. (para 4.327)

Terms of the Federal Parliament

We recommend alterations to the Constitution to reduce the frequency of elections by increasing the maximum term of the House of Representatives to four years, with a qualified minimum term of three years. To achieve that purpose we recommend that, subject to the qualification below, there be a minimum term of three years during which neither House can force an election.

We recommend that the Constitution be altered to provide that:

(i) The maximum term of the House of Representatives shall be four years.

(ii) The House of Representatives shall not be dissolved within three years of its first meeting after a general election unless the House has passed a resolution expressing a lack of confidence in the Government and no Government can be formed from the existing House.

(iii) Senators chosen in the States shall hold their places for two terms of the House of Representatives except in the event of a double dissolution.

(iv) Senators chosen in the Territories shall hold their places for one term of the House of Representatives.

(v) The polling day for an election of senators shall be the same day as the polling day for the election of members of the House of Representatives.

(vi) If, after the election of senators following a dissolution of the Senate but before the division of senators into two classes takes place, a senator dies, resigns or becomes disqualified, the division is to be made as if the place had not become vacant.

(para 4.345)

Electoral laws and writs for elections

We recommend that sections 9, 10, 11, 12 and 31 of the Constitution be omitted and that the following sections be substituted:

9. (1) The Parliament may make laws, subject to this Constitution, with respect to the election of senators but so that the method of choosing senators shall be the same for all the States and for the Territories that are entitled to be represented in the Senate.

(2) The polling day for an election of senators shall be the same day as the polling day for the election of members of the House of Representatives.[1]

10. (1) The Governor-General in Council shall cause writs to be issued for the election of senators whenever the terms of service of senators are about to expire or have expired.

(2) The writs shall be issued within ten days of the expiry of those terms of service.

1 The recommendation reflected in this sub-section is dealt with under 'Terms of the Federal Parliaments' above (recommendation(v)).

31. The Parliament may make laws, subject to this Constitution, with respect to the election of members of the House of Representatives but so that the method of choosing members shall be the same for all the States and for the Territories that are entitled to be represented in the House of Representatives.

(para 4.444)

Simultaneous federal and State elections

We recommend that section 394(1) of the *Commonwealth Electoral Act 1918* (Cth) should be repealed. That section provides:

394. (1) On the day appointed as polling day for an election of the Senate or a general election of the House of Representatives, no election or referendum or vote of the electors of a State or part of a State shall, without the authority of the Governor-General, be held or taken under a law of the State.

(para 4.466)

Relationship between the Senate and the House of Representatives

Powers of the Houses with respect to money Bills

We recommend that the Constitution be altered by omitting sections 53 and 54 and substituting sections incorporating the following principles:

(i) A proposed law imposing taxation or appropriating revenue or moneys shall not originate in or be amended by the Senate.

(ii) The Senate may not amend any proposed law that:

- imposes taxation or deals only with the imposition, assessment or collection of taxation; or
- appropriates revenue or moneys:
  - for the ordinary annual services of the Government;
  - for the construction of public works or buildings;
  - for the acquisition of land; or
  - for the acquisition of plant or equipment,

  or for two or more of those purposes.

(iii) The Senate shall, however, have power to amend an appropriation Bill mentioned in (ii) above so far as it appropriates revenue or moneys for a new purpose, that is a purpose:

- in respect of which revenue or moneys were not appropriated for expenditure in the previous financial year; or
- the accomplishment of which is not specifically authorised by law or is dependent upon the enactment of a proposed law.

(iv) A Bill shall not be taken to be one within any of the classes mentioned in (i) and (ii) above by reason only that it contains provisions for:

- the imposition or appropriation of fines or other pecuniary penalties; or
- the demand, payment or appropriation of fees for licences or for services under the proposed law.

(v) The Senate may not amend a proposed law so as to increase a proposed charge or burden on the people.

(vi) The Senate may request amendment of Bills it may not amend.

(vii) If a Bill which the Senate cannot amend becomes a law, a provision in it that deals with a matter which could have been the subject of amendment by the Senate is of no effect.

(viii) The first paragraph of section 55 should be omitted.

(ix) Subject to the foregoing, the Senate shall have equal power with the House of Representatives with respect to all Bills.

(para 4.475)

We further recommend that the Constitution be altered by the inclusion of sections to limit the power of the Senate to reject, or refuse to pass, Bills it cannot amend. In particular we recommend that the Constitution be altered to provide that:

(i) If at any time during the first three years of a Parliament the Senate rejects, or fails to pass, within 30 days of its transmission, a Bill it cannot amend, the Bill shall be presented for the Royal assent.

(ii) If, in the fourth year of a Parliament, the Senate rejects, or fails to pass, within 30 days of its transmission, a Bill it cannot amend, the Senate and the House of Representatives may be dissolved simultaneously by the Governor-General in Council.

(iii) If a Bill which cannot be amended by the Senate has not been rejected or passed by the Senate at the time the House of Representatives is dissolved, or the Parliament is prorogued, the above provisions shall not apply.

The recommendations are an integral part of the series of recommendations we make in relation to the terms of the Parliament, the terms of senators, termination of the appointment of a Prime Minister and the power to dissolve the Houses of the Parliament. (para 4.476)

Recommendation of money votes

We recommend that section 56 of the Constitution be altered by omission of the word 'Governor-General' and substitution of the words 'Governor-General in Council'. This alteration would make it clear that the Crown's financial initiative is exercisable by the Governor-General only on ministerial advice. (para 4.591)

Disagreement between the Houses over non-money Bills

Section 57 of the Constitution should be renumbered as section 57B and altered as follows:

(i) It should apply only to proposed laws which may be amended by the Senate, that is, non-amendable money Bills should be excluded from its operation.

(ii) Simultaneous dissolution of the House of Representatives and the Senate following the second 'rejection', as defined, of a proposed law by the Senate should be permitted only in the fourth year of the term of the House of Representatives.

(iii) It should be made clear that the Governor-General acts on the advice of Ministers when dissolving the two Houses and, following the third rejection of a proposed law, when convening a joint sitting.

(iv) The drafting of the section should be clarified in the following ways:

- 'rejection' of a proposed law by the Senate should be defined to include the concepts of 'failure to pass' and 'passage with amendments to which the House of Representatives will not agree';

- the only amendments to a proposed law which should be considered and voted on at a joint sitting are those which have been made by the Senate and not agreed to by the House of Representatives;
- it should be made explicit that the period which must elapse before the second passage of a proposed law by the House of Representatives runs from its rejection by the Senate;
- the intervening period should be expressed as 'ninety days' rather than 'three months'.

(v) Affirmation by a special majority of members at the joint sitting should be required before:

- an amendment to a proposed law shall be taken to have been agreed to;
- a proposed law shall be taken to have been duly passed by both Houses of the Parliament.

The special majority should consist of an absolute majority of the total number of members of both Houses and at least half the total number of senators and members chosen for or in a particular State, in at least half the States.

(vi) A proposed law should not lose its identity as the proposed law which is the subject of the section if it contains only such alterations as are necessary by reason of the time which has elapsed since its introduction or which represent amendments made by the Senate.

(vii) Section 58 (assent to Bills) should not apply to a proposed law passed at a joint sitting unless the Speaker of the House of Representatives has certified that it has complied with all the requirements set out in section 57 as amended.[2]

(para 4.613)

Salaries of members of Parliament

We recommend that section 48 be omitted and that the following section be substituted:

> Each senator and each member of the House of Representatives shall receive such remuneration as the Parliament may fix.

(para 4.686)

Parliamentary privileges

We recommend that section 49 of the Constitution be omitted and the following section be substituted:

> 49. The powers, privileges and immunities of the Senate and of the House of Representatives, and of the members and committees of each House –
>
> (a) are such as are declared by the Parliament; and
>
> (b) subject to such a declaration, are the powers, privileges and immunities that those Houses, members and Committees respectively possessed immediately before the commencement of the *Constitution Alteration (Parliamentary Privileges)* 19 . . .

(para 4.694)

2 The Speaker's certificate would not be conclusive of compliance with the provisions.

Qualifications and disqualifications of members of Parliament

We recommend that the Constitution be altered:

(i) to make Australian citizenship a necessary qualification for membership of the Parliament;

(ii) to make the age qualification for members of the Parliament eighteen years or such lower age as is prescribed by the Parliament (we do not recommend any upper age limit); and

(iii) to make unsoundness of mind a disqualification for membership of the Parliament.

Entitlement to vote should not be a necessary qualification to be or become a member of the Parliament.

(para 4.735)

We recommend that the Parliament should also have power to make laws which could, as a qualification for membership of the Parliament, require a person to comply with reasonable conditions as to residence in Australia; and which could disqualify a person whilst he or she is undergoing imprisonment for an offence against a law of the Commonwealth or a State or Territory of the Commonwealth; and to lay down procedures for determining whether a person is of unsound mind. (para 4.736)

We recommend that the Constitution be altered to provide that:

(i) Any person who has been convicted of treason under a law of the Commonwealth, and not subsequently pardoned, should be disqualified from being a senator or a member of the House of Representatives. (At present the Constitution disqualifies any person who is 'attainted of treason'.) Other criminal convictions would not be prescribed in the Constitution as an automatic disqualification.

(ii) A member of the Parliament who becomes:

- a judge or holds any other judicial office;
- a member or employee of the federal, a State or a Territorial public service;
- a member of the Defence Force;
- a member of any other Australian Parliament or legislature; or
- a member, officer or employee of certain public authorities,

should also be disqualified from being a senator or a member of the House of Representatives.

(para 4.737)

On the other hand, a person in such a position who subsequently becomes a member of the Parliament would be deemed to have ceased to be so employed or to hold that office on the day immediately before becoming a member of the Parliament and so would be qualified to be a member. (para 4.738)

We recommend that the Parliament have power, subject to the Constitution, to make laws to disqualify members of the Parliament who hold interests which might constitute a material risk of conflict between their public duty and private interests, and to disqualify

any person convicted of an offence relating to corrupt practices or improper influence. Subject to any such law, the existing constitutional disqualification provisions should continue to apply to any person who has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than 25 persons. Candidates for or members of the Senate or the House of Representatives should no longer be disqualified under section 44(iv.) for holding any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth. The place or a senator or member of the House of Representatives should no longer become vacant under 45(iii.) if he or she directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State. (para 4.739)

We recommend that any person who sits as a member of the Parliament while disqualified should be liable to such pecuniary penalties payable to the Commonwealth as are prescribed by the Parliament. (para 4.740)

We recommend that the House in which the question arises should continue to be able to determine any question respecting the qualification of a member of that House, or respecting a vacancy in that House, and any question of a disputed election to that House; but that any elector in the electorate of the person whose qualification or membership is in question should be able to apply to the High Court for a declaration as to the person's qualification or membership, and that a declaration of the High Court should have full force and effect notwithstanding any determination of the respective House of the Parliament. (para 4.741)

We recommend that no change be made to section 43 which provides that a member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House. (para 4.742)

The above recommendations would substitute new provisions for sections 34, 44, 45, 46 and 47. (para 4.743)

We recommend that sections 44(i.) and 44(iii.) and 45(ii.) be omitted and not replaced. Section 44(i.) disqualifies any person who is 'under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen of a foreign power' from being chosen or of sitting as a member of Parliament. Section 44(iii.) disqualifies a person who is an undischarged bankrupt or insolvent. Under section 45(ii.) a member's place in the Parliament also becomes vacant if he or she takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors. (para 4.744)

CHAPTER 5. THE EXECUTIVE GOVERNMENT OF THE COMMONWEALTH

Head of state

We recommend no change to Australia's status as a constitutional Monarchy or to the position of the Queen of Australia as head of State.[3] (para 5.9)

3 The only changes we recommend affecting the powers of the Queen under the Constitution are in relation to assignment of powers to the Governor-General pursuant to section 2 of the Constitution, reservation of Bills passed by the Houses of the Federal Parliament for the Queen's personal assent, the power to disallow Federal Acts, and the power to authorise the Governor-General to appoint deputies. Our recommendations on these matters are set out under the heading 'The Governor-General' below, and under Chapter 2 above.

Ministers and departments and Federal Executive Council

We recommend that a number of alterations be made to the provisions in Chapter II – The Executive Government – of the Constitution to give constitutional expression to certain accepted principles governing the operation of the Westminster system as it applies in Australia.

We recommend that the Constitution be altered to make it clear that most of the powers vested in the Governor-General are exercisable only on Ministerial advice. In the case of the appointment and dismissal of Ministers, and the appointment of deputies of the Governor-General, the advice on which the Governor-General must act should be that of the Prime Minister. The powers of the Governor-General which should be exercisable only on the advice of Ministers meeting as the Federal Executive Council are:

(a) the power to cause writs for elections to be issued;

(b) the power to appoint terms for holding the sessions of the Parliament and to prorogue the Parliament;

(c) the power to dissolve the Houses of Parliament simultaneously;

(d) the power to recommend money votes, that is appropriation Bills and Bills imposing taxation; and

(e) the power to assent to proposed laws passed by both Houses, or, in certain cases, passed only by the House of Representatives.

(see para 5.144)

We recommend that the Constitution be altered by omitting sections 62, 63, 64, 65 and 66 and by substituting the following sections:

Prime Minister, Ministers and Departments of State

62. (1) The Governor-General shall appoint a person, to be known as the Prime Minister, to be the Head of the Government of the Commonwealth.

(2) The Prime Minister shall not hold office for a longer period than ninety days unless he is or becomes a member of the House of Representatives.

(3) The Prime Minister shall hold office, subject to this Constitution, until he resigns or, following a resolution passed by the House of Representatives that the Government does not have the confidence of the House, the Governor-General terminates his appointment on that ground.

Ministers and Assistant Ministers

63. (1) The Governor-General may, with the advice of the Prime Minister, appoint Ministers and Assistant Ministers.

(2) No Minister or Assistant Minister shall hold office for a longer period than ninety days unless he is or becomes a senator or a member of the House of Representatives.

(3) The Governor-General may, with the advice of the Prime Minister, terminate the appointment of a Minister or an Assistant Minister.

Queen's Ministers of State

64. (1) The Prime Minister, Ministers and Assistant Ministers appointed under section sixty-two or section sixty-three of this Constitution shall be the Queen's Ministers of State for the Commonwealth.

(2) The number of Ministers and Assistant Ministers shall not exceed the number prescribed by the Parliament.

Federal Executive Council

65. (1) There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth.

(2) The Councillors shall be the Queen's Ministers of State for the time being, who shall each make the oath or affirmation prescribed by the Parliament.

(3) The Governor-General may convene meetings of the Federal Executive Council.

(4) The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

Departments of State

65A. (1) The Governor-General in Council may establish departments of State of the Commonwealth.

(2) The Governor-General may, with the advice of the Prime Minister, appoint any of the Queen's Ministers of State to administer each of those departments.

Remuneration of Ministers of State.

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the remuneration of the Ministers of State, an annual sum the amount of which shall be as fixed by the Parliament.

(para 5.30, 5.104)

The effect of the proposed section 65 is:

(i) to limit the membership of the Federal Executive Council to the Prime Minister, Ministers and Assistant Ministers of State for the Commonwealth for the time being;

(ii) to make it clear that the power to convene a meeting of the Federal Executive Council is vested in the Governor-General; and

(iii) to preserve the present constitutional requirement that members of the Federal Executive Council shall be sworn in, but to clarify what is meant by that requirement.

(para 5.105)

Sir Rupert Hamer recommends that the reserve powers of the Governor-General be expressly retained in relation to section 62(3). (para 5.70-5.72)

The Governor-General

Appointment and terms of office

We recommend no alteration of the provisions of the Constitution which relate to the appointment and terms of office of the Governor-General other than of the provision relating to the Governor-General's salary. (para 5.128)

Remuneration of the Governor-General

We recommend that section 3 be omitted and the following section be substituted:

3. There shall be payable to the Queen out of the Consolidated Revenue fund of the Commonwealth, for the remuneration of the Governor-General, an annual sum the amount of which shall be fixed by the Parliament.

The remuneration of the Governor-General shall not be reduced during his continuance in office.

(para 5.129)

Powers assigned to the Governor-General under section 2

We recommend that section 2 of the Constitution be altered so that it would read:

> 2. (1) There shall be a Governor-General, who shall be appointed by the Queen and shall be Her Majesty's representative in the Commonwealth.
>
> (2) The Governor-General shall hold office during Her Majesty's pleasure.

(para 5.172)

The command in chief of the naval and military forces

We recommend that section 68 of the Constitution be altered to read:

> The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative, acting with the advice of the Federal Executive Council.

The object of this proposed alteration is to make it clear that whatever powers the Governor-General may exercise by virtue of having the command in chief of the Defence Force are powers which, constitutionally, cannot be exercised except in accordance with the advice of the Federal Executive Council.

(para 5.174)

Administrator of the Commonwealth and deputies of the Governor-General

We recommend that section 126 of the Constitution be altered to read:

> The Governor-General may, with the advice of the Prime Minister, appoint any person, or any persons jointly or severally, to be his deputy or deputies within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies: but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function.

(para 5.192)

Transferred departments

We recommend that the Constitution be altered by repealing:

(i) section 52(ii.);

(ii) section 69; and

(iii) sections 84 and 85.

(para 5.222)

The Parliament and the Executive

The majority of us (Sir Maurice Byers, Professor Campbell, Sir Rupert Hamer and Mr Whitlam) are not persuaded that it is necessary to alter the Constitution to include express statements that the executive power of the Commonwealth and the powers invested in the Governor-General and Governor-General in Council are subject to legislative control. The Parliament already has power to legislate to regulate the exercise of the prerogatives of the Commonwealth and other powers included in section 61 – even to abrogate them. In the light of the principles of responsible government which the Constitution implies and also in the light of the constitutional principles received from the United Kingdom which accord Parliament supremacy over the Executive organs of government, we are inclined to the view that section 51(xxxix.) of the Constitution would support much legislation of this type. Professor Zines is in agreement with the other members of the Commission that no alteration of the Constitution is necessary to enable the Parliament to legislate to control the general executive powers vested by section 61. Any power included

in section 61 is reflected in a legislative power of the Commonwealth. As to powers invested in the Governor-General and the Governor-General in Council, Professor Zines is of the view, like the majority of the Commission, that the High Court is likely to hold that Parliament has the necessary power because of the principle of Parliamentary supremacy over the Executive. He would, however, recommend that there be added to section 51 a paragraph conferring power on the Parliament to make laws with respect to the regulation and control of any power vested by this Constitution in the Governor-General or the Governor-General in Council. (para 5.208, 5.217-5.221)

CHAPTER 6. AUSTRALIAN JUDICIAL SYSTEM

The structure of the Australian judicial system

We do not recommend any alteration to the Constitution to provide for the integration of the court systems of the Commonwealth and the States. (para 6.1)

We recommend that the Constitution be altered to empower State and Territorial legislatures with the consent of the Federal Parliament, to confer State and Territorial jurisdiction, respectively, on federal courts. (para 6.29)

We do not recommend the alteration of the Constitution to provide for the transfer of State judicial power to the Commonwealth. (para 6.40)

The High Court and federal jurisdiction

We recommend that sections 75 and 76 be repealed and the following provisions substituted:

75. (1) The High Court shall have original jurisdiction in all matters:

(i.) Arising under this Constitution or involving its interpretation:

(ii.) Between any two or more of the Commonwealth, the States and the Territories:

(iii.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:

(iv.) Affecting ambassadors, high commissioners, consuls or other representatives of other countries:

(v.) In which there is sought an order, including a declaratory order, for ensuring that the powers or duties of an officer of the Commonwealth, other than a Justice of a superior court, are exercised or performed in accordance with law.

(2) The jurisdiction conferred by paragraphs (iii.), (iv.) and (v.) of sub-section (1) of this section may be limited or excluded by a law made by the Parliament, but only to the extent that the jurisdiction has been conferred on some other federal court, the jurisdiction of which is not limited as to locality, or on a court of each of the States and Territories.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i.) Arising under or involving the interpretation of a treaty:

(ii.) Arising under or involving the interpretation of a law made by the Parliament or of a law (including the common law) in force in a Territory:

(iii.) Relating to the same subject-matter claimed under the laws of different States or Territories:

(iv.) Of Admiralty and maritime jurisdiction.

(para 6.46)

We recommend that the Constitution should be altered to give power to the Parliament to authorise a court to request the Inter-State Commission to enquire into and report on any fact relating to trade and commerce that is relevant to a matter that arises under the Constitution or involves its interpretation. (para 6.75)

We recommend that the Constitution should be altered:

(a) to extend the appellate jurisdiction of the High Court to appeals from 'decisions', and interlocutory judgments etc of other courts, the Inter-State Commission and a Justice of the High Court;

(b) to provide that the High Court cannot be deprived by Parliament of the power to grant special leave to appeal from decisions of any court in Australia;

(c) to repeal section 74 of the Constitution (which regulated appeals to the Privy Council) and to provide in section 73 that decisions of the High Court shall not be subject to any appeal or prerogative appeal.

(para 6.95)

We recommend that section 73 be altered to read as follows:

> 73. (1) The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all decisions, judgments, decrees, orders and sentences, whether final or interlocutory:
>
> (i.) Of a Justice of the High Court:
>
> (ii.) Of any other federal court or of any court of a State or Territory:
>
> (iii.) Of the Inter-State Commission, but as to questions of law only.
>
> (2) The judgment of the High Court in all such cases shall be final and conclusive and shall not be subject to appeal, by prerogative or otherwise.
>
> (3) A law made by the Parliament shall not prevent or restrict the High Court from granting special leave to appeal from a decision, judgment, decree, order or sentence, whether final or interlocutory, of a Justice of the High Court or of another federal court or of a court of a State or Territory.

(para 6.108)

We recommend that section 74 be repealed. (para 6.114)

We recommend that section 77 be altered to confer on the Parliament power to invest any court of a Territory with federal jurisdiction. (para 6.115)

We recommend that the Constitution be altered to add the following provision:

> 76A. The power of the Parliament to authorise the High Court to remit a matter to some other court extends to matters in respect of which original jurisdiction is vested in the High Court by this Constitution.

(para 6.125)

The separation of judicial power

We recommend that no alteration be made to the Constitution relating to the powers that can only be exercised, and that cannot be exercised, by federal courts. (para 6.127)

We recommend that no alteration be made to the Constitution relating to the terms of office of State or Territorial judges, magistrates or other persons exercising judicial power. (para 6.139)

Appointment and removal of judges

We recommend that no alteration be made to the Constitution relating to the appointment of federal judges. (para 6.162)

We recommend that there be no alteration to the Constitution relating to the term of office of federal judges or the appointment of acting judges or reserve judges to federal courts. (para 6.179)

We recommend that the Constitution be altered to provide:

(i) that there be a Judicial Tribunal established by the Parliament to determine whether facts established by it are capable of amounting to proved misbehaviour or incapacity warranting removal of a judge; and that the Tribunal should consist of persons who are judges of a federal court (other than the High Court) or of the Supreme Court of a State or a Territory;

(ii) that an address under section 72 of the Constitution shall not be made unless:

- the Judicial Tribunal has reported that the facts are capable of amounting to misbehaviour or incapacity warranting removal, and
- the address of each House is made no later than the next session after the report of the Tribunal.

(para 6.180)

We recommend that the Constitution be altered to provide:

(i) that a judge of a superior court of a State shall not be removed except by the Governor-in-Council on an address from each House of the State Parliament, praying for such removal on the ground of proved misbehaviour or incapacity;

(ii) that removal shall not take place unless the Judicial Tribunal, referred to above, has found that the conduct of the judge is capable of amounting to misbehaviour or incapacity warranting removal (where the Federal Parliament has not established a Tribunal, the State Parliament may do so);

(iii) that provisions for the removal of judges of the superior courts of the self-governing Territories be on the same terms as those of the States, the address being by each House of the Territory legislature. In respect of the superior courts of other Territories, the removal provisions should be the same as those for federal judges.

(para 6.204)

We recommend that the Constitution be altered to provide:

(i) for the appointment and removal of federal magistrates;

(ii) that provision for appointment of federal magistrates should be the same as those for Justices of federal courts;

(iii) that removal of federal magistrates should be by the Governor-General in Council on a report from a superior federal court recommending such removal on the ground of proved misbehaviour or incapacity;

(iv) that the Parliament may prescribe additional conditions of removal;

(v) that the above provisions should take effect two years after they receive the Royal assent.

(para 6.214)

We recommend that the Constitution be altered to provide that the members of an inferior court of a State or Territory should be removable only on grounds and in accordance with procedures that have been recommended in respect of federal magistrates, substituting the appropriate vice-regal authority for 'the Governor-General in Council', and the Supreme Court of the State or Territory for 'a superior federal court'. (para 6.222)

Advisory jurisdiction

We recommend that the Constitution be altered to invest the High Court with jurisdiction to make a declaration on any question of law referred to it:

(i) by the Governor-General in Council relating to the manner and form of enacting any proposed law of the Commonwealth, including any proposed alteration to the Constitution;

(ii) by the Governor in Council of a State or the Administrator in Council of a Territory relating to the manner and form of enacting any proposed law of that State or Territory. (para 6.237)

Right to proceed

We recommend that section 78 of the Constitution be amended by deleting the words 'within the limits of the judicial power' and substituting the words 'referred to in sections seventy-five and seventy-six of this Constitution'. (para 6.272)

CHAPTER 7. NEW STATES

We recommend that the Constitution be altered so as to provide more precise and simplified means for the creation of new States. In particular we recommend that section 121 be altered to make it clear that the Federal Parliament has power:

(i) to create or establish a constitution for a new State:

- established from a Territory;
- formed by separation of territory from a State or by the union of two or more States, or parts of States; or
- formed by the union of a part or parts of a State and a Territory, and

(ii) to make its approval of the Constitution of an independent body politic a condition of the admission of that body politic as a new State.

We also recommend that the Constitution be altered to establish the entitlement of a new State to membership of the House of Representatives and the Senate (as set out in Chapter 4 under the heading 'Composition of the Federal Parliament').

(para 7.1, 7.29)

CHAPTER 8. CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT

We recommend that a new section 119A be added in the Constitution in the following terms:

> 119A. Each State shall provide for the establishment and continuance of local government bodies elected in accordance with its laws and empowered to administer, and to make by-laws for, their respective areas in accordance with the laws of the State.

The addition of the proposed new section 119A would give Local Government recognition for the first time in the Australian Constitution.

(para 8.1)

CHAPTER 9. RIGHTS AND FREEDOMS

A new Chapter for the Constitution

We recommend that the Constitution be altered by inserting Chapter VIA – Rights and Freedoms, as set out below:
(para 9.138-9.140)

Chapter VIA. Rights and Freedoms

Extent of guarantee

124A. This Chapter guarantees the rights and freedoms mentioned in it against acts done:

(a) by the legislative, executive or judicial arms of the Commonwealth, States or Territories; or

(b) in the performance of any public function, power or duty conferred or imposed on any person or body by law.

(para 9.167-9.169)

Remedies

124B. A person whose rights or freedoms, as guaranteed by this Chapter, or by sections eighty, one hundred and sixteen or one hundred and seventeen, have been infringed or denied may apply to a court of competent jurisdiction for such remedy as the court considers appropriate and just in the circumstances.

(para 9.235-9.236)

Limits

124C. The rights and freedoms guaranteed by this Chapter may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

(para 9.200-9.209)

Other rights and freedoms not abrogated

124D. The rights and freedoms guaranteed by this Chapter do not abrogate or restrict any other right or freedom that a person may have.

(para 9.156)

Freedom of conscience, etc

124E. Everyone has the right to:

(a) freedom of conscience and religion;

(b) freedom of thought, belief and opinion;

(c) freedom of expression;

(d) freedom of peaceful assembly; and

(e) freedom of association.

(para 9.262-9.263, 9.302, 9.342, 9.364)

Freedom of movement

124F. (1) Every Australian citizen has the right to enter, remain in and leave Australia.

(2) Everyone lawfully in Australia has freedom of movement and residence in Australia.

(3) Sub-sections (1) and (2) of this section are not infringed by laws made by the Parliament with respect to entry into and residence in a Territory that is not on the mainland of Australia.

(para 9.412)

Equality rights

124G. (1) Everyone has the right to freedom from discrimination on the ground of race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.

(2) Sub-section (1) is not infringed by measures taken to overcome disadvantages arising from race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.

(para 9.438)

No cruel or inhuman punishment etc

124H. (1) Everyone has the right not to be subjected to cruel, degrading or inhuman treatment or punishment.

(2) Everyone has the right not to be subjected to medical or scientific experimentation without that person's consent.

(para 9.490)

Search and seizure

124I. Everyone has the right to be secure against unreasonable search or seizure.

(para 9.537)

Liberty of the person

124J. (1) Everyone has the right not to be arbitrarily arrested or detained.

(2) Everyone who is arrested or detained has the right:

(a) to be informed, at the time of the arrest or detention, of the reason for it;

(b) to consult and instruct a lawyer without delay and to be informed of that right;

(c) to have the lawfulness of the arrest or detention determined without delay;

(d) to be released if the detention or continued detention is not lawful.

(para 9.554)

Rights of persons arrested

124K. Everyone who is arrested for an offence has the right:

(a) to be released if not promptly charged;

(b) not to make any statement, and to be informed of that right;

(c) to be brought without delay before a court or competent tribunal;

(d) to be released on reasonable terms and conditions unless there is reasonable cause for the continued detention.

(para 9.554)

Rights of persons charged

124L. (1) Everyone who is charged with an offence has the right:

(a) to be informed without delay, and in detail, of the nature of the charge;

(b) to have adequate time and facilities to prepare a defence;

(c) to consult and instruct a lawyer;

(d) to receive legal assistance if the interests of justice so require and, if the person does not have sufficient means to provide for that assistance, to receive it without cost;

(e) to be tried without delay;

(f) to a fair and public hearing by a court;

(g) to be present at the trial and to present a defence;

(h) to have the assistance, without cost, of an interpreter if the person cannot understand or speak the language used in the court;

(i) to be presumed innocent until proved guilty according to law;

(j) to examine witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution;

(k) not to be compelled to be a witness against himself or to confess guilt;

(l) if finally acquitted of the offence or pardoned for it, not to be tried for it again;

(m) if finally found guilty of the offence and punished for it, not to be tried or punished for it again.

(2) Everyone convicted of an offence has the right to appeal according to law against the conviction and any sentence.

(para 9.554)

No retrospective offences

124M. No one shall be liable to be convicted of an offence on account of any act or omission which did not constitute an offence when it occurred.

(para 9.554)

We have decided by a majority (Sir Maurice Byers, Sir Rupert Hamer and Mr Whitlam) not to recommend that a Parliament may expressly declare that an Act, or part of an Act, shall operate notwithstanding a constitutionally entrenched right. That is, we *recommend* against a power to 'opt-out' of or override constitutionally guaranteed rights and freedoms. (para 9.210)

The effect of the proposed new Chapter would be:

(a) to guarantee specified rights and freedoms against acts done by the arms of government of the Commonwealth, States and Territories, and by persons and bodies performing public functions, powers or duties, but subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society;

(b) to confer on persons whose guaranteed rights and freedoms have been infringed a right to apply to a court of competent jurisdiction for such remedy as the court considers just and appropriate in the circumstances; and

(c) to ensure that guaranteed rights and freedoms do not abrogate or restrict any other rights and freedoms that persons may have.

We further recommend that Chapter VIA come into operation at the expiration of three years after it receives the Royal assent.

Extension of existing rights and freedoms[4]

Trial by jury

We recommend that section 80 of the Constitution be altered to provide for a right of trial

4 See also our recommendations in the summary of Chapter 2 above in relation to section 117 of the Constitution.

by jury in all cases where the accused is liable to capital punishment, corporal punishment or imprisonment for two years or more, except in cases of trial for contempt of court or the trial of defence force personnel under defence law.

This guarantee should apply to trial by jury of offences against laws of the Commonwealth, State and Territories.

Trial by jury for any offence against a law of the Commonwealth should be held in the State or Territory where the offence was committed. However, the court should have power to transfer the trial to another competent jurisdiction on the application of either the accused or the prosecution. Where such an offence was not committed in a State or Territory, or was committed either in two or more of the States and Territories or in a place or places unknown, the trial should be held where Parliament prescribes.

The legislatures of the Commonwealth, States and self-governing Territories should have the express power to make laws relating to waiver by the accused of trial by jury, the size and composition of juries, and majority verdicts. (para 9.703-9.707)

Property rights

We recommend that the Constitution be altered to ensure that:

(i) a law of a State may not provide for the acquisition of property from any person except on just terms; and

(ii) a law made for the government of any Territory (under section 122) or a law of a Territory may not provide for the acquisition of property from any person except on just terms.

(para 9.747)

Freedom of religion

We recommend the alteration of section 116 of the Constitution so that the guarantees of freedom of religion therein shall apply to the Commonwealth, States and Territories.

We further recommend the omission of the words 'make any law' from section 116 of the Constitution in order to give the provision operation beyond the making of a statute.

Section 116 as altered would provide:

> The Commonwealth, a State or a Territory shall not establish any religion, impose any religious observance or prohibit the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth, a State or a Territory.

(para 9.794-9.796)

If these alterations to section 116 are approved at referendum, then we further recommend that the words 'and religion' be omitted from the proposed section 124E of the Constitution. (para 9.264)

Other rights and freedoms

We do not recommend that the Constitution be altered to provide that:

(i) The Commonwealth or a State shall not ... deprive any person of liberty or property except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice.
(para 9.835)

(ii) The Commonwealth or a State shall not deny to any person . . . access to the courts.
(para 9.873)

(iii) Subject to section 51(vi.), the Commonwealth or a State shall not . . . impose any form of civil conscription . . . .
(para 9.887)

(iv) Section 51(xxiiiA) have the following words deleted: '(but not so as to authorise any form of civil conscription)'. (para 9.888)

(v) Subject to section 51(vi.), the Commonwealth or a State shall not . . . unreasonably withhold information.
(para 9.902)

(vi) Subject to section 51(vi.), the Commonwealth or a State shall not . . . restrict any person . . . from participating in the culture, religion and language of a cultural, religious or linguistic group to which they belong.
(para 9.921)

(vii) the Federal Parliament be given an express power to make laws with respect to human rights or for the enforcement of constitutionally guaranteed rights and freedoms.
(para 9.927)

CHAPTER 10. THE DISTRIBUTION OF POWERS

The constitutional structure

We recommend that the manner in which the legislative powers of the Commonwealth and the States are divided in the Constitution should not be changed. (para 10.2)

Legislative purpose

We recommend that no change be made to the present principles of interpretation relating to the purpose of the Federal Parliament in enacting a law. (para 10.11)

The relationship of federal powers to each other

We recommend that no change should be made to the present principles that are applicable in respect of the relationship of federal powers to each other. (para 10.23)

Inconsistency of federal and State laws

We recommend that:

(i) there should be no alteration of section 109 of the Constitution;

(ii) the Federal Parliament should enact provisions to the effect that the law of the Commonwealth shall not be construed as indicating an intention to regulate exclusively the subject matter dealt with by the law unless that intention appears by express statement or by necessary implication;

(iii) the practice currently followed by the Federal Parliamentary Counsel of inserting savings provisions in Federal Acts for the purpose of preserving State laws, which might otherwise be affected, should be continued and extended.

(para 10.29)

Existing and proposed additional legislative powers

We recommend that section 51 of the Constitution be altered as follows:

- by inserting the words 'and means of communication' at the end of paragraph (v.) so that the Federal Parliament has power to make laws with respect to:

  (v.) Postal, telegraphic, telephonic, and other like services and means of communication:

  (para 10.50)

- by inserting the following paragraph so that the Federal Parliament has power to make laws with respect to:

  (vA.) Defamation otherwise than in the course of the proceedings of the Parliament of a State or of a court of a State:

  (para 10.81)

- by inserting the following paragraph so that the Federal Parliament has power to make laws with respect to:

  (viA.) Nuclear material, nuclear energy and ionising radiation:

  (para 10.110)

- by inserting the following paragraph so that the Federal Parliament has power to make laws with respect to:

  (viiA.) Admiralty and maritime matters:

  (para 10.130)

- by omitting from paragraph (xviii.) the words 'and trade marks' and substituting 'trade marks and other like protection for the products of intellectual activity in industry, science, literature and the arts' so that the Federal Parliament has power to make laws with respect to:

  (xviii.) Copyrights, patents of inventions and designs, trade marks and other like protection for the products of intellectual activity in industry, science, literature and the arts:

  (para 10.140)

- by omitting paragraph (xxii.) and substituting the following paragraphs so that the Federal Parliament has power to make laws with respect to:

  (xxii.) Divorce and matrimonial causes:

  (xxiiA.) Property and financial rights between persons who are or were living together as if they were husband and wife:

  (xxiiB.) Adoption, legitimacy and the determination of parentage:

  (xxiiC.) Custody and guardianship of children, and parental rights, but not so as to affect State protection of children:

  (xxiiD.) Maintenance of children:

  (para 10.154)

- by inserting the words 'and any other forms of social welfare' at the end of paragraph (xxiiiA.) so that the Federal Parliament has power to make laws with respect to:

  (xxiiiA.) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances and any other forms of social welfare:

  (para 10.251)

- by inserting the following paragraph so that the Federal Parliament has power to make laws with respect to:

  (xxiiiB.) Accident compensation and rehabilitation:

  (para 10.263)

- so that the Federal Parliament has power to make laws with respect to:

  (xxiv.) The service and execution of the process of the States and Territories, including the process, judgments and orders of the courts and tribunals of the States and Territories:

  (para 10.302)

- by inserting the following paragraph so that the Federal Parliament has power to make laws with respect to:

  (xxvA.) Principles of choice of law:

  (para 10.326)

- by inserting 'and the Territories' at the end of paragraph (xxv.) so that the Federal Parliament has power to make laws with respect to:

  (xxv.) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States and the Territories:

  (para 10.326)

We recommend that section 118 of the Constitution be altered by inserting 'and the Territories' at the end of the section so that it provides:

> Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State and the Territories.'

(para 10.326)

We recommend that section 51 of the Constitution be altered as follows:

- by omitting paragraph (xxvi.) and
- by inserting the following paragraph so that the Federal Parliament has power to make laws with respect to:

  (xxvi.) Aborigines and Torres Strait Islanders:

(para 10.352)

We recommend that, at this stage, the Constitution should not be altered to enable constitutional backing to be given to an agreement or agreements, between the Commonwealth and representatives of Aborigines and Torres Strait Islanders. (para 10.353)

We recommend that:

- No alteration be made to section 51(xxix.) of the Constitution (the 'external affairs' power).
- There should be established by the Premiers' Conference an Australian Treaties Council with the composition and functions recommended by the Australian Constitutional Convention.
- The Commonwealth should consider improvement in the existing procedures for Federal and State consultation on treaties in the light of comments made by some State Governments and the recommendations of the Australian Constitutional Convention.
- A federal Act should provide that all matters referred to the Australian Treaties Council be tabled in both Houses of the Parliament at the time of referral to the Council.

(para 10.461)

We recommend that the Commonwealth cease to have exclusive legislative power with respect to 'all places acquired by the Commonwealth for public purposes' and that such power be concurrent with the States. We therefore recommend that:

- section 52 of the Constitution be altered by omitting 'and all places acquired by the Commonwealth for public purposes' from paragraph (i.); and
- section 51 of the Constitution be altered by inserting the following paragraph so that the Federal Parliament has power to make laws with respect to:

  (xxxvA.) Places acquired by the Commonwealth for public purposes:

(para 10.545)

We recommend that the Constitution be altered to allow the inter-change of legislative powers between the Federal and State Parliaments. The alteration has the following features:

- The Federal Parliament may designate any of its exclusive powers as matters about which a State Parliament may make laws, and a State Parliament may refer a matter to the Federal Parliament for the purposes of section 51(xxxvii.) of the Constitution.
- Any designation or reference under this provision:
  - shall be by Act of the Parliament making the reference or designation;
  - may be subject to limitations or conditions;
  - if limited in duration, may be extended by or under an Act of the Parliament making the reference or designation;
  - may be modified or revoked, but only by express provision in an Act of the Parliament making the reference or designation.

(para 10.564)

Other possible powers

We do not recommend that the Constitution be altered by adding an express provision to empower the Federal Parliament to make laws with respect to the environment.
(para 10.588)

We do not recommend that the Constitution be altered by adding an express provision to empower the Federal Parliament to make laws with respect to:

- the registration and qualifications of trades and professions; or
- the recognition throughout the Commonwealth of registration or qualifications obtained in a State, a Territory or another country.

(para 10.619)

We do not recommend that the Constitution be altered to provide the Federal Parliament to make laws with respect to the following matters:

- regional development and regional authorities;
- national works in cooperation with the States;
- national crime;
- health in cooperation with the States;
- fisheries; and
- scientific and industrial research.

(para 10.631)

CHAPTER 11. THE NATIONAL ECONOMY

We recommend that Section 51 should be altered by omitting from paragraph (i.) the words 'with other countries and among the States'.

If the above recommendation is not accepted, we recommend that section 51 be altered by inserting the following paragraphs so that the Federal Parliament has power to make laws with respect to:

(iA.) Civil aviation, navigation and shipping:

(xvA.) The labelling and packaging of, and standards for, goods for sale or hire.

(para 11.11)

We recommend that section 51 of the Constitution be altered by inserting the following paragraphs so that the Federal Parliament has power to make laws with respect to:

(xxA.) The incorporation, organisation and administration of corporations:

(xxB.) Financial, investment and other like markets and services:

(para 11.87)

We recommend that the Constitution should be altered to omit the present words in section 51(xxxv.) and substitute the words 'Industrial relations'. (para 11.119)

We recommend that:

(i) there should be no alteration to the first paragraph of section 92 of the Constitution; and

(ii) the second paragraph of section 92 should be omitted.

(para 11.158)

We recommend:

(i) that section 99 be altered by adding at the end 'unless the Inter-State Commission has adjudged that the preference is in the national interest';

(ii) that section 51(ii.) be altered by adding at the end 'unless the Inter-State Commission has adjudged that the discrimination is in the national interest'; and

(iii) that section 51(iii.) be altered by adding at the end 'unless the Inter-State Commission has adjudged that the particular bounty is in the national interest'.

(para 11.208)

We recommend that no alteration be made to section 114 of the Constitution. (para 11.236)

We recommend that the States be empowered to levy excise duties, by omitting the words 'and of excise' from section 90 of the Constitution. (para 11.242)

Alternatively, we recommend that the States be empowered to levy an excise duty with the consent of both Houses of the Parliament of the Commonwealth. This may be achieved by an alteration of section 91 of the Constitution. (para 11.243)

Independent of these alternatives, we recommend that the second paragraph of section 90 be omitted as it is now outmoded. (para 11.244)

We recommend that there be no alteration to the Constitution to provide machinery for discussion and decision-making in relation to federal-State financial relations. (para 11.286)

We recommend:

(i) that section 81 be amended to allow the appropriation of the Consolidated Revenue Fund for any purpose that the Parliament thinks fit; and

(ii) that the second paragraph of section 83 be omitted.

(para 11.296)

We recommend that:

(a) the words 'During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides,' be omitted from section 96; and

(b) no other alteration be made to that section.

(para 11.317)

We recommend that:

(i) if our proposed alteration to section 51(i.) is approved, the Constitution be altered by adding at the end of section 101 'and of all laws made under section one hundred and twenty-two of this Constitution relating to trade and commerce'; or

(ii) if our proposed alteration to section 51(i.) is not approved, the Constitution be altered by adding at the end of section 101 'and of all laws made under section one hundred and twenty-two of this Constitution relating to trade and commerce among the Territories or among the Territories and the States'.

This alteration would confer on the Inter-State Commission functions in respect of the Territories.

(para 11.337)

We recommend that sections 86, 87, 89, 93, 95 of the Constitution be repealed. They all deal with transitional arrangements that followed the passing of customs duties with the exclusive control of the Commonwealth and are all now expended. (para 11.373)

We also recommend the omission of section 97, which provides

> Until the Parliament otherwise provides, the laws in force in any Colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the Colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned.

(para 11.374)

CHAPTER 12. INTERSTATE RIVER MANAGEMENT

We recommend that no amendment be made to the Constitution at present in respect of interstate river management. (para 12.1)

CHAPTER 13. ALTERING THE CONSTITUTION

We recommend as follows:

(i) The Constitution should be altered to allow constitutional referendums to be initiated not only by the Federal Parliament, but also by State Parliaments. A proposal to alter the Constitution would be required to come

from the Parliaments of not fewer than half the States. There should be an additional requirement that the State Parliaments concerned represent a majority of Australian overall. It would be a requirement that the proposed alteration be passed in identical terms by the State Parliaments concerned within a 12 month period. The proposed alteration would be required to be put to referendum not less than two months and not more than six months after this requirement was satisfied. (para 13.1, 13.19)

(ii) The Constitution should not be altered to allow for commission or convention initiated constitutional referendums. (para 13.1, 13.43)

(iii) The Constitution should not be altered to allow for citizens' or electors' initiated constitutional referendums, nor to provide for initiation by electors of referendums with respect to ordinary legislation. (para 13.1, 13.58)

(iv) The deadlock provision contained in the second paragraph of section 128 should be altered in a similar way as we have recommended section 57 should be altered. (para 13.1, 13.160)

(v) Section 128 should be altered to require that 'the Governor-General in Council shall submit' a proposed law for altering the Constitution to the electors where the proposed law has been initiated in accordance with the Constitution by:

- the Parliaments of not fewer than half the States or
- either or both Houses of Federal Parliament in accordance with section 128.

(para 13.1, 13.170)

(vi) Referendums of the people should continue to be the only means of altering the Constitution, subject to recommendation (xi) below. The Constitution should not be altered to allow for alteration of the Constitution by ratification:

- of State Parliaments or
- by special majorities of the Federal Parliament.

(para 13.1, 13.100)

(vii) Section 128 should be altered to provide that a proposed law to alter the Constitution will be passed if it receives an overall majority of votes in favour, and if there is also a majority in favour in not fewer than half the States. (At present, a majority in a majority of States is required.)

(para 13.1, 13.137)

(viii) Neither the Federal Parliament nor the State Parliaments should be able to submit a proposed alteration containing options or alternatives to the electors at a referendum. But the two Houses of Federal Parliament could initiate competing proposed alterations. Furthermore, either House of both Houses of the Federal Parliament, on the one hand, and the State Parliaments, on the other, could initiate proposed alterations which were at variance with one another. If two or more proposed alterations were approved by referendum on the same day, the proposed alteration which attracted the greater number of votes overall at the referendum would prevail, and the other proposed alteration or alterations would, to the extent that they were inconsistent, be invalid.[5] (para 13.1, 13.199)

(ix) The second sentence of the third paragraph of section 128 should be omitted as it is expended. (para 13.1)

5 If the proposed alterations went to referendum on different days, and two or more were approved, the last one approved would prevail.

(x) Paragraph five of section 128 should be altered to read:

(7) Notwithstanding anything contained in this section, a proposed law for the alteration of this Constitution that –

(a) diminishes the proportionate representation of a State in either House of the Parliament;

(b) diminishes the minimum number of representatives of a State in the House of Representatives; or

(c) increases, diminishes or otherwise alters the limits of a State,

shall not become law unless a majority of the electors voting in that State have approved the proposed law.

(8) Notwithstanding anything contained in this section, a proposed law for the alteration of this Constitution that provides for the alteration or omission of sub-section (7) or affects in any manner any of the provisions of that sub-section shall not become law unless in each State a majority of the electors voting have approved the proposed law.

(para 13.1, 13.196)

(xi) The Constitution should be altered to allow the Federal Parliament, with the consent of the Parliaments of all of the States, to make laws for the omission of a provision, or part of a provision, of the Constitution which has ceased to have any operation. This would have to be done by a formal Act of the Parliament. Such legislation would be reviewable by the High Court. The legislation would be invalid if, in the view of the High Court, the provision that was sought to be omitted was not an expended or outmoded one. (para 13.1, 13.146)

(xii) The Constitution should be altered by inserting at the end of Chapter VIII the following section:

129. (1) In this section, 'constitutional alteration' means an alteration of this Constitution, however made; 'legal proceeding' includes a proceeding in or before a body or person not being a court.

(2) A constitutional alteration does not affect the continued operation of a law of the Commonwealth or of a State or Territory made before the alteration took effect except to the extent (if any) that, under this Constitution as so altered, the law could not have been made.

(3) A constitutional alteration does not –

(a) revive anything (including a law) that was not in force or existence immediately before the alteration took effect;

(b) affect the previous operation of this Constitution or anything duly done or suffered before the alteration took effect;

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred before the alteration took effect;

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence before the alteration took effect; or

(e) affect an investigation, legal proceeding or remedy in respect of such a right, privilege, obligation, liability, penalty, forfeiture or punishment.

(4) Such an investigation, legal proceeding or penalty may be instituted, continued or enforced and the penalty or forfeiture may be imposed as if the constitutional alteration had not been made and anything in relation to investigation, legal proceeding or penalty may be done in all respects as if the constitutional alteration had not been made.

(5) A constitutional alteration does not affect the holding of the office of Governor-General or any other office established by or referred to in the Constitution and a person holding the office immediately before the constitutional alteration took effect continues to hold the office as if the alteration had not been made.

(6) The preceding provisions of this section have effect except to the extent that a contrary intention is expressed by the constitutional alteration.

(para 13.1, 13.207)

CHAPTER 1

INTRODUCTION

ESTABLISHMENT AND PURPOSE

Establishment of the Constitutional Commission and Advisory Committees

1.1 On 19 December 1985, the Acting Prime Minister and Attorney-General, Hon Lionel Bowen, MP, announced that the Federal Government had decided to establish a Constitutional Commission to carry out a fundamental review of the Australian Constitution. The members of the Commission would be Sir Maurice Byers, CBE, QC, (Chairman), Professor Enid Campbell, OBE, Hon Sir Rupert Hamer, KCMG, Hon Mr Justice JL Toohey, AO, Hon EG Whitlam, AC, QC, and Professor Leslie Zines.

1.2 The Attorney-General also announced that the Commission would be assisted by five Advisory Committees, each of which would examine and report to the Commission on a particular area of the Constitution, namely:

(a) Australian Judicial System
(Chairman: Hon Mr Justice DF Jackson);

(b) Distribution of Powers
(Chairman: Hon Sir John Moore, AC);

(c) Executive Government
(Chairman: Rt Hon Sir Zelman Cowen, AK, GCMG, GCVO, KSt J, QC);

(d) Individual and Democratic Rights under the Constitution
(Chairman: Mr Terence Purcell); and

(e) Trade and National Economic Management
(Chairman: Hon Mr Justice MG Everett).

1.3 The Advisory Committees comprised 37 people from a range of backgrounds who have achieved distinction in various fields of Australian life. Many members brought experience and knowledge which was directly relevant to the matters being considered by their committee. A list of the members of the Advisory Committees is set out at *Appendix A.*

1.4 Members of the Commission and the Advisory Committees were appointed by letters of appointment from the Attorney-General.

1.5 The Hon Justice Toohey, then a judge of the Federal Court of Australia, served as a member of the Commission until 31 December 1986 when he resigned before taking up his appointment as a Justice of the High Court of Australia.

Terms of Reference

1.6 The Terms of Reference are set out in *Appendix B.* They provide for the Constitutional Commission:

> To inquire into and report, on or before 30 June 1988, on the revision of the Australian Constitution to:
>
> (a) adequately reflect Australia's status as an independent nation and a Federal Parliamentary democracy;
>
> (b) provide the most suitable framework for the economic, social and political development of Australia as a federation;

(c) recognise an appropriate division of responsibilities between the Commonwealth, the States, self-governing Territories and local government; and

(d) ensure that democratic rights are guaranteed.

1.7 To put this Report, and particularly the recommendations, in context, the key terms in this part of the Terms of Reference will be analysed in the next Chapter. That Chapter will include discussion of the term 'federation' as it applies in Australia and elsewhere. 'Australia's status as an independent nation' and the type of 'Federal Parliamentary democracy' which operates in Australia will also be considered.

1.8 The second part of the Terms of Reference describes the procedural aspects of this review and has guided the way in which the Commission and the Advisory Committees have conducted their activities. Those matters are discussed later in this Chapter.[1]

1.9 Each of the Advisory Committees had a separate set of Terms of Reference relevant to its particular area of review. Those sets of Terms of Reference are found in *Appendix C.* They were drafted and proposed by the respective Advisory Committees and were approved by the Commission.

Acknowledgments

Advisory Committees

1.10 The Terms of Reference required the Commission to:

(v) consult with, and evaluate the reports and recommendations of, advisory committees which are established to examine specific subject areas of constitutional reform.

1.11 The Advisory Committees provided invaluable assistance in this review of the Constitution. They included people who are experts on the matters considered by each Committee. Their widespread consultation did much to attract useful submissions from a range of people and organisations. As will be readily apparent from this Report, the Reports by the Advisory Committees have been a source of much information and considered analysis of the issues. We have adopted many of their recommendations. Most of the Committees' work was carried out between the time of their appointment and the submission of their Reports to the Commission in the middle of 1987.

1.12 Although they ceased to function formally as Committees after making their final Reports, from time to time we have drawn on the expertise of members as we considered specific issues with which they had dealt. At all times we found them helpful, and the load on the Commission was reduced accordingly. We express our gratitude to the chairmen and members of the Advisory Committees and to the secretaries to the Committees.

Secretariat

1.13 The Commission was greatly assisted by its skilled and devoted staff who worked long hours without complaint and who were unfailingly courteous to enquiries and requests made of and to them by the public. We wish to acknowledge our debt to them and our gratitude for what they have done. They are listed at *Appendix D.*

1.14 We wish in particular to thank Mr Ian Cunliffe, our Secretary, for his unremitting and skilful work in managing the Commission's affairs, in explaining its task to the public and in the preparation of our Reports. Public awareness of the Constitution owes much to his endeavours and to those of Ms Barbara Guthrie and Mr Graeme Neate. They have

1 para 1.49-1.83.

been constant companions in our meetings and substantial collaborators in the production of the Report. It is no mere formality to say that without their efforts our task could not have been achieved.

Meetings of the Constitutional Commission

1.15 The first meeting of the Commission was marked by a public ceremony on Friday 31 January 1986 in the main courtroom of the Federal Court in Sydney. The ceremony was attended by the Prime Minister, the Federal Attorney-General, members of the Commission, the chairman of each Advisory Committee and members of the Advisory Committees.

1.16 Members of the Commission met formally on 34 occasions for a total of 85 days. Most meetings were held in the Commission's offices in Sydney, with some taking place in Canberra. A list of those meetings is at *Appendix E.*[2]

THE CONSTITUTIONAL COMMISSION AND CONSTITUTIONAL REVIEW

1.17 At the ceremony to mark the first meeting of the Constitutional Commission the Prime Minister, Hon RJL Hawke, AC, MP, said:

> This commission is unique in Australia's history of Constitutional reform and brings with its establishment a new hope for the renewal of the Australian Constitutional framework.

1.18 There are some features which distinguish this Commission from previous reviews of the Constitution. The members of the Commission and Advisory Committees have a wide variety of backgrounds and expertise, and an active attempt has been made to involve the people of Australia by seeking submissions from them.

1.19 However, the Commission and its work should not be seen in isolation from the referendums and general reviews which preceded it. Thirty-eight proposals for change to specific provisions of the Constitution were put to the electors, in accordance with section 128 of the Constitution, between 1906 and 1984. Eight proposals were approved by a majority of all the electors voting and also by a majority of the electors voting in a majority of the States. Consequently alterations were made to the Constitution in 1906, 1910, 1928, 1946, 1967 and 1977. Five other proposals[3] were approved by a majority of the electors voting but failed to attract a majority in four or more of the States.

1.20 Seven Bills containing proposals for alterations to the Constitution have been passed by both Houses of the Parliament in relation to which writs for referendums have not been issued,[4] and in 1914 six Bills were passed by the Senate but were not submitted to the electors at referendum.[5]

1.21 Table 1.1 shows the history of referendums on the Constitution to date.

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2 At the date of the First Report the Commission had met formally on 29 occasions for a total of 70 days. *First Report of the Constitutional Commission*, Appendix E, 689.
3 One each in 1936, 1977 and 1984, two in 1946.
4 Two in 1965, five in 1983.
5 The amendment process is dealt with in Chapter 13; see also Appendix N.

TABLE 1.1: HISTORY OF CONSTITUTIONAL REFERENDUMS

YEAR	PROPOSAL	GOVERNMENT SUBMITTING	STATES WHERE ELECTORS APPROVED PROPOSAL	PERCENTAGE OF ALL ELECTORS APPROVING PROPOSAL
1906	*Senate elections*	* Protectionist	6	82.65
1910	Finance	* Fusion	3 (Qld, WA, Tas)	49.04
	State debts	* Fusion	5 (all exc. NSW)	54.95
1911	Legislative powers	Labor	1 (WA)	39.42
	Monopolies	Labor	1 (WA)	39.89
1913	Trade and commerce	* Labor	3 (Qld, SA, WA)	49.38
	Corporations	* Labor	3 (Qld, SA, WA)	49.33
	Industrial matters	* Labor	3 (Qld, SA, WA)	49.33
	Railway disputes	* Labor	3 (Qld, SA, WA)	49.13
	Trusts	* Labor	3 (Qld, SA, WA)	49.78
	Monopolies	* Labor	3 (Qld, SA, WA)	49.33
1919	Legislative powers	* Nationalist	3 (Vic, Qld, WA)	49.65
	Monopolies	* Nationalist	3 (Vic, Qld, WA)	48.64
1926	Legislative powers	Nat. – C.P.	2 (NSW, Qld)	43.50
	Essential services	Nat. – C.P.	2 (NSW, Qld)	42.79
1928	*State debts*	* Nat. – C.P.	6	74.30
1936	Aviation	U.A.P.	2 (Vic, Qld)	53.56
	Marketing	* U.A.P.	0	36.26
1944	Post war powers	Labor	2 (SA, WA)	45.99
1946	*Social services*	* Labor	6	54.39
	Marketing	* Labor	3 (NSW, Vic, WA)	50.57
	Industrial Employment	* Labor	3 (NSW, Vic, WA)	50.30
1948	Rents, prices	Labor	0	40.66
1951	Communists	Liberal/C.P.	3 (Qld, WA, Tas)	49.44
1967	Nexus	Liberal/C.P.	1 (NSW)	40.25
	Aborigines	Liberal/C.P.	6	90.77
1973	Prices	Labor	0	43.81
	Incomes	Labor	0	34.42
1974	Simultaneous elections	* Labor	1 (NSW)	48.32
	Amendment	* Labor	1 (NSW)	48.02
	Democratic elections	* Labor	1 (NSW)	47.23
	Local Government	* Labor	1 (NSW)	46.87
1977	Simultaneous elections	Liberal/NCP	3 (NSW, Vic, SA)	62.20
	Casual vacancies	Liberal/NCP	6	73.30
	Territorial votes	Liberal/NCP	6	77.70
	Retirement of judges	Liberal/NCP	6	80.10
1984	Simultaneous elections	* Labor	2 (NSW, Vic)	50.60
	Inter-change of powers	* Labor	0	47.10

* Referendum held at the same time as a federal election. *Italicised subjects* achieved sufficient majorities for alteration to the Constitution.

1.22 There have been a number of general reviews of the Constitution. A Royal Commission, appointed by Letters Patent in 1927, reported to the Governor-General in 1929.[6] There was a conference of Federal and State Ministers in 1942. A Joint Parliamentary Committee on Constitutional Review was constituted by resolutions of the two Houses of the Federal Parliament in May 1956. It took evidence in all States and presented its final report in November 1959.[7] In 1973, following the initiative of the Victorian Parliament, the Australian Constitutional Convention was convened. The Convention comprised delegates from all Houses and all political parties in the State and Federal Parliaments and representatives of Local Government. It met in Sydney (1973), Melbourne (1975), Hobart (1976), Perth (1978), Adelaide (1983) and Brisbane (1985). Committees and Sub-Committees of the Convention worked between those sessions and produced reports to the Convention.

1.23 So the work of the Constitutional Commission is a further part in a process of constitutional alteration and review dating back to the years immediately after Federation.

GENERAL APPROACH TO THE REVIEW AND RECOMMENDATIONS

1.24 From the outset it has been our clear intention not to propose an entirely new Constitution. We consider that the Terms of Reference, while providing for a thorough review of the existing document, were meant to ensure that any proposals for change would preserve the framework and principles contained in the Constitution. In particular, we have been conscious of the need to retain in form and spirit the federal framework of government in Australia, parliamentary government and democratic institutions.

1.25 It will be apparent from the Report that, in our view, many provisions of the Constitution do not need to be altered or removed. We approached the task on the basis that, for the most part, the Constitution has served Australia well. There are, however, some significant problems and we have sought to identify ways in which the Constitution should be improved.

1.26 As Sir Robert Menzies said:

> a written Constitution is an expressed scheme of government designed to give a basic structure in a changing world; not designed to inhibit growth in a growing world, nor to make the contemporary world subject to the political, social, or economic ideas of a bygone age. . . . [A] Constitution is not a strait-jacket; it is a frame of government.[8]

1.27 Bearing in mind the fundamental nature of the Constitution, we have not recommended changes on matters which it is not necessary or appropriate to include in such a document. Nor have we, for the most part, recommended changes on matters which are more appropriately dealt with by the Parliament, operating within the general frame of government provided by the Constitution. In other words, we have concentrated on the structures created or preserved by the existing document, and we have considered whether they need modification.

1.28 In two main respects we have gone beyond those structures. First, in this Report we recommend the constitutional recognition of Local Government as the third sphere of government in Australia.[9] Secondly, in this Report we recommend a number of

6 1929 Report.
7 1959 Report.
8 R Menzies, *Central Power in the Australian Commonwealth* (1967) 152, 28.
9 Chapter 8.

alterations which will enhance the rights and freedoms of all Australians in relation to Governments, both Federal and State.[10] The rationale for recommending those changes in relation to State Governments is discussed in Chapter 2.[11]

1.29 Under our system of government the operation of the Constitution is supervised by the High Court. The Court can decide, for example, whether the Federal Parliament has acted within its power in purporting to pass a law, whether a person is disqualified from sitting as a senator or member of the House of Representatives, or whether a law of a State or the Commonwealth breaches the constitutional guarantee that 'trade, commerce, and intercourse among the States . . . shall be absolutely free.' The Constitution is, and must remain, a living document the purpose of which is 'to authorize and facilitate action within ascertainable limits',[12] and it is the High Court which ensures that the limits set by the Constitution are interpreted and applied appropriately.

1.30 Because of the role played by the High Court, it is not desirable to attempt to set out in considerable detail such matters as the precise limits of a legislative power; nor would it be appropriate to do so. It is impossible to foresee the multitude of situations with which the Parliament, the Executive and the courts will have to deal. Too much precision in some areas may impose unforeseen and undesirable limitations on what it is appropriate for the branches of government to do. Our concern has been to ensure that the 'frame of government' is sound.

1.31 A number of other objectives or factors have influenced the content and form of the recommendations. First, there is a need to make the Constitution more intelligible and less misleading. As the Advisory Committee on Executive Government observed:

> the language of the Australian Constitution is less straightforward than that of most constitutions. This makes the Constitution difficult or impossible to teach in schools or to become an acknowledged part of the political culture of the nation, as constitutions can in other societies. Our Constitution remains too much of a mystery to those who should be its masters.[13]

Many of the recommended alterations, particularly the Executive Government provisions, would make for a clearer statement of accepted principles (such as responsible government) and practices by omitting some provisions and adding others.

1.32 Secondly, there is a need to provide means within the Constitution whereby purely transitional provisions can be safely excised from the text when their force is spent. Similarly, there is a need to provide for problems which are incidental to formal constitutional change, for example, by general savings clauses. The savings provisions would include such matters as the continued operation of certain laws made or actions taken before the Constitution was altered, and the continuation in office of people holding certain offices, such as the Governor General, immediately before the alteration took effect. These matters are dealt with in Chapter 13.

1.33 Thirdly, we have borne in mind the necessity for any alteration to comply with section 128 of the Constitution. While we see section 128 as a clear recognition by the Framers of the Constitution that alterations would need to be made,[14] we recognise that it is a costly process which is only invoked for what are seen as necessary or highly desirable

10 Chapter 9.
11 para 2.92-2.111.
12 R Menzies, op cit, 28-9.
13 Executive Report, 61.
14 See Quick and Garran, 986-95.

alterations. Consequently we have limited our recommendations to such matters, rather than including alterations which would amount to no more than tidying up or revising existing forms of expression.

1.34 While recognising that no alteration can be made except with the approval of a majority of the electors voting and a majority of electors voting in a majority of the States, we have not recommended only those proposed alterations which seem likely to have popular appeal, nor have we rejected meritorious proposals because they may be unpopular or because similar proposals have been defeated previously at referendum. Rather, we have recommended alterations which would, in our view, improve the Constitution for the benefit of the nation.

Materials considered

1.35 To make a general review of the Constitution in the way contemplated by the Terms of Reference is a large undertaking. We have drawn on a huge volume of material in preparing this Report. It has been appropriate and necessary to go back, from time to time, to the Constitutional Convention debates of the 1890s to see what the Framers of the Constitution had in mind when drafting certain provisions. Reference has been made to classic early texts, especially the *The Annotated Constitution of the Australian Commonwealth* (1901) by J Quick and RR Garran, and to the reports of the Royal Commission on the Constitution (1929) and the Joint Parliamentary Committee on Constitutional Review (1959).

1.36 The reports of the proceedings of the six sessions of the Australian Constitutional Convention between 1973 and 1985 and the reports of Convention Committees and Sub-Committees have been carefully considered. Recommendations of the Convention have been treated as if they were submissions to this Commission and have been given the considerable weight which they merit. Submissions made to the five Advisory Committees and to the Commission have been a valuable source of information and arguments. We have been referred to numerous court decisions, textbooks and journal articles, as well as to constitutional provisions in the Australian States and other countries which are relevant to the matters being considered.

1.37 This Report has been written with such material in mind and we have referred to it where appropriate. In dealing with each topic we have considered the current constitutional position and the issues raised during this review. We have noted any previous recommendations for reform and referred, where necessary, to the other material to support our recommendations.

Types of recommendations

1.38 All the provisions of the Constitution and the covering clauses of the *Commonwealth of Australia Constitution Act 1900* have been examined in the course of this review. It is not necessary, however, to comment on each provision. Our comments are limited to those provisions which we recommend be altered and those provisions which, despite some difficulties with their meaning or operation, we recommend remain unaltered.

1.39 Our recommendations can be broadly classified in six ways. First, there are many provisions in the Constitution which have a clear meaning, adequately meet the ends they were designed to serve and continue to be appropriate. In some instances the meaning is clear from a reading of the words as they are used in ordinary English. In other instances

the words or phrases have gained a settled meaning as a result of court decisions. We have not recommended change where there seems no compelling reason to do so. In some places we expressly recommend that the words be left as they are.

1.40 Secondly, there are provisions in the Constitution which are outmoded or expended. They fall into the following four categories:

(a) original provisions which have been spent;

(b) interim provisions which dealt with specific matters pending the enactment of federal legislation;

(c) provisions which have been accepted by the Australian Constitutional Convention as obsolete and inconsistent with Australia's status as a sovereign nation; and

(d) a transitional provision added to cover the period before the commencement of the operation of an alteration made to section 15 of the Constitution in 1977.

Rather than deal with them as a group, we shall consider the expended or outmoded provisions separately when discussing the relevant subject matter of the Constitution.[15] The purpose of recommending the removal of these provisions from the Constitution is to create a more readable document. They could be repealed with no practical effect on the operation of the Constitution. Unencumbered by the clutter and potentially confusing presence of these provisions, the document would be more easily understood and would give a clearer picture of the constitutional framework of government in Australia.

1.41 Thirdly, some provisions were included by the Framers of the Constitution with a particular purpose in mind but have not achieved that purpose. For example, the protection given by section 117 against discrimination based on residence in a particular State has been interpreted narrowly, so that the section does not seem to provide the protection which the Framers of the Constitution intended. In such cases we recommend changes to the existing words which would preserve the spirit of the provisions while spelling them out more clearly and effectively.

1.42 Fourthly, some provisions of the Constitution seem out of step with the economic, social and political needs and realities of Australian life or with the role Australia plays in international affairs as an independent sovereign nation. Where circumstances have changed sufficiently since Federation and provisions are no longer adequate or appropriate (either in their own terms or the way in which courts have interpreted them) we recommend that changes be made. So, for example, we recommend expansion of the revenue raising and legislative capacity of the States by alterations to sections 90 and 52 respectively. We also recommend the addition of a qualified federal power to make laws with respect to defamation to take account of the revolutionary technological changes which have taken place since Federation.

1.43 Fifthly, experience of the structures of government in Australia (legislative, executive and judicial) has shown the need for alterations to be made to some constitutional provisions. Our review of the way in which the Federal Parliament is elected and functions has led us to recommend modifications to aspects of the election process, the terms of the Houses of Parliament and the relationship between those Houses. We make recommendations concerning Executive Government and the Australian Judicial System. We also recommend constitutional recognition of Local Government as the third sphere of government.

15 We recommend, however, that most of the expended or outmoded provisions be dealt with in one Bill.

1.44 Sixthly, we recommend that some matters which are not expressly dealt with should be included in the Constitution. For example, some high governmental offices and some procedures which are features of the government of the nation are not mentioned in the Constitution. We recommend that the office of Prime Minister, the way in which Ministers and Assistant Ministers are appointed and related matters should not remain the subject of conventions but should be clearly provided for in the Constitution. Their addition would make the Constitution a more comprehensive and certain statement of the way Australia is governed.

1.45 As a general rule, we have confined our recommendations to provisions of the Constitution and have not recommended amendments to legislation or new legislation. This approach was taken because the Terms of Reference expressly limit the exercise to a review of the Constitution and because legislation which may be passed pursuant to the Constitution is a matter for the Parliament. We recognise that some Advisory Committees made recommendations which could be given effect to by legislation. We shall not usually be commenting on such recommendations. Our lack of comment should not be taken as any reflection on the merit of any or all of those recommendations but merely as an indication that the adoption or otherwise of them is a matter of policy for the Parliament.

1.46 We also want to make clear that there is a significant difference between whether a provision should be included in the Constitution and the use to which such a provision might be put, especially in the case of legislative powers. We have had to consider such matters as whether it is appropriate that a particular power should be granted to the Federal Parliament and, if it should, whether the Federal Parliament should have exclusive power or whether Federal and State Parliaments should each be able to exercise the power. We have also had to consider whether powers exclusively held by the Commonwealth should be shared by the States. We have recommended, for example, that the Federal Parliament be given an express, concurrent power to make laws with respect to defamation. For the reasons outlined in Chapter 10,[16] we consider it appropriate that the Federal Parliament have such a power. A number of submissions on this topic were concerned with what a national defamation law might contain. The issues raised are important. But whether, when and how that power is exercised would be a matter for the Parliament to decide. Similarly we have recommended altering the current provision which gives the Federal Parliament exclusive power to impose duties of excise (section 90) in order that that source of revenue be made available to the States. We recognise that there could be a number of consequences of such a change, including a significant rearrangement of federal financial relations. Again, the recommendation is one of principle. The way in which the States and the Commonwealth reorder their revenue raising and revenue sharing arrangements would be for them to work out.

1.47 A number of submissions were made arguing for inclusion of provisions relating to matters which, however important, we do not think should be dealt with in the Constitution. For example, essentially symbolic matters such as the national anthem and the Australian flag are best dealt with otherwise.[17]

1.48 In summary, we have not devised nor do we recommend a new Constitution for Australia. We have not recommended that sections be rewritten merely for the sake of clearer expression nor have we recommended a more rational reordering of existing provisions. Rather we have reviewed the existing text and have recommended deletions,

16 para 10.81-10.109.
17 eg see *Flags Act 1953* (Cth).

alterations and additions where they seem appropriate.[18] Taken separately, alterations based on these recommendations would resolve or significantly relieve specific problems arising under the existing Constitution. Taken together, the changes recommended would result, in our opinion, in a Constitution more able to provide for the present and future needs of Australia.

PUBLIC INVOLVEMENT IN CONSTITUTIONAL REVIEW

1.49 The Terms of Reference state that, during the course of the inquiry, the Commission shall:

(i) seek the views of the public, and business, trade unions and financial institutions;

(ii) hold public hearings and sponsor public meetings to ascertain the views of interested organisations, groups and individuals on constitutional reform . . . .

1.50 Letters were sent to State and Federal Governments, government departments, Local Government bodies, senior judges, leaders of political parties, and numerous organisations and individuals thought to have an interest in matters being considered by the Commission. They were invited to make submissions. Where appropriate, such bodies and individuals were contacted on behalf of a particular Advisory Committee or Committees. Many responded with oral submissions made at public hearings or private meetings, or by making written submissions. Detailed submissions were received from some Governments on specific matters of particular interest to them. Only the Tasmanian Government and the Queensland Government made comprehensive submissions on the range of matters being considered by the Advisory Committees, Tasmania responding to the issues first raised by the Committees and both Tasmania and Queensland responding to the Reports of the Advisory Committees.

1.51 As well as direct requests, there was widespread advertising of the Commission's work and the public hearings. The advertisements attracted other submissions.

Submissions

1.52 The Advisory Committees and the Commission received submissions at meetings, most of them public, on 92 days in 27 cities and towns in all States and mainland Territories and on Norfolk Island. Each Advisory Committee held at least one public hearing in each State capital city. Some 670 people made submissions at such meetings. A list of where and when meetings were held and the number of submissions made at those meetings, and the list of submissions, is at *Appendix F.* Over 4,000 written and oral submissions were received by the Commission and the Advisory Committees.

1.53 Numerous submissions were made to the Advisory Committees and were dealt with by those Committees in the preparation of their reports. As a general rule we have not thought it necessary to refer to them except as they were reflected in the reports of the Advisory Committees.

1.54 Other submissions which we have considered include:

(a) submissions made to the Commission on matters which were not being considered by an Advisory Committee but were reserved for our consideration (for example, the Parliaments);

(b) submissions made to Advisory Committees but received too late to be considered by the Committees when preparing their reports; and

18 As a consequence of alterations to some sections, alterations will need to be made to some marginal headings which, although not part of the Constitution, provide a useful guide to its contents.

(c) submissions made in response to the reports of the Advisory Committees.

Public discussion and awareness

1.55 The Terms of Reference also required the Commission to:

(iii) stimulate public discussion and awareness of constitutional issues by circulating draft proposals and putting forward initiatives and views on constitutional reform ....

1.56 We encouraged individuals and organisations to make submissions about those matters which they thought needed changing (as well as those which should remain unchanged) and to suggest changes which they wanted made. Secondly, we tried to raise the level of knowledge about the Constitution in the community so that the work and recommendations of the Commission can be seen in the context of the provisions and operation of the Constitution as a whole. A survey conducted in April 1987[19] showed that only some 53.9% of Australians knew that Australia has a written Constitution. In the 18-24 age group, nearly 70% of the respondents did *not* know that we have a written Constitution. The survey showed that the people most aware of the Constitution and its significance are men who are over 35 years of age, who left school at 17 years of age or older, who work full-time and are white collar workers.

1.57 We are most concerned at the widespread ignorance of the Constitution and of the major impact which it has on life in Australia. The process of constitutional reform is ultimately determined by the electors of Australia. They will decide whether any change is made to the Constitution. We believe that there is a real need to educate people in at least its basic scheme and provisions. Education in these matters will assist greatly in improving the general appreciation of how our system of democratic government operates. More particularly, such education would help many people understand more fully the arguments for and against specific proposals for change to the Constitution. As a first step we suggest that the education authorities in each State and Territory give consideration to including appropriate material on constitutional provisions and parliamentary institutions and practices in school curriculums.

1.58 In order to meet these objectives we arranged for the printing of 205,000 copies of the Constitution for free distribution to people who requested them. Thirteen Background Papers were produced in which specific issues being considered by the Commission and options for possible change were discussed. Where we had a preliminary view about what to recommend, that view was set out. Submissions were invited on the matters raised. A list of Background Papers is at *Appendix G.*

1.59 The Commission also published a series of Bulletins reporting on the work of the Commission and the Advisory Committees and summarising some of the issues being considered and our preliminary views. A list of Bulletins is at *Appendix H.*

1.60 In 1986 each Advisory Committee prepared an Issues Paper, which was published and distributed by the Commission. The Advisory Committee on the Australian Judicial System also prepared a *Summary of Issues Paper* and a *Statement of Preliminary Views.*

1.61 The Rights Committee arranged for the translation of its Issues Paper and an accompanying press release into the six principal ethnic languages (Italian, Greek, Arabic, Serbo-Croat, Turkish and Spanish) and for the distribution of the documents to appropriate groups and media representatives.

19 'Australian Constitution Study' conducted by Newspoll for Hill & Knowlton Australia Pty Ltd, April 1987.

1.62 While he was a member of the Commission, Mr Justice Toohey suggested that material directly relevant to Aborigines be translated into the main Aboriginal languages. In 1986 a document drawing on parts of the Issues Papers of the Rights Committee and the Powers Committee was prepared. It was translated into Kriol and Djambarrpuyngu by the School of Australian Linguistics and into Warlpiri, Arrenrnte and Luritja by the Institute of Aboriginal Development. These translations, as well as an English version (recorded by Mr Peter Garrett), were tape-recorded for use on radio stations and in communities. The tapes were sent to radio stations, Aboriginal broadcasting groups and tape exchanges and broadcasters who expressed interest in using them.

1.63 In mid-1987 each Advisory Committee presented its Report to the Commission. A list of papers and reports prepared by Advisory Committees is at *Appendix I.*

1.64 In response to a request by a blind person, the Secretary to the Commission (Mr Ian Cunliffe) tape-recorded the Constitution. Copies of the tape were sent to people requesting them.

1.65 A videotape on the Constitution, 'Whereas the People . . .', produced for the Constitutional Convention Council, was made available to the Commission for loan to interested individuals and groups. The video tape (in 31 minutes and 16 minutes versions) was sent to approximately 180 enquirers.

1.66 Members of the Commission and Advisory Committees and Commission staff spoke at meetings and seminars organised for or by the Commission. They addressed meetings of service clubs, schools, electorate branches and other groups and organisations, as well as giving numerous radio, television and press interviews throughout Australia. Articles were written for newspapers. Television producers and magazine publishers were assisted in preparing programs[20] and publications[21] relevant to the Commission's work.

1.67 An essay competition early in 1988 on the topic 'Australia's Constitution: What it means to us in 1988' attracted considerable interest. Entries were received in the under 18 years and open categories from people in all States and mainland Territories. One winner in each of the 14 categories was selected from a total of 1,078 entries, the prize for each being travel to Canberra and a place at the official opening ceremony at the new Parliament House on 9 May 1988.

Advisory Committees' proposals

1.68 The Report of each Advisory Committee was published separately. Copies were distributed by the Commission and were sold at Australian Government Bookshops at a cost of $9.95 each. Four of the Advisory Committees marked the publication of their Reports with a formal function.

1.69 The Report of the Advisory Committee on Individual and Democratic Rights was launched on the Ray Martin Midday Show, a national television program, on Monday 20 July 1987. Three members of the Committee (Mr Terence Purcell, Mr Peter Garrett and Mr Thomas Keneally) were interviewed by Mr Martin about the Report. A press conference followed that program. Another press conference for representatives of the ethnic media was held on 27 August 1987.

20 eg, Geoffrey Robertson's 'Hypothetical' program 'Blood on the Wattle' broadcast nationally on ABC TV on 31 March 1988.

21 eg, Time Australia, Special Issue 'By Which We Live . . .', 16 May 1988.

1.70 On Friday 31 July 1987 the Report of the Advisory Committee on the Australian Judicial System was launched by Committee member Professor James Crawford at a function in the judges' chambers next to the Chief Justice's garden in the old New South Wales Supreme Court building, Sydney.

1.71 The Report of the Advisory Committee on the Distribution of Powers was launched by Committee member Mr George Polites at a reception in the Victorian Parliament on 6 August 1987.

1.72 The Advisory Committee on Executive Government released its Report at a press conference at the National Press Club, Canberra, on Wednesday 19 August 1987. Sir James Killen (deputy chairman) announced the findings and recommendations and two other Committee members, Mr David Solomon and Associate Professor George Winterton, also spoke to the representatives of the print and electronic media.

1.73 The Report of the Advisory Committee on Trade and National Economic Management was released on Wednesday 12 August 1987.

1.74 Publication of the Reports was reported in newspapers and on radio and television. A number of newspaper editorials and feature articles were written about the work of the Advisory Committees and the main recommendations in the Reports. Members of the Advisory Committees as well as staff of the Commission gave interviews and spoke at meetings about the Reports. These occasions were used to encourage people to read the Reports and comment on the recommendations in order to assist us in the preparation of our Final Report.

1.75 To inform as many people as practicable about the recommendations of the Advisory Committees and to assist people making submissions to the Commission, a summary of those Reports was published. Entitled *Australia's Constitution – Time to Update,* the 72 page booklet also included the Commission's Terms of Reference, a background note on the Constitution and the Commission, a list of members of the Commission and the Advisory Committees, a list of publications prepared by the Commission and the Committees, and cartoon-style illustrations. Readers of the booklet were invited to send their comments on the Advisory Committees' recommendations to the Commission.

1.76 One hundred and sixty thousand copies of the booklet were printed for free distribution to people who contacted the Commission and asked to be sent our publications, as well as to judges, members of parliaments, libraries, schools and the media. More than 1,000 other organisations and individuals were sent the booklet because the Commission thought they would be interested in some or all of the matters mentioned in it. These included civic associations (for example, RSL), Local Government associations, teachers' associations, political associations, electorate secretaries to State and federal parliamentarians, libraries, major and small business groups, trade unions, rural groups, women's groups, Aboriginal groups, ethnic affairs bodies, public speaking bodies, welfare groups and environmental groups.

1.77 We were encouraged by the quantity and quality of the responses made to the recommendations of the Advisory Committees and these were considered when we were deciding whether to adopt those recommendations.

Commission's proposals

1.78 On Friday 2 October 1987, at a press conference convened at the National Gallery in Canberra, we announced proposed recommendations on three major matters. In summary, they dealt with:

(a) extending the maximum term of the Parliament to four years with a fixed three year term component, and consequent changes to the constitutional provisions governing the powers of the Senate with respect to money Bills and the means of resolving deadlocks between the House of Representatives and the Senate over other legislation;

(b) giving the Federal Parliament power to make laws with respect to defamation, but not so as to affect the privileges of State Parliaments; and

(c) strengthening the constitutional guarantee of trial by jury for serious offences under federal, State and Territorial laws by altering section 80.

1.79 The Chairman indicated that we would consider comments on the proposals. The announcement was widely reported and attracted editorial and other comment. The recommendations concerning the Parliament were the subject of a number of statements in the Federal Parliament and of debate in the House of Representatives on 8 October 1987[22] and in the Senate on 17 December 1987.[23] We have considered the views expressed in those debates and elsewhere and have modified elements of the proposed parliamentary scheme announced on 2 October 1987.

INTERIM REPORT

1.80 The Terms of Reference required the Commission to:

(iv) make interim reports on matters under study at intervals to be determined in consultation with the Attorney-General . . . .

1.81 At a Commission meeting on 27 January 1988, following a discussion of matters already decided by the Commission, the Attorney-General asked us to provide him with an interim report by the first week of May on a number of those matters, namely:

(a) maximum four year term for House of Representatives (and related matters such as the term and powers of the Senate);

(b) the right to vote in federal and State elections;

(c) one vote one value in federal and State elections;

(d) aspects of Executive Government;

(e) trial by jury (alterations to section 80);

(f) freedom of religion (alterations to section 116);

(g) compensation payable by States and Territories for acquisition of property (section 51(xxxi.));

(h) recognition of Local Government;

(i) federal power to make laws with respect to defamation;

(j) State power to impose duties of excise (section 90); and

(k) inter-change of powers.

It was agreed that the interim report would contain our recommendations and reasons for them as well as draft Bills for proposed alterations to the Constitution.

22 *Hansard*, 8 October 1987, 1023-32.
23 *Hansard*, 17 December 1987, 3325-36.

1.82 The *First Report of the Constitutional Commission*, dated 27 April 1988, was sent to the Attorney-General on 28 April and was launched at the National Press Club on 6 May. The First Report dealt with the matters listed above and related matters. It included:

Chapter 1	Introduction
Chapter 2	The Terms of Reference
Chapter 3	Preamble and covering clauses
Chapter 4	The Parliaments (part)
Chapter 5	The Executive Government of the Commonwealth
Chapter 7	New States
Chapter 8	Constitutional recognition of Local Government
Chapter 9	Rights and freedoms (part)
Chapter 10	Distribution of powers (part)
Chapter 11	The national economy (part)

as well as 11 Appendices, including the text of the existing Constitution *(Appendix J)* and one which contained seventeen Bills setting out proposed alterations to the Constitution *(Appendix K)*.

1.83 A 44 page *Summary* booklet was printed setting out the major recommendations to alter the Constitution contained in the First Report. Copies were sent to all persons and organisations on the Commission's mailing list and to others asking for it. Eighty thousand copies were printed.

FINAL REPORT

1.84 We stated in the First Report that it was an interim report 'in the sense that it precedes our Final Report' but it was 'not a provisional report.' The recommendations and reasons set out in it were final and the material in those Chapters and Appendices has been included in this Report virtually unchanged. We have revised it to record the Commission's activities up to 30 June 1988. That has particularly affected Chapter 1. We have not, however, sought to update the substantive material covered in the First Report.[24]

1.85 As anticipated in the First Report, we have added new material to:

Chapter 4	—	on the privileges of the Federal Parliament and the qualifications and disqualifications of members of that Parliament
Chapter 9	—	on rights and freedoms other than those already included in the Constitution
Chapter 10	—	on matters other than defamation and the interchange of powers
Chapter 11	—	on a wide range of matters to do with the national economy.

We have added to Chapter 8 a note on the intended effect of our recommendation for the constitutional recognition of Local Government.

24 Some alterations were made to provisions in draft Bills, for example to *Constitution Alteration (Democratic Elections) 1988* to ensure that our recommendation did not have the unintended effect of precluding proportional representation. Other minor changes have been made to some Bills and to the text.

1.86 This Report includes a number of new Chapters:

Chapter 6	Australian judicial system
Chapter 12	Interstate river management
Chapter 13	Altering the Constitution

and three new Appendices:

Appendix D	Secretariat staff
Appendix M	Fact finding in constitutional cases
Appendix N	History of Bills proposing alterations to the Constitution

1.87 A further 25 Bills have been added to *Appendix K* (Proposed alterations to the Constitution) which would give effect to our recommendations, together with a copy of the Constitution as it would be altered if these recommendations were approved under section 128 of the Constitution. The proposed alterations were prepared, on the basis of detailed instructions, by the distinguished former Parliamentary Counsel, Mr JQ Ewens, CMG, CBE, QC, and Mr J Finemore, AO, OBE, QC and by Mr S Mason. We have been assisted greatly by them. They have not only cast our recommendations in appropriate constitutional language but have also drawn our attention to matters of detail which might otherwise have been overlooked.

1.88 The style adopted in the proposed alterations is based on the existing text. We have preferred to follow such things as the punctuation already used so that the altered document would retain a cohesive appearance. Where appropriate, additional provisions have adopted or adapted the language used in provisions which they supplement. For this reason we have decided to include in some proposed alterations expressions in the masculine gender (for example, 'he', 'his', 'him') where we might otherwise have recommended that the proposals be drafted in non-sexist or gender neutral language.

1.89 We are aware that modern drafting practice is to employ non-sexist or gender neutral language and we have attempted to adopt that style in the writing of this Report. If the Parliament prefers to use such language in proposed alterations, we suggest that consideration be given to making alterations to some other sections so that the same form of expression is used throughout the Constitution.[25]

CONCLUSION

1.90 On Tuesday, 10 May 1988 the Attorney-General introduced four Constitution Alteration Bills into the Houses of Representatives:[26]

(a) *Constitution Alteration (Parliamentary Terms) 1988;*

(b) *Constitution Alteration (Fair Elections) 1988;*

(c) *Constitution Alteration (Local Government) 1988;* and

(d) *Constitution Alteration (Rights and Freedoms) 1988.*

1.91 The Bills passed through both Houses of the Federal Parliament by 3 June 1988 and are to be voted on by the electors of Australia on 3 September 1988. In some cases the Bills are similar in substance and form to what was recommended in the First Report. In other cases they vary from what we recommended.

25 The sections of the Constitution with references to 'he', 'his' or 'him' are sections 2, 3, 4, 5, 13, 15, 17, 18, 19, 20, 33, 34, 35, 36, 37, 38, 40, 42, 45, 46, 48, 58, 62, 64, 70, 72, 84, 117, 126.

26 *Hansard,* 10 May 1988, 2381-7.

1.92 We hope this Final Report will contribute to an informed, continuing debate on constitutional issues and will provide the foundation for further proposed alterations to be put to referendums in the future.

CHAPTER 2

THE TERMS OF REFERENCE

INTRODUCTION

2.1 As noted in Chapter 1, our Terms of Reference required us to report on the revision of the Constitution to:

(a) adequately reflect Australia's status as an independent nation and a Federal Parliamentary democracy;

(b) provide the most suitable framework for the economic, social and political development of Australia as a federation;

(c) recognise an appropriate division of responsibilities between the Commonwealth, the States, self-governing Territories and local government; and

(d) ensure that democratic rights are guaranteed.

2.2 The Terms of Reference involve an understanding of a number of concepts related to the nature and structure of government in Australia. In this Chapter we discuss three basic qualities that inhere in our constitutional and political system, namely, federation, parliamentary government and national independence. The Terms of Reference treat these concepts as major assumptions upon which our consideration of constitutional revision must proceed. An analysis of these concepts requires some examination of the provisions and structure of the Constitution, the development of its interpretation, the practices and conventions operating in public affairs and the evolution of Australian independence.

2.3 Recommendations made in the course of this Chapter are set out at the end of it.[1]

AUSTRALIA AS A FEDERATION

The federal concept

2.4 Paragraphs (a) and (b) of our Terms of Reference referred respectively to Australia as a '*Federal* Parliamentary democracy' and as a 'federation'. The Australian Commonwealth is expressly described in the preamble to, and section 3 of, the *Commonwealth of Australia Constitution Act 1900* as 'Federal'. It is an assumption of our Terms of Reference, therefore, that the Australian Constitution is and shall remain federal in nature.

2.5 A federal state must, of course, comprise a central government and regional governments, which have a degree of independence or autonomy. Beyond that, however, the concept of a federation is not one that has a precise legal or political meaning. It has given rise to a great deal of literature and much argument and debate from legal, political and philosophical viewpoints. Sometimes the concept is qualified by adjectives such as 'coordinate', 'cooperative', 'organic'[2] and 'new'.

2.6 Whether a particular country can be called a federation raises issues involving legal and social factors and their inter-relationships as well as questions of degree. The following situations in a simplified form have, for example, given rise to discussion and argument as to the characterisation of the particular system as federal.

1 para 2.240.
2 G Sawer, *Modern Federalism* (2nd edn, 1976) Ch 8.

2.7 First, the Austrian Constitution distributes power in the same manner as the Australian and United States Constitutions. Express legislative power is conferred on the central government and the States have the residue. The central government's powers, however, include all major areas of political and social life. The States' area of power resembles the functions of Local Government; but, unlike Local Governments in Australia, the powers, governmental structure and areas of the States are guaranteed. The powers and existence of the State governments cannot, therefore, be destroyed at the will of the central government. Also, the Austrian central government is, unlike common law federations such as those of Australia, India or the United States, in relation to some subjects, permitted only to lay down general policy; the States must provide the details of the program. In other areas, the central government may declare the law in all its details, but it must be administered and executed by the States. (A similar situation exists under the Constitution of the Federal Republic of Germany.)

2.8 Secondly, the central government of the Federal Republic of Germany has a degree of power *vis-a-vis* the States which has also raised questions as to whether the system can properly be described as federal. Does it make a difference to one's assessment of the situation to know that the upper House of the Federal Parliament consists of members who are appointed by the State Governments and who can be removed at any time by those Governments if they do not vote according to State Government directions?

2.9 Thirdly, the Swiss Cantons have considerable constitutional power, but the constitutional court has no power to declare a federal law invalid. It can declare a Cantonal law invalid. On the other hand, the federal legislature does not have the last word; the Constitution provides that on the demand of a prescribed number of voters or Cantons a federal law must be put to the people at a referendum.

2.10 Fourthly, the Canadian Constitution divides power between the Federal Government and those of the Provinces in a fairly rigid manner. The Provinces have, in comparison with other federations, a large area of exclusive power. The Federal Government has power, however, to disallow a Provincial statute; it appoints the Lieutenant-Governors of the Provinces and can instruct them to refuse consent to Provincial Bills and to reserve them for consideration by the Federal Executive. Yet Canada is almost universally recognised as a state in which the federal system thrives. The political and social forces in the country have resulted in the powers of disallowance and reservation becoming a dead letter.

2.11 With much of this general debate we are not concerned. Our task relates to federalism as it is understood in Australia. Although this narrows the area of inquiry, it does not imply that 'Australian federalism' is a precise notion about which there is wide agreement in the community. Nevertheless, while critics differ in their lists of countries which they regard as worthy of being called federations, Australia is included in all lists and is often grouped with a few other countries which are referred to as 'classic federations' or 'genuine federations'.[3]

2.12 What one learns from a study of the wider theories of federation is that the federal aspects of a society cannot be properly judged from the legal provisions of the Constitution alone. Institutions laid down in the Constitution, whether aimed at strengthening the influence of the central or State Governments, may not achieve the purpose that was intended because of extra-constitutional institutions or other political or economic forces. For example, most (though not all) agree that the Australian Senate has

3 SR Davis, *The Federal Principle* (1978) 217-9.

not proved a vehicle for the expression of State interests owing to the rise of tightly controlled political parties. Votes in the Senate are generally on party lines rather than upon a State basis.

2.13 On the other hand, it has often been observed that despite the greater financial might of the Commonwealth as compared with the States, the latter are often vigorous, and quite often successful, opponents of Federal Government policy. They have not been 'brought to heel' by financial pressure as Alfred Deakin predicted over eighty five years ago.[4] This has no doubt been due to the operation of democratic politics and more particularly the organisation of the major political parties in Australia, all of which give State branches an equal or near equal say in the determination of federal policy.

2.14 So, while the organisation of political parties prevented the Senate fulfilling the role some thought it should have as a States' House, those same parties have themselves become a means by which State interests affect federal policy. While, therefore, we are primarily concerned in this Chapter with the legal and constitutional framework of Australian society, our examination and recommendations must have regard to the broader political and social forces that operate.

Federal features in the Australian Constitution

2.15 In the nineteenth century, the Constitution of the United States was seen by many as the pre-eminent model of federal government. Our Framers looked mainly to it as a guide to the sort of governmental system they were seeking to establish. While they rejected the presidential system of government and a comprehensive Bill of Rights, in other respects they found, in the American system, what Sir Owen Dixon described as 'an incomparable model.' The federal features of that country's Constitution that we followed were:

(a) the establishment of a central (or Federal) Government and State Governments, each with its own governmental institutions;

(b) a distribution of authority between the Federal and State Governments that confined the former to express enumerated subjects, while leaving the undefined residue to the States;

(c) a judicial authority, appointed by the Federal Government, to determine whether either level of government had exceeded its legislative, executive or judicial powers;

(d) the supremacy of federal laws over State laws in cases of inconsistency; and

(e) an entrenchment of these features by a rigid constitutional framework that is difficult to alter.

2.16 It would seem that the minimal essential features of a federal system as it has come to be understood in Australia are a high degree of autonomy for the governmental institutions of the Commonwealth and the States, a division of power between these organisations, and a judicial 'umpire'.

2.17 There are other aspects of the Constitution which, while not creating a federal state, reflect its federal nature. Some of these are concerned with ensuring that the Commonwealth behaves fairly to each State as compared with other States. These include section 51(ii.) which restricts the taxation power 'so as not to discriminate between States or parts of States'; section 51(iii.) and section 88 which require bounties and customs duties, respectively, to be 'uniform throughout the Commonwealth'; and section 99 which

4 A Deakin (JA La Nauze ed) *Federated Australia* (1968) 97.

provides that 'the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue give preference to one State or any part thereof over another State or any part thereof.'

2.18 Similarly there are provisions relating to the respect and fairness owed by a State to the Government and people of other States. Section 117 is aimed at preventing a State (and perhaps the Commonwealth) from discriminating against non-alien residents of other States. Section 118 requires that 'full faith and credit' be given throughout the Commonwealth to 'the laws, the public Acts and records and the judicial proceedings of every State.' Discrimination against the trade and commerce of another State is prohibited, and the entry of its people is protected, by section 92, guaranteeing that 'trade, commerce and intercourse among the States shall be absolutely free', and by section 102 dealing with State railway rates which are 'undue and unreasonable or unjust to any State.'

2.19 Another feature of the Constitution which has, in the courts and in public political debate, been closely associated with the federal principle in Australia is representation in the Senate. The people of the Original States are guaranteed equal representation (section 7). The founding fathers were divided on the desirability of an upper House of this nature (usually depending on whether they came from the larger or smaller colonies). Many of the delegates seem to have approved the adoption of this principle on the practical ground that otherwise union would have been impossible, rather than on the basis of federal principle. This is perhaps borne out by the fact that the right of equal representation in the Senate was not granted to any new State which might be admitted to the Commonwealth, but was, in section 121, made to depend on the will of the Federal Parliament.[5]

2.20 Nevertheless it is clear that, although an upper House of the nature that we have may not be an essential element of a federation, it reflects the union of the original colonial communities which were co-equal in status. It was the people of each of those colonies, voting separately, rather than the vote of the mass of Australia people as a whole, which determined the union and who would join it. Again, the provision in respect of new States points to this explanation.

Relationship between Governments

Coordinate federalism

2.21 In a classic work on the subject, Professor KC Wheare gave this as his test for federal government: 'Does a system of government embody predominantly a division of powers between general and regional authorities, each of which, in its own sphere, is co-ordinate with the others and independent of them?'[6]

2.22 This concept of federalism (which the author regarded as a matter of degree), namely two sets of coordinate and independent governments pursuing their own policies, does not conform to a number of provisions of the Australian Constitution. Indeed, even the institution of a Senate designed to intrude State interests into the federal authority (regarded by many as a federal aspect of our system) detracts from this 'coordinate' model.

5 Quick and Garran, 189.
6 KC Wheare, *Federal Government* (1946) 32-3.

2.23 There are many other provisions which do not conform to it. For the first ten years of the federation, the Commonwealth, which was given exclusive power to levy customs and excise duties, was required to give three-quarters of this revenue to the States. The amount received by the States constituted a large proportion of their revenue. (The situation today is similar. The States rely on federal grants for most of their revenue.) The Commonwealth was empowered, under section 96, to make grants to the States on terms and conditions, and was required, by section 94, to give surplus revenue to the States. (The latter provision became a dead letter as a result of a legislative device ensuring that there was no 'surplus'. This device was upheld in *New South Wales v Commonwealth (Surplus Revenue Case)*.[7]) It was clearly envisaged, therefore, that the States would not necessarily be able to raise enough revenue of their own to carry out all their functions.

2.24 Under Chapter III of the Constitution the Commonwealth was empowered to confer federal jurisdiction on State courts, and so use State courts as 'judicial agents' of the Commonwealth. Similarly, under section 120, each State is required to make provision in its prisons for persons accused or convicted of offences against the laws of the Commonwealth.

2.25 If the Framers' view of federalism conformed to the 'independent and coordinate' theory it is clear that practical considerations produced a number of departures from it.

2.26 On the other hand, the Constitution contained a number of provisions designed to establish the independence of one level of government from the other in respect of particular matters. Section 114 prohibits the States, without the consent of the Commonwealth, from taxing the property belonging to the Commonwealth, and prohibits the Commonwealth from levying a tax on State property. The powers given to the Commonwealth with respect to banking (section 51(xxiii.)) and insurance (section 51(xiv.)) expressly exclude some areas of State Government banking and insurance.

2.27 It is arguable, therefore, that the extent to which the two levels of government were to be independent of, and coordinate with, each other was to be determined by the terms of the Constitution alone. In other words, the understanding of 'federalism' in Australia was to be judged by the way in which the Constitution created the polity, whether or not it conformed to any theory or definition of federalism.

2.28 But from the earliest days of the High Court the judges considered that the broad structure of the Constitution required the application of doctrines, of one sort or another, which were derived from a concept of federalism not to be found expressly in the Constitution. The nature of these doctrines changed over the decades as different notions of federalism were applied.

2.29 The first High Court's conception went considerably beyond the minimum essential features we described earlier.[8] They found implied in the Constitution a doctrine which had the object of making Australia conform as fully as possible to the 'independent and coordinate' theory. The Commonwealth and the States were regarded as coordinate and independent organisations of government, each 'sovereign' within its sphere of responsibility. Neither was subject to the power of the other, and each was free to carry out its functions and exercise power without any interference or hindrance from the other (subject to section 109 of the Constitution). The result of the application of this doctrine was, for example, that a State could not levy income tax on the salary of an officer of the

7 (1908) 7 CLR 179.
8 para 2.16.

Commonwealth[9] and the Commonwealth could not, under section 51(xxxv.) – the conciliation and arbitration power – authorise the Arbitration Court to make an award arising out of a dispute between a State and its railway employees.[10]

2.30 The idea, however, of two separate streams of governmental authority running parallel with each other and never intermingling proved impossible of practical application. All the judges held that the Commonwealth could levy customs duty on a State. Several of them referred to the practical consequences of the contrary view, including the possible destruction of any tariff policy the Commonwealth adopted.[11] Similarly in World War I the defence power of the Commonwealth was seen as a paramount power before which any implied State rights had to give way.[12]

2.31 This doctrine of the first High Court – known as the immunity of instrumentalities – was finally overruled in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)*[13] which held that under the conciliation and arbitration power federal legislation could bind a State Government. Emphasis was placed on the express words of the Constitution and the plenary nature of the powers of the Commonwealth. Implications from the general concept of federalism were regarded as too vague and subjective for judicial application. The possibility of abuse of power by the Commonwealth in relation to the States was seen as a matter to be resolved in the political arena and, ultimately, by the electorate.

Power of the Commonwealth to bind the States

2.32 Federation, as a legal principle, however, did not disappear from Australian constitutional law. From the early 1930s there was a revival of federal theory in constitutional interpretation led mainly by Dixon and Evatt JJ. In *Melbourne Corporation v Commonwealth (State Banking Case)*[14] a federal law which required State and Local Governments to bank with the Commonwealth Bank was held invalid on the ground that it singled out the States from the rest of the community. There was no express provision in the Constitution prohibiting discrimination of this sort. Mr Justice Dixon, however, declared that: 'The federal system itself is the foundation of the restraint upon the use of the power to control the States'.[15] He went on to say that 'The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities'.[16]

2.33 This doctrine, or something like it, has been accepted by most judges in recent times. The following formulation by Mason J sums up, we believe, the present view of the Court:

> . . . the implication that should be made is that the Commonwealth will not in the exercise of its powers discriminate against or 'single out' the States so as to impose some special burden or disability upon them, unless the nature of a specific power otherwise indicates, and will not inhibit or impair the continued existence of the States or their capacity to function.[17]

9 *Deakin v Webb* (1904) 1 CLR 585.
10 *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway, Traffic Employes' Association (Railway Servants' Case)* (1906) 4 CLR 488.
11 *Attorney General of NSW v Collector of Customs for NSW (Steel Rails Case)* (1908) 5 CLR 818.
12 *Farey v Burvett* (1916) 21 CLR 433.
13 (1920) 28 CLR 129.
14 (1947) 74 CLR 31.
15 id, 81.
16 id, 82.
17 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 93.

This was expressly adopted by Brennan J in *Commonwealth v Tasmania (Tasmanian Dam Case)*[18] and was also quoted with apparent approval by Deane J in the *Queensland Electricity Commission v Commonwealth (Queensland Electricity Commission Case).*[19]

2.34 The principle of non-discrimination was applied in the *Queensland Electricity Commission Case* to invalidate a Federal Act relating to arbitration which provided special and more stringent rules to govern a dispute involving the Commission, which was a public authority of Queensland. The High Court made it clear that the implied restraint protected not only the State Government, but also the statutory authorities of a State. It was also applicable where only one State Government or its authority was discriminated against.

2.35 The Australian Constitutional Convention in 1985 recommended that the corporations power in section 51(xx.) be altered by adding the words: 'but so as not to discriminate against State statutory corporations'.[20]

2.36 In the light of the decision in the *Queensland Electricity Commission Case* it seems that such an alteration is no longer required and we *recommend* accordingly.

2.37 No federal law has been held invalid under the second limb of the implied restriction, namely, that it threatens the existence of a State or its ability to function as an independent Government. It was held that the application of federal payroll tax legislation to the States did not breach the principle; and a similar finding was made by a majority of the Court which upheld the federal legislation that had the effect of preventing Tasmania from building a dam in that State.[21]

2.38 There is considerable difficulty in determining the scope of this second restriction. It is clear, of course, since the *Engineers' Case*, that to run foul of the restriction it is not enough to show that the law binds the States in the sense that it prevents a State from carrying out a particular function or controls the way it may be performed. Nor is the Court willing to make any distinction between 'inalienable' or 'governmental' functions and other functions performed by a Government, because of the difficulty of formulating any test to distinguish those functions in the absence of an ideological commitment.

2.39 What seems to be involved, however, is the independence of the organisation and machinery of government, which we earlier[22] referred to as an essential element of a federation as it has come to be understood in Australia. The area protected was described by Stephen J as 'the structural integrity of the State components of the federal framework, State legislatures and State executives'.[23] This description has been approved by Mason J in the *Tasmanian Dam Case*[24] and Gibbs CJ in the *Queensland Electricity Commission Case.*[25] Brennan J similarly distinguished federal measures which 'diminish the powers of the executive government' of a State from those which 'impede the processes by which its powers are exercised.'[26] It is only the latter which are of concern to the implied restrictions on federal power.

18 (1983) 158 CLR 1, 215-6.
19 (1985) 159 CLR 192, 247.
20 ACC Proc, Brisbane 1985, vol I, 419.
21 *Victoria v Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353; *Tasmanian Dam Case* (1983) 158 CLR 1.
22 para 2.16.
23 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 216.
24 (1983) 158 CLR 1, 139.
25 (1985) 159 CLR 192, 207.
26 *Tasmanian Dam Case* (1983) 158 CLR 1, 214.

2.40 It is clear that the restriction is concerned with what we described earlier[27] as essential to federalism, namely, a high degree of autonomy for the governmental organisation and institutions of the units of the federation. There are, however, few judicial examples of laws that will be regarded as impairing this essential aspect of our system. Professor Zines has suggested[28] that the following, among others, might be regarded as necessary to the organisation and processes of State Governments: 'advice to Ministers by the Civil Service, the relationship of the Governor to Ministers and to parliament, parliamentary debate and the internal procedures of parliament, the operation of "responsible government", and the freedom of the State judiciary.'[29]

2.41 Even in areas such as these, however, it seems that the Court would be concerned to look at the actual or potential operation of the particular law, rather than rely on abstract propositions exempting particular areas from federal power. It may be, for example, as some judges have suggested, that particular applications of federal taxation laws to the States could threaten their independence, such as a progressive receipts tax as applied to the ordinary revenue of the States. That, however, was not regarded by the High Court as a sufficient reason for constitutionally exempting the States from federal payroll tax. The Court pointed to the fact that the States had been paying the tax for many years, without impairing their existence or capacity to function as States. It can, however, be stated as Gibbs J said of the taxation power[30] that a federal law operating on the matters referred to in the preceding paragraph 'would be more likely than many other laws to offend against the limitations that apply generally to Commonwealth powers'.

2.42 In dealing with such a broad concept as 'the federal system' it is inevitable that there will be different views expressed in relation to particular cases. For example, there is little doubt that freedom of speech in a State Parliament is an important aspect of State Government. Federal laws that impaired it could have the capacity to threaten the functioning of a State as an independent unit of the federation. But does that mean that in no circumstances may a federal law prohibit or regulate such speech? Would the Commonwealth be powerless, say, to prevent the giving of information in a State Parliament in wartime that would imperil Australian ships or forces? On this issue the members of a Senate Committee in 1985[31] were divided. The majority were of the view that, under present law, the Commonwealth had no such power, because of the implied federal restriction and section 106 of the Constitution. As indicated above,[32] we do not believe that the view of the majority of the Committee is consistent with the more flexible and practical approach adopted by the High Court.

2.43 In our view it is impossible to formulate any clearer principles in this area to ensure the independence of State governmental institutions and procedures. The High Court has taken cognizance of the indispensability of the States and the autonomy of their organisations to the federal system. Whether any federal law, if valid, would threaten those essential features of our system depends on the particular situation and requires the weighing of many factors. We do not believe that it is possible to provide any more precise formula in the Constitution.

2.44 As mentioned above,[33] the Senate Committee relied on section 106 as well as the implied federal restriction for reaching its conclusion. That section provides:

27 para 2.16.
28 L Zines, *The High Court and the Constitution* (2nd edn, 1987) 295-6.
29 id, 296.
30 *Payroll Tax Case* (1971) 122 CLR 353, 424.
31 *Commonwealth law making power and the privilege of freedom of speech in State Parliaments*, Report by the Senate Standing Committee on Constitutional and Legal Affairs (1985).
32 para 2.31 and following.
33 para 2.42.

> 106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

Section 106 and section 51 of the Constitution are both expressed to be 'subject to this Constitution'. It was suggested by some judges in *Australian Railways Union v Victorian Railways Commissioners*[34] and *New South Wales v Commonwealth [No 1] (Garnishee Case)*[35] that section 106 might prevent the Commonwealth from imposing on the States an obligation to pay money that was not conditional on an appropriation of funds by the State Parliament.[36] In fact, however, the Court has not over the past fifty years relied on section 106 for the purpose of restricting federal power to bind the States. The Court has gone directly to the concept of a federal state.[37] The need for a State parliamentary appropriation to satisfy a federally imposed obligation is clearly one which requires consideration of the implied federal restrictions on the powers of the Commonwealth.

State laws and the Commonwealth

2.45 Insofar as federal principles prevent the Commonwealth from binding a State, it follows that the States are equally restricted in relation to the Commonwealth. In fact, however, the decisions of the High Court to date indicate that the Commonwealth has a far greater area of immunity.

2.46 It had been held in *In re Foreman and Sons Pty Ltd; Uther v Federal Commissioner of Taxation (Uther's Case)*[38] that the *Companies Act 1936* of New South Wales had validly prescribed an order of priority for payment of debts on the winding up of a company which was incompatible with the prerogative right to priority of the Commonwealth. As the prerogative right had its source in the common law, it was held that it could be abrogated by a valid Act. The Act as a whole was regarded as having a close relationship with the peace, welfare and good government of New South Wales. Mr Justice Dixon dissented, and his reasoning predominated in the later case of *Commonwealth v Cigamatic Pty Ltd (In Liquidation) (Cigamatic Case)*[39] which overruled *Uther's Case.* In both cases he affirmed that a State could not legislate as to the rights which the Commonwealth should have against its own subjects. The fact that the Commonwealth's claim was based on the prerogative was 'an added reason', 'perhaps conclusive in itself', to deny State power to control it.[40] In the *Cigamatic Case*[41] he expressed the view that the prerogative right might in modern times be better referred to as 'one of the fiscal rights of government'.[42]

2.47 While the *Cigamatic Case* clearly decided that prerogative rights of the Commonwealth could not be subjected to State law, the broad language used by Dixon CJ seems to point to a much wider area of immunity. This view is confirmed by dicta in

34 (1930) 44 CLR 319, 352 (Isaacs CJ), 389 (Starke J).
35 (1932) 46 CLR 155, 176 (Rich, Dixon JJ).
36 Such an unconditional obligation was upheld in the *Garnishee Case,* but the Court relied on the special provisions of section 105A(5) which declares the Financial Agreement binding 'notwithstanding anything contained in this Constitution or the Constitution of the several States . . .'.
37 Of course, section 106 is one of the provisions of the Constitution, together with others, from which the federal nature of the Constitution may be inferred: *Queensland Electricity Commission Case* (1985) 159 CLR 192, 231 (Brennan J).
38 (1947) 74 CLR 508.
39 (1962) 108 CLR 372.
40 *Uther's Case* (1947) 74 CLR 508, 528.
41 (1962) 108 CLR 372.
42 id, 377.

Commonwealth v Bogle.[43] Mr Justice Fullagar said that: 'The Commonwealth – or the Crown in the right of the Commonwealth, or whatever you choose to call it – is, to all intents and purposes, a juristic person, but it is not a juristic person which is subjected either by any State Constitution or by the Commonwealth Constitution to the legislative power of any State Parliament.'[44] This broader view was accepted by Barwick CJ in the *Payroll Tax Case*.[45]

2.48 There is some dispute about the interpretation of these decisions and dicta. One view confines it to the immunity of the prerogatives of the Commonwealth.[46] Another view is that it extends to the Commonwealth only when it is exercising governmental rights as distinct from 'rights or interests which are shared by ordinary members of the community'.[47] Others consider that the meaning of the decisions is that a State has no power to make laws binding the Commonwealth.[48]

2.49 The latter view of the immunity has been supported on the basis that it is in the nature of the federal system that the concerns of the Federal Government are those of the nation as a whole, and therefore are beyond the purview of what relates to the 'peace, order and good government' of any one State. From the political point of view, also, the Commonwealth is the Government of all the people in all the States, who are represented in its Parliament. They are not represented in a State Parliament. While the States are part of the Commonwealth, the Commonwealth is not a part of any State.[49]

2.50 This view has been criticised by a number of writers who take a different view of the nature of our federal system and who also criticise it on practical grounds. These critics emphasise the dual nature of federalism. They claim that the Commonwealth should therefore have no greater degree of immunity than is accorded to the States. Also, they argue, a wide area of immunity is incompatible with the ideal of government under law. More significantly, it is argued that the wide area of immunity provides the Commonwealth with more than is necessary to preserve federal interests. This is because the Commonwealth always has power to protect itself, its agencies and its servants by legislation from the operation of State laws. The Federal Government plays a large part in many areas of economic and social activities. To exclude it automatically can have serious impact on the effectiveness of State legislation. Where there are countervailing arguments of public interest, the Commonwealth can determine this and act accordingly by legislation.[50]

2.51 The matter was discussed by the Australian Constitutional Convention at the Brisbane (1985) session when it was recommended that the following provision should be made:

43 (1953) 89 CLR 229, 259-60 (Fullagar J, with whose judgment Dixon CJ, Webb and Kitto JJ agreed).
44 id, 259.
45 (1971) 122 CLR 353, 373.
46 G Evans, 'Rethinking Commonwealth immunity' (1972) 8 *Melbourne University Law Review*, 521.
47 RD Lumb, *The Constitution of the Commonwealth of Australia Annotated* (4th edn, 1986), 352-3.
48 L Zines, *The High Court and the Constitution* (1987) op cit, 314ff.
49 cf Marshall CJ in *McCulloch v Maryland* (1819) 4 Wheat 316 and *D'Emden v Pedder* (1904) 1 CLR 91, 115 (Full High Court); MJ Detmold, *The Australian Commonwealth* (1985) 19; MH Byers in G Evans (ed), *Labor and the Constitution 1972-1975* (1977) 67.
50 L Zines, *The High Court and the Constitution* (1987) op cit, 321-2. It should be noted that even on the widest view of the immunity, the Commonwealth may be affected by State law if it chooses (in the absence of federal law) to enter into a transaction such as a contract or trust, or otherwise takes advantage of machinery or institutions provided by State law, such as registration of a company or of land under Torrens title: *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (Farley's Case)* (1940) 63 CLR 278, 308 (Dixon J); *Commonwealth v Bogle* (1953) 89 CLR 229, 260 (Fullager J); *Uther's Case* (1947) 74 CLR 508, 528 (Dixon J).

> 107A. Every power of the Parliament of a State shall, subject to section 109, extend to the Commonwealth in its operations within that State; but the Commonwealth shall not be bound by a State law unless the Crown in right of the State is bound by that law.[51]

2.52 The main areas where it was suggested by the New South Wales Government that the immunity of the Commonwealth caused difficulty were occupational health and safety, town planning and environmental controls, State and Local Government taxes and charges, and human rights legislation. The Federal Government opposed the resolution.

2.53 The practical significance of the constitutional immunity enjoyed by the Commonwealth, however, has been very much reduced by the interpretation given by the High Court to section 64 of the *Judiciary Act 1903* (Cth). That section provides:

> In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

2.54 For many years there had been disagreement among the judges as to whether this provision was limited to procedural law. In *Maguire v Simpson*,[52] however, it was held that the section had the effect of applying to the Commonwealth in a suit the whole body of substantive law that would be applied if the Commonwealth were a subject.[53] This seems to suggest that the decision in the *Cigamatic Case* was incorrect, not as a matter of constitutional law, but because the Court failed to take into account that the State *Companies Act 1936* was to be applied, not as a result of it operating by virtue of State authority, but as a result of a federal statutory direction, namely section 64.[54]

2.55 At the time of the Brisbane (1985) session of the Australian Constitutional Convention, however, there was still some doubt about the effect of *Maguire v Simpson* as evidenced by differing decisions by State judges. In *Commonwealth v Evans Deakin Industries Ltd*,[55] the High Court emphatically affirmed its earlier view.

2.56 It seems to follow from this decision that a successful suit can be brought against the Commonwealth in many areas in which the proponents of a constitutional alteration desire the Commonwealth to be bound by State law. Indeed, in one respect, section 64 goes beyond the proposed alteration. The Commonwealth under section 64 may be made liable by reference to a State law which does not bind the State (or even one which expressly declares that the Commonwealth is not bound).

2.57 There may still be some areas of federal immunity despite section 64. First, that provision is qualified by the words 'as nearly as possible'. It is clear, however, from the decisions, that the Court will not give this phrase a broad meaning so as to undermine the basic principle established in *Maguire v Simpson* and the *Evans Deakin Case*. The actual scope of the qualification is still uncertain. What is clear is that the special position of the Crown is not itself a reason for not applying the ordinary law.

51 ACC Proc, Brisbane 1985, vol I, 420.
52 (1977) 139 CLR 362.
53 The Court did not consider the validity and operation of the provision insofar as it deals with suits to which a State is a party. In any case it would apply to the latter suits only where federal jurisdiction is being exercised.
54 See (1977) 139 CLR 362, 402 (Mason J), 403-4 (Jacobs J).
55 (1986) 66 ALR 412.

2.58 Secondly, it is doubtful if section 64 has anything to say about the prosecution of servants of the Commonwealth in relation to criminal acts in the course of their employment. Such a prosecution is probably not a 'suit' within section 64.[56] In *Pirrie v McFarlane*[57] a member of the Royal Australian Air Force driving in the course of his duty was held subject to State law relating to driving licences. The decision is difficult to reconcile with the wide view of the immunity of the Commonwealth expounded in later cases. Section 64 of the *Judiciary Act* (Cth) does not seem to affect the matter. More recently the High Court proceeded on the basis that the members of the Australian Secret Intelligence Service were bound by State criminal law for acts done in the course of their duty.[58] There was, however, no discussion of the general issue of the immunity of the Commonwealth.

2.59 Assuming that a State cannot make the Commonwealth or its servants or agents liable for an offence and that, as suggested, section 64 of the *Judiciary Act* (Cth) is not relevant, that does not prevent section 64 applying to any civil suit brought against the Commonwealth for breach of statutory duty. This was decided by the New South Wales Supreme Court in *Strods v Commonwealth*[59] and was approved by the High Court in the *Evans Deakin Case.*

2.60 Apart from the remaining areas of immunity noted above,[60] it seems that much of what the proponents of the resolution passed at the Constitutional Convention desired has been achieved as a result of judicial interpretation of section 64 of the Judiciary Act. The present position can, of course, be altered by the Federal Parliament; but that is also the case under the proposed alteration which would be subject to section 109. We understand that the Commonwealth has under active consideration the extent to which the Commonwealth should seek immunity from the operation of State laws. The considerations that the Commonwealth will have to take into account in determining this matter will be no different whether or not the Constitution is altered in the manner proposed. The effect of any resulting legislation will be substantially the same.

2.61 We *recommend* therefore that no alteration to the Constitution be made in this respect.

2.62 The issue of the immunity of the Commonwealth is also affected by two exclusive legislative powers of the Commonwealth in section 52, namely, to make laws with respect to 'all places acquired by the Commonwealth for public purposes' (in section 52(i.)) and 'Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth' (in section 52(ii.)).

2.63 The effect of the exclusive power of the Commonwealth in relation to 'places' on the operation of State laws has been alleviated by the enactment of the *Commonwealth Places (Application of Laws) Act 1970* (Cth) which provides, with some exceptions, for the assimilation of State law except where such law is inconsistent with federal law. The Act, however, does not affect any immunity that arises for reasons other than the exclusivity of the power in section 52(i.). At the Brisbane (1985) session of the Australian Constitutional Convention, resolutions were passed to the effect that if the 'inter-change of powers' proposal were not implemented, federal power in respect of places and departments in

56 See the definition of 'Suit' in section 2 of the *Judiciary Act 1903* (Cth) and compare the definition of 'Cause' which 'includes any suit, and also includes criminal proceedings'.
57 (1925) 36 CLR 170.
58 *A v Hayden* (1984)156 CLR 532.
59 [1982] 2 NSWLR 182.
60 para 2.50-2.53.

section 52 should in effect be made concurrent powers.[61] This matter is dealt with in Chapters 5 and 10.[62] Similarly, a resolution to remove from section 114 the immunity of Commonwealth and State property from taxation by the other level of government is discussed in relation to the financial powers of the Commonwealth in Chapter 11.[63]

Federalism and the content of federal and State powers

2.64 In addition to the doctrine of the immunity of instrumentalities, the early High Court evolved another principle of constitutional interpretation known as the doctrine of reserved powers. This doctrine was based on an inference, from the list of powers given to the Commonwealth, that legislative powers over certain subjects were exclusively vested in the States. The existence of these 'reserved powers' of the States formed the major premise of reasoning in construing the breadth of the various subjects of federal power. Unless the contrary intention appeared, the federal powers were construed so as not to impinge on this State field. Therefore, where it was possible to give a broad or narrow interpretation to a particular subject of federal power the narrower interpretation was chosen if the broader one would have involved straying into what the Court believed was the reserved State legislative jurisdiction.

2.65 The difficulty with the doctrine was determining what matters were within the State reserved powers because the Constitution did not (except in some minor cases) confer any express powers on the States, but merely left them with the undefined residue. On some occasions the Court relied on an inference from the subject matter of section 51(i.) – 'Trade and commerce with other countries, and among the States' – that the State Parliaments had exclusive power to make laws with respect to intra-State trade. It followed that no other subject of federal power would be so interpreted as to impinge significantly on this implied reserved power, unless the contrary intention clearly appeared. It was in this manner that the term 'trademarks' in section 51(xviii.) was held not to include a mark indicating that the members of a trade union had produced a product to which a mark was affixed.[64] Similar reasoning was used to hold that the corporations power in section 51(xx.) had a narrower meaning that it might otherwise have been given.[65]

2.66 In other cases, however, it was made clear that the 'reserved power' was not confined to intra-State trade. In *Peterswald v Bartley*[66] and *The King v Barger*[67] the doctrine was used to invalidate federal laws that affected manufacturing (which the Court has consistently held is not within the concept of 'trade and commerce'). On these occasions the majority judges referred to all 'domestic affairs' of a State as being reserved. In *R v Barger* the taxation power of the Commonwealth was held not to authorise the levying of an excise on the manufacture of agricultural equipment when it was coupled with an exemption for employers who provided certain conditions of employment to their employees. Chief Justice Griffith said that:

> the power of taxation . . . was intended to be something entirely distinct from a power to directly regulate the domestic affairs of the States, which was denied to the Parliament.[68]

61 ACC Proc, Brisbane 1985, vol I, 420.
62 para 5.222-5.244; para 10.545-10.563.
63 para 11.239-11.240.
64 *Attorney General for NSW v Brewery Employes Union of NSW (Union Label Case)* (1908) 6 CLR 469.
65 *Huddart, Parker & Co Proprietary Ltd v Moorehead* (1908) 8 CLR 330.
66 (1904) 1 CLR 497.
67 (1908) 6 CLR 41.
68 id, 69.

2.67 This doctrine was – like the immunity of instrumentalities – overthrown by the decisions in the *Engineers' Case*, and no judge has purported directly to rely on it since. In the *State Banking Case*,[69] for example, Dixon J, while using the notion of 'federalism' in arguing for a degree of immunity of State Governments from certain federal laws, made it clear that he was not proposing that the express powers of the Commonwealth were to be read down in the light of State residuary power preserved by section 107. Indeed, he declared that the reserved powers doctrine 'lacked a foundation in logic'.[70]

2.68 For about 60 years there was a general adherence (at least verbally) to the view that federal powers should not be construed having regard to any 'reserved powers' of the States, and that is still the view of the majority of the Court. In recent years, however, some judges have suggested that federal considerations might be relevant at times in determining the content of, at any rate, some powers of the Commonwealth. In *Gazzo v Comptroller of Stamps (Vict)*[71] Gibbs CJ declared that 'in considering whether a law is incidental to the subject matter of a Commonwealth power it is not always irrelevant that the effect of the law is to invade State power; that of course would not be relevant if the law were clearly within the substantive power expressly granted.'[72] In *Actors and Announcers Equity Association v Fontana Films Pty Ltd (Actors Equity Case)*[73] Gibbs CJ, with whom Wilson J agreed, rejected a particular interpretation of the corporations power, having regard to the 'proper reconciliation between the apparent width of section 51(xx.) and the maintenance of the federal balance which the Constitution requires.'

2.69 Other judges have attacked what they see as a revival of the reserved powers doctrine, and the notion of 'federal balance'. They argue that one cannot determine from the Constitution what are subjects of State exclusive power beyond concluding that that power contains whatever remains after properly construing the extent of federal power.[74] The difficulty with the notion of 'federal balance', it is argued, is that in the absence of any express powers given to the States it is difficult to know what are 'balanced', unless it is the functions that the States are performing at any particular time.[75]

2.70 The Government of Queensland, in its submission to the Commission relating to the recommendations of the Advisory Committee on the Distribution of Powers, supported the doctrine of ' "federal balance" as a legitimate and absolutely essential tool of constitutional interpretation.' It argued that unless the High Court had regard to the ability of the States to exercise their basic functions, the State legislatures would become 'empty shells' and the federal framework of government would be subverted.[76]

2.71 It is not for us to enter into this argument as to the principles of constitutional interpretation. Whether and how judges can discover a particular balance from the structure and terms of the existing Constitution is of relevance to us only insofar as it is necessary for us to determine the existing state of the law and its probable development. Our task is to examine the existing division of powers – recognising that it changes and evolves in time by judicial interpretation – and consider whether we should make recommendations for its alteration. Does the concept of a federal state assist in this determination?

69 (1947) 74 CLR 31.
70 id, 83.
71 (1981) 149 CLR 227.
72 id, 240.
73 (1982) 150 CLR 169, 182.
74 id, 207 (Mason J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 241 (Murphy J); *Tasmanian Dam Case* (1983) 158 CLR 1, 221 (Brennan J).
75 See (1986) 60 *Australian Law Journal* 653.
76 Queensland Government S3172, 16 December 1987, 6.

2.72 A number of submissions have suggested that the concept is of direct relevance in relation to the financial powers of the States and Commonwealth, and the extent of the external affairs power of the Commonwealth. We consider these matters in Chapters 11 and 10 respectively.[77] Leaving them aside for the moment, we can say that we do not consider that the federal principle provides any clear guidance in deciding whether a power over a particular area of social life should be assigned, or denied, to the Commonwealth.

2.73 In discussing the essential features of a federal state we referred to the distribution of powers between the two spheres of government. What those powers should be is a very important issue and we were required to examine it (taking into account also Local Government and self-governing Territories) under paragraph (c) of our Terms of Reference. The Advisory Committee on the Distribution of Powers has listed a number of factors that we believe are useful in determining these issues.[78]

2.74 But, whatever may be the proper criteria for determining whether the Constitution should be altered to provide or deny to the Commonwealth a particular area of power, we are unable to appreciate how a theory of federalism or federal balance can give any guidance in that task. It is not possible to determine a distribution of powers, generally speaking, from the fact that a federal state is to be created or maintained. It could not for example be effectively argued that if the Commonwealth were denied power with respect to divorce, trading corporations, or industrial arbitration any federal principle would have been breached. Similarly, if the Commonwealth had been given express power over criminal law, public works, or agriculture (as in Canada) it would be difficult to conclude that Australia had ceased to be a federation.

2.75 This is not to deny, of course, that the community's view of good government or prevailing social values may have been influenced in many cases by historical considerations and the traditional functions performed by the Federal and State Governments. On other occasions the traditional practices might be seen to inhibit desirable social and political objectives. In other words the issue in most cases is what *sort* of a federal state is desirable rather than whether or not we should have one.

2.76 Accepting that the concept of federalism in itself cannot provide a criterion for determining a division of powers, it is argued that it does require that the States have substantial, or not insubstantial, power. Formally, the States retain power (subject to constitutional limitations) over all subjects relevant to their State except the few that are made exclusive to the Commonwealth, such as customs and excise, the raising of armies (unless the Federal Parliament consents) and Commonwealth places. Where, however, the State power is concurrent with that of the Commonwealth, a State law made in exercise of the power is subject to being overridden by federal law under section 109. This particular view of federalism requires a degree of exclusive power in the States.

2.77 From time to time argument occurs as to whether any particular country is 'federal' despite provisions for the entrenchment of the existence of the States and the autonomy of their institutions, because the area of State power is relatively insignificant. As Professor Sawer has said 'the question of federalism or no federalism becomes in practice whether the area of the autonomy is sufficient to be worth considering'.[79]

77 para 11.208-11.224; para 10.461 and following.
78 Powers Report, 2, para 1-3, 217-8 (Appendix F).
79 G Sawer, *Modern Federalism*, op cit, 106.

2.78 It is undoubted that over the past three decades or so the Commonwealth has, by virtue of judicial interpretation of the Constitution, been found to have powers that were once thought not to be within its area of responsibility. But it cannot be said that Australia has reached the point where the legislative and executive powers of the States are insignificant and that, as a consequence, there is any doubt that Australia is a federal state. Much of the law taught in Australian law schools, for example, is in large part untouched by federal statutes, consisting mainly of common law or State statutory law. This includes the law of contract, torts, criminal law, land law, conflict of laws, State administrative law, principles of equity, police law, Local Government law, occupational health and safety, town planning law and so on.

2.79 While the Commonwealth has power to enter some of these areas to a greater or lesser degree, none of them can be comprehensively covered by federal legislation under the present state of constitutional interpretation or any reasonable prediction of what it is likely to be. In many of these and other areas, therefore, it is likely that the States will retain the primary role and the Commonwealth a secondary one, in the absence of any alteration to the Constitution.

2.80 We indicated earlier[80] that we were putting to one side for purposes of our analysis the external affairs power. There are those who would accept what has been said above as the situation up to 1983, but who argue that,as a result of the decision in the *Tasmanian Dam Case*,[81] the external affairs power now has the potential to destroy all independent State functions and powers other than those preserved by the implied federal restrictions, dealt with above.[82] This view is summed up by the statement of Gibbs CJ that 'The external affairs power differs from the other powers conferred by section 51 in its capacity for almost unlimited expansion.'[83] The construction of this power has given rise to public debate and we have received a number of submissions with regard to it. We consider them in Chapter 10.[84]

2.81 The financial provisions of the Constitution, including the possibility of an interpretation of the taxation power in section51(ii.) to cover State taxation, raises issues that more directly concern the functioning of the States as independent units of the federation. They have been the subject of recommendations of the Australian Constitutional Convention. This matter is examined in detail in Chapter 11.[85]

Discrimination against out-of-State residents

2.82 Section 117 provides:

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

The reference to a 'subject of the Queen' was intended to exclude aliens from the benefit of this section. Apart from that, section 117 is clearly inspired by the federal principle. While it provides an individual protection or guarantee, its focus is on the relationship between a State and the people of other States. Its object does not include protection for the resident of a State against the Government of that State, as one would find in, say, a Bill of Rights. As Quick and Garran said: 'It is assumed that the resident subjects of the Queen will be the most favoured people and the special object of State consideration and

80 para 2.72.
81 (1983) 158 CLR 1.
82 para 2.65.
83 id, 100.
84 para 10.461 and following.
85 para 11.225 and following.

solicitude.'[86] It is appropriate therefore that section 117 should be discussed in the context of an examination of federalism, rather than in relation to the broader issue of individual rights against Governments, which is dealt with in Chapter 9.

2.83 In the few cases that have been decided involving section 117 the High Court has taken a very narrow approach which, in many situations, permits the States to evade the object of the provision. In *Davies and Jones v Western Australia*[87] the High Court held valid legislation that discriminated against persons who were not '*bona fide* residents of and domiciled in' Western Australia in its application to a plaintiff who was not resident or domiciled in that State. The Court rejected the argument that residence and domicile of choice were in practical reality so similar that they should be treated as amounting to the same thing.

2.84 The narrow and technical construction was further emphasised in *Henry v Boehm*.[88] In that case the Court considered South Australian admission rules for legal practitioners which provided (a) that an applicant for conditional admission, previously admitted elsewhere, must have resided in South Australia for three months continuously immediately before the filing of his application, except in the case of a person who ordinarily resided in or was domiciled in the State, and (b) that absolute admission would be granted one year later if during the period since conditional admission the applicant had 'continuously resided' in South Australia. The majority of the Court (Barwick CJ, McTiernan, Menzies and Gibbs JJ; Stephen J dissenting) upheld the rules on the ground that all persons whether permanently resident in South Australia or not had to satisfy the residential requirements. A resident in South Australia for the purposes of section 117 might be in fact residing in Victoria, as the plaintiffs were.[89]

2.85 The Royal Commission on the Constitution in 1929 expressed the view that cases such as *Davies and Jones v Western Australia* were not 'within the spirit of section 117' and they recommended adding to the end of section 117 a provision preventing a State, in imposing taxation, from discriminating against a person who was resident or domiciled in another State.

2.86 It is clear that the above decisions have resulted in section 117 having a very narrow impact. Indeed, many believe that the provision has been robbed of much of its vitality and purpose. While section 117 has been successfully applied to invalidate certain blatant provisions,[90] in other cases it can be avoided by various techniques.

2.87 To achieve the object of preventing less favoured treatment of out-of-State residents it seems to us that it is desirable to ensure that the notion of 'resident' in section 117 should not be confined to permanent residence. Mr Dennis Rose has suggested that the issue that arises out of cases such as *Davies and Jones* and *Boehm* could be dealt with by altering section 117 to include persons who are permanently or temporarily resident or domiciled in other States.[91] We agree with him.

86 Quick and Garran, 960.
87 (1904) 2 CLR 29.
88 (1973) 128 CLR 482, followed by the Supreme Court of Queensland in *Re Street* (1987) 74 ALR 604.
89 For a trenchant criticism of this case see D Rose, 'Discrimination, Uniformity and Preference' in L Zines (ed) *Commentaries on the Australian Constitution* (1977) 219-29.
90 *Australian Building Construction Employees' Etc Federation v Commonwealth Trading Bank* (1976) 2 NSWLR 371; *Commissioner of Taxes v Parks* (1933) SRQ 306; *Re Loubie* (1985) 62 ALR 139.
91 D Rose, 'Discrimination and Preference' in *Constitutional Reform and Fiscal Federalism,* Centre for Research on Federal Financial Relations, (1987), 61.

2.88 Such an alteration may not take care of all the possibilities of States endeavouring to favour their own people. It is not possible, however, particularly in a Constitution, to make detailed provision for every ingenious device that Governments may produce. In the long run it will be for the High Court to construe the provision in a manner that will ensure that its object is not undermined.

2.89 We see no reason to confine the protection to 'subjects of the Queen' or to Australian citizens. Also, having regard to our general approach throughout this Report in matters relating to the Territories, we believe that the protection should be extended to persons in and from the Territories.[92]

2.90 Section 117 as proposed would not prevent a residential period being prescribed for enrolment as an elector in a State electoral division or municipality. It might be argued however, that where the entire State is one electorate section 117 might be breached if a period of residence in the State was required as a condition of enrolment. We *recommend*, therefore, that section 117 should be qualified by permitting a law providing for reasonable residency requirements as a condition of enrolment as an elector.

2.91 We *recommend* that section 117 be omitted and the following provision be substituted:

> 117. (1) A person who is resident, temporarily resident or domiciled in any State or Territory shall not be subject in another State or Territory to any disability or discrimination on the ground or substantially on the ground of that residence, temporary residence or domicile.
>
> (2) Sub-section (1) of this section is not infringed by a law that imposes reasonable conditions of residence as a qualification for an elector.

The Constitution and State systems of government

2.92 It has been argued at times and in submissions to the Commission – notably by the Governments of Queensland and Tasmania – that the procedure in section 128 of the Constitution should not be used to alter the Constitution to affect the machinery of government in each State or to confer on the people of a State rights or guarantees in relation to their State Government.

2.93 The argument is as follows: The Federal Constitution is concerned with the creation, organisation and functioning of the Commonwealth and its institutions. The States and their governmental frameworks were not brought into existence by the Constitution. Their governmental organs and the functioning of those organs are left to State laws to control and regulate. So far as the States are concerned, therefore, the provisions of the Constitution are, and should be, confined to such matters as the distribution of legislative, executive and judicial powers among the Commonwealth and the States and the effect of State action on the people of other States. Any other provisions should be limited to the structure of federal institutions and restrictions on federal powers.

92 We received few submissions concerning section 117. The most detailed submission came from Mr Charles Lowe, who suggested changes which would have gone beyond what we recommend and were aimed at providing a means for gradually bringing about the creation of uniform laws in the States: S2195, 5 June 1987; S2290, 2 July 1987; S3966, 21 September 1987; S2759, 24 October 1987; S3967, 17 February 1988; S3300, 22 February 1988.

2.94 Those who adopt this view regard such issues as individual rights against State authorities, the right to vote and the value of the vote in State elections, responsible government in the States and the appointment and dismissal of State judges as of concern only to the Government and people of each State. They are of no legitimate interest or concern to the people of the Commonwealth as a whole.

2.95 In support of this approach, reference is made to section 106 of the Constitution, which provides:

> The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

2.96 The Constitution, generally speaking, does not lay down rules relating to the organisation and functioning of State Parliaments, Governments or courts. Also, a number of constitutional provisions that might be regarded as individual rights are applicable only in respect of federal laws. These include the right to trial by jury (section 80), to freedom of religion (section 116) and to just terms for the acquisition of property (section 51(xxxi.)). There are limitations on the exercise of State governmental power, but these are designed to protect the people of, or trade affecting, other States, such as section 117, which was examined earlier,[93] and section 92, which guarantees the freedom of interstate trade.

2.97 That is not to say that the Constitution does not impinge at all on the operation of State institutions. Section 12, for example, gives a State Governor the function of issuing writs for an election of senators for the State. Section 15 imposes a duty on State Houses of Parliament in relation to the filling of casual vacancies in the Senate. Section 120 requires every State to make provision in its prisons for the detention of persons accused or convicted of federal crimes. Section 77 empowers the Federal Parliament to invest State courts with federal jurisdiction. The fact remains, however, that the internal organisation of the States and the rights of their people are largely untouched by the Constitution.

2.98 For present purposes, the issue is not whether section 128 extends legally to controlling State governmental systems. We share the view of most commentators that it encompasses alterations to the Constitution dealing with these matters. The argument is rather that such action would destroy or impair the federal nature of the Constitution or, alternatively, would be fundamentally opposed to the scheme of union which provided the basis for the agreement by the people of the several colonies to federate.

2.99 We find it difficult to understand how constitutional provisions imposing limitations on the powers, or affecting the structures, of *all* Governments in Australia can be regarded as opposed to the concept of a federal society. The purpose of provisions of that nature is to protect the people, not to rearrange the distribution of power between the Federal and State Governments. For example, a provision extending section 80 of the Constitution to trials for State offences or one requiring just terms for the acquisition of property by a State would not increase the power of the Commonwealth. Both the Commonwealth and the States would be bound by similar provisions.

93 para 2.82-2.91.

2.100 There is certainly nothing in the nature of a federal constitution that is contrary to the presence of provisions relating to democratic rights, individual rights or governmental procedures in the State sphere. Indeed all the federal constitutions with which we are most familiar have provisions concerning these matters, including those of the United States, India, Canada and the Federal Republic of Germany.

2.101 The second argument against alteration of the Constitution in these respects is based primarily on historic considerations and, therefore, on conditions peculiar to Australia. Most of the Framers of the Constitution were colonial politicians. Naturally, their main concern was the creation, power and restrictions on power of the new polity. The immediate task did not require the dismantling of the colonial Constitutions and their reformulation as State Constitutions in the Federal Constitution. It was sufficient to continue in force the framework of government existing in each colony, subject to any changes made necessary by the union of those colonies. It is also the case that most of the Framers, while willing in some respects to protect their people from actions of the Commonwealth, and to entrench structural features of the Commonwealth, were not anxious to impose similar limitations or forms on their own Governments as States of the federation.[94]

2.102 What the Framers did recognise, however, was that they were creating a constitution for future generations, who would, in turn, be entitled to determine their form of government. They, therefore, devised section 128 of the Constitution.

2.103 Consequently, our task in considering what alterations should be made to the Constitution cannot be confined to the values held by the Framers, or by the people, at the end of the last century. That is not, of course, to suggest that many of their values and policies are not still those of the Australian people; others, however, may not be. Some events and some alterations made to the Constitution reflect a different attitude from that which prevailed at the Constitutional Conventions of the 1890s. From the viewpoint of the issue we are considering, the most significant is the control of all the governmental borrowing in Australia by a national body, the Loan Council (section 105A). Other changes include Australia's independence from Great Britain and federal responsibility for a wide range of social services (section 51(xxiiiA.)) and for Aborigines (section51(xxvi.)). The participation of the people of the Territories in referendums to alter the Constitution (section128) and the constitutional recognition of political parties for the purpose of filling casual vacancies in the Senate (section 15) provide other examples.

2.104 In any case, the Framers certainly did not limit section 128 in any way, and they further declared that section 106 was 'subject to this Constitution', which includes section 128.[95] Quick and Garran suggested that it was possible to regard the State Constitutions as receiving their authority from the Constitution of the Commonwealth. They said:

> By force of [section 106] it may be argued that the Constitutions of the States are incorporated into the new Constitution, and should be read as if they formed parts or Chapters of the new Constitution. The whole of the details of State Government and Federal Government may be considered as constituting one grand scheme provided by and elaborated in the Federal Constitution.[96]

94 L Zines, 'The Federal Balance and the Position of the States' in G Craven (ed), *The Convention Debates 1891-1898* (1986) vol VI, 79-81.

95 While section 106 continues State constitutions 'until altered in accordance with the Constitution of the State', it is clear that the latter phrase was inserted to prevent any argument that State constitutions were frozen as at 1900 and could not be altered by the State in the usual manner (Conv Deb, Melbourne 1898, vol I, 645). It had nothing to do with section 128, which authorises alterations of any provision of the Constitution, which, of course, includes section 106.

96 Quick and Garran, 903.

There are differences of opinion on this issue, as a matter of law.[97] But the fact that it was stated as a plausible construction, contemporaneously with the commencement of the Constitution, is clear evidence against the view that State constitutions were regarded, from a policy viewpoint, as beyond the appropriate scope of constitutional alteration under section 128.

2.105 In our view, the question comes back to whether the electors of the nation as a whole can have a sufficient interest to justify referring these matters to them under section 128 of the Constitution. We answer that question in the affirmative. Whether an alteration should be made in any particular case is, of course, a different issue. The circumstances of the States and the value of diversity and experimentation may weigh against a new constitutional provision. We consider, however, that examination of such a possible alteration should not be precluded merely because it would affect State Governments, Parliaments or courts.

2.106 If, as all would agree, the people at a referendum could determine to deprive the Commonwealth or States of a power by transferring it to the other Government, it is hard to understand why, for example, they should not, if they saw fit, deprive all Governments of any particular power, such as the making of a law to interfere with freedom of speech or religion or to deprive people of the right to vote. Whether such constitutional alterations would be desirable is, for present purposes, irrelevant.

2.107 A Constitution is, in part, concerned with the broad social and political values of the nation. Many have pointed out, both in literature and in submissions to the Commission, that national interest, need or concern should not be equated with federal power or federal policies. The nation, it is argued, can at times be better served by recognising the diverse needs and desires of the people of the States, considered severally. We believe there is much in this argument, but it is necessary to distinguish it from the matters we are at present considering, namely, submissions that the Constitution should include provisions reflecting fundamental values to which, it is said, the Australian people adhere, and to which all Governments should be subjected.

2.108 Of course, those who claim that a provision gives effect to a matter of concern nationally may be proved wrong by the results of a referendum. Those results may also indicate that the electors would prefer the States not to be subject to restrictions in the Constitution, whatever may be the position or relation to the Commonwealth. That, however, is different from saying that the people of Australia, acting in accordance with section 128 of the Constitution, have no sufficient interest to determine the question.

2.109 It is appropriate here to note some matters of a more subsidiary nature relating to practical difficulties in applying some constitutional restrictions to the Commonwealth and not to the States. Experience has shown that to limit federal power and not State power can result in inter-governmental arrangements designed to avoid the limitation. As indicated in Chapter 9 this has occurred in relation to the acquisition of property. The provision for just terms for acquisition by the Commonwealth, required by section 51(xxxi.), was avoided by an arrangement with a State for it to acquire land needed for a soldier settlement scheme, on other than just terms, by using funds supplied to the State by the Commonwealth under section 96 of the Constitution.[98]

97 It was supported by Barwick CJ in *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337, 372 and Murphy J in *Bistricic v Rokov* (1976) 135 CLR 552, 566. The opposite view was expressed by the Supreme Court of Western Australia in *Western Australia v Wilsmore* [1981] WAR 179.

98 *Pye v Renshaw* (1951) 84 CLR 58.

2.110 If provisions protecting individual rights, binding only the Commonwealth, were added in the Constitution, attempts at avoidance could increase. As the legislative power of the States is largely concurrent with that of the Commonwealth, the Federal Government, instead of proposing federal laws, might arrange with the States to deal with the matter, and so avoid the restriction on power.

2.111 In our view, there is nothing in the Constitution, in federal theory, in historic understanding, or in policy considerations that prevents us from examining issues related to State organisations of government or individual and democratic rights in State spheres of responsibility.[99]

AUSTRALIA'S STATUS AS AN INDEPENDENT NATION

2.112 Paragraph (a) of our Terms of Reference required the Commission, among other things, to report on the revision of the Constitution to 'adequately reflect Australia's status as an independent nation'.

Historical development

2.113 The Australian States were, by the time of Federation, self-governing colonies of Great Britain. They had been given constitutions by the Imperial Parliament. Under these constitutions the local Parliaments and Governments were left to manage their own affairs in local matters without interference from the Imperial authorities. In relation to those matters the Governor of the colony was required to act, by virtue of constitutional practice, on the advice of colonial ministers. In matters of Imperial concern the Governor was, however, responsible to the Imperial Government. In the last two or three decades of the nineteenth century the number of matters regarded as of Imperial significance was reduced. Generally speaking, by the time of federation, the Australian colonies had complete self-government except in fields of defence, foreign affairs and merchant shipping.

2.114 For the purposes of international law the British Empire was one unit or 'nation'. The Imperial Government was responsible to other nations for the observance within the whole Empire of treaties and other rules of international law. The colonies, therefore, had no power, for example, to enter into treaties, declare war and peace and send or receive ambassadors. It was no answer to a complaint to Britain from a foreign country that the act complained of was committed by the Government of a self-governing colony.

2.115 Provisions in all the colonial constitutions provided for the 'reservation' or 'disallowance' of legislation enacted by the colonial legislatures. The Governor might be instructed (or might choose), when presented with a colonial Bill, to 'reserve' it for Her Majesty's pleasure. What this meant was that it would be referred to the British Government to consider whether it should be allowed to become a law. In 1907 an Imperial Act – the *Australian States Constitution Act 1907* – set out classes of laws that were required to be reserved. In addition, the Queen, that is the British Government, could 'disallow' legislation passed by colonial parliaments within, usually, two years of its enactment. Upon being disallowed an Act ceased to be a law. By 1900 these powers of the British Government were exercised only in rare cases where Imperial or foreign interests were involved, such as laws which discriminated against the people of other countries (usually Asians or Africans).

99 Issues of this nature are examined in Chapters 4, 6, 7 and 9.

2.116 The British Parliament retained power to make laws for Australia; indeed the Australian Constitution was one such law. By virtue of the *Colonial Laws Validity Act 1865* (Imp), the colonial parliaments could not validly enact a law which was repugnant to an Imperial law that was expressed to operate within the colony. By 1900, however, the British Government pursued a policy of not making laws for the self-governing colonies on matters outside Imperial concern, unless the colonial Government requested it.

2.117 A further Imperial institution that bound all the colonies was the Judicial Committee of the Privy Council to which appeals could, in certain circumstances, be taken from the highest courts of the colonies. In form this was an appeal to the Queen, but it was in fact an appeal to a court of judges appointed by the Lord Chancellor, a British Minister.

2.118 The creation of the Commonwealth of Australia by the union of the six Australian colonies did not in itself change the status of Australia or its relationship with the United Kingdom. The restrictions referred to above[100] on the power of colonial Governments and legislatures continued, generally speaking, to apply to both the States and the Commonwealth. The same was true of the other great Dominions of the Crown, which by 1910 included Canada, New Zealand, South Africa and Newfoundland.

2.119 Section 74 of the Constitution of the Commonwealth, however, prevented appeals going to the Privy Council from the High Court in most constitutional cases (that is, those concerning the boundary between the powers of the Commonwealth and those of the States or between two or more States) unless the High Court of Australia certified that the case should go to the Privy Council. It also gave the Parliament of the Commonwealth the power to further limit appeals from the High Court. Any proposed law to that effect was required to be reserved 'for Her Majesty's pleasure', which in reality meant the approval of the British Government.

2.120 The Australian Constitution also contained provisions which, while they could not be given their full application because of Australia's status as part of the Empire, were seen by later judges to contain the potentiality of full nationhood. These included the power of the Parliament of the Commonwealth to make laws with respect to the defence of Australia (section 51(vi.)) and external affairs (section 51(xxix.)). Barwick CJ described this situation as follows:

> Whilst the new Commonwealth was upon its creation the Australian colony within the Empire, the grant of the power with respect to external affairs was a clear recognition, not merely that, by uniting, the people of Australia were moving towards nationhood, but that it was the Commonwealth which would in due course become the nation state, internationally recognised as such and independent. The progression from colony to independent nation was an inevitable progression, clearly adumbrated by the grant of such powers as the power with respect to defence and external affairs. Section 61, in enabling the Governor-General as in truth a Viceroy to exercise the executive power of the Commonwealth, underlines the prospect of independent nationhood which the enactment of the Constitution provided.[101]

2.121 The evolution toward nationhood of the British Dominions proceeded rapidly as a result of World War I, in which Australia and the other British countries played a prominent part. The first major step toward self-government in foreign affairs occurred at the Peace Conference of 1919. The Dominions had separate representation equivalent to that of other non-major powers. They signed the Peace Treaty, became members of the League of Nations, and were given mandated territories under the authority of the League.

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100 para 2.115.

101 *Seas and Submerged Lands Case* (1975) 135 CLR 337, 373.

2.122 The Imperial Conference of 1926 resulted in the famous 'Balfour Declaration' which declared that the United Kingdom and the Dominions 'are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations'. It was also stated that 'every self-governing member of the Empire is now the master of its own destiny'.

2.123 As a result of this resolution it was further declared (a) that the Governor-General was no longer a representative or agent of the British Government; (b) that the United Kingdom Government would not advise the King on Dominion matters against the views of the Dominion Government; and (c) that the Dominion Government had full power to enter into treaties, appoint ambassadors, etc, in its own right. In any case when action of the King was required, the King would act on the advise on the Dominion Government.

2.124 The above resolutions were put into effect without change of the law. There remained, however, some other legal disabilities on the Dominions, which conflicted with the broad scope of the Balfour Declaration, and which had to be removed by Imperial enactment. The Parliaments of the Dominions could not make laws contrary to Acts of the Imperial Parliament which operated in the Dominions, because of the provisions of the *Colonial Laws Validity Act 1865* (Imp). There was also some doubt as to whether the Dominion Parliaments could make laws operating outside their territories. These restrictions were abolished by the *Statute of Westminster 1931* (Imp) (sections 2 and 3) subject, in the case of Australia, to the adoption of the Act by the Parliament of the Commonwealth. This was done by the *Statute of Westminster Adoption Act 1942* (Cth), to operate from the outbreak of World War II, that is, 3 September 1939.

2.125 The legislative supremacy of the United Kingdom Parliament remained, but section 4 of the *Statute of Westminster 1931* (Imp) provided that no Act of the United Kingdom Parliament should extend to a Dominion as part of its law unless it expressly declared that the Dominion had requested and consented to its enactment. Sections 8 and 9 of the *Statute of Westminster 1931* (Imp) ensured that the power given to the Parliament of the Commonwealth to repeal or amend Imperial laws operating in Australia did not extend to overriding the Constitution.

2.126 In relation to World War II, Australia acted as if it were bound by the declaration of war by Great Britain against Germany and did not issue a separate declaration. Similarly the Australian Government assumed we were at war when Italy declared war against Great Britain on 10 June 1940. The Dominions of Canada and South Africa issued separate declarations of war in both cases. In respect of the declarations of war against Finland, Hungary, Rumania and Japan in 1941, a separate Australian declaration of war was made. The King, on the advice of the Australian Government, purporting to act under section 2 of the Constitution, assigned power to the Governor-General to make these declarations.

2.127 On the other hand, in 1951 the Commonwealth adopted the view that the Governor-General had the necessary authority to declare peace with Germany without any specific delegation from the Queen. The Solicitor-General, Professor KH Bailey, advised that the Governor-General could exercise all prerogatives relating to peace and war and that the assignment to declare war in 1941 was legally unnecessary.

2.128 It is clear from these events, and recognition by the world community, that at some time between 1926 and the end of World War II Australia had achieved full independence as a sovereign state of the world. The British Government ceased to have any responsibility in relation to matters coming within the area of responsibility of the Federal Government and Parliament.

Effect of independent nationhood

2.129 The sovereign status of Australia resulted in the rejection of earlier colonial restrictions on the interpretation of the powers of the Commonwealth. It has been declared by a number of High Court judges that the Governor-General, as the Queen's representative, possesses the prerogatives of the Crown relevant to the Federal Government's sphere of responsibility, which includes, for example, all matters relating to external affairs.[102]

2.130 The development of Australian nationhood did not require any change to the Australian Constitution. It involved, in part, the abolition of limitations on constitutional power that were imposed from outside the Constitution, such as the *Colonial Laws Validity Act 1865* (Imp) and restricting what otherwise would have been the proper interpretation of the Constitution, by virtue of Australia's status as part of the Empire. When the Empire ended and national status emerged, the external restrictions ceased, and constitutional powers could be given their full scope.

2.131 Sir Garfield Barwick has described the result, in relation to the Framers' purpose in drafting the Constitution as follows:

> The Constitution was not devised for the immediate independence of a nation. It was conceived as the Constitution of an autonomous Dominion within the then British Empire. Its founders were not to know of the two world wars which would bring that Empire to an end. But they had national independence in mind. Quite apart from the possible disappearance of the Empire, they could confidently expect not only continuing autonomy but approaching independence. This came within 30 years. They devised a Constitution which would serve an independent nation. It has done so, and still does.[103]

2.132 As a result of federal legislation all appeals to the Privy Council from Australian courts exercising federal jurisdiction were abolished in 1968 *(Privy Council (Limitation of Appeals) Act 1968* (Cth)). All appeals from any decision of the High Court (other than those where a certificate might be granted under section 74 of the Constitution) were terminated by the *Privy Council (Appeals from the High Court) Act 1975* (Cth).

2.133 The growth to full national status, of course, did not affect the position of the Commonwealth as a community under the Crown. While the preceding events dissolved most of the constitutional links with the British Government, those with the Sovereign remain.

2.134 Indeed the notion of the Crown pervades the Constitution. The preamble recites that the people of the named colonies had agreed to unite in a Federal Commonwealth under the Crown. The Queen is empowered by section 2 of the Constitution to appoint a Governor-General who 'shall be Her Majesty's representative'. Section 61 of the Constitution vests the executive power of the Commonwealth in the Queen and declares that it is exercisable by the Governor-General as the Queen's representative.

102 eg *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 406 (Jacobs J); *New South Wales v Commonwealth* (1975) 135 CLR 337, 373 (Barwick CJ).

103 PH Lane, *The Australian Constitution* (1986) viii.

2.135 These powers are, of course, consistent with British constitutional practice, exercised on the advice of Australian Ministers (except in those very rare cases which are said to come within the 'reserve powers' of the Crown). On those occasions when the Queen acts in her own capacity, such as in appointing the Governor-General, she also acts on the advice of Australian Ministers, rather than British ones, in accordance with the principle established at the Imperial Conference of 1926.

2.136 The position of the Queen as the Sovereign of a number of independent realms was recognised at a conference of Prime Ministers and other representatives of the nations of the Commonwealth in December 1952 where it was agreed that each country should adopt a form of Royal title suitable to its own circumstances. As a result, the legislation of each country of the Commonwealth (other than Pakistan which expected to become a Republic) included for the first time a reference in its Royal Style and Titles to the particular country which enacted the legislation.

2.137 The *Royal Style and Titles Act 1953* (Cth), therefore, for the first time referred to the Queen as 'Elizabeth the Second, by the Grace of God of the United Kingdom, *Australia* and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith'. As a result of amendments made in 1973 the present Royal Style and Titles in Australia are 'Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth.'

2.138 The disappearance of the British Empire has therefore meant that the Queen is now Sovereign of a number of separate countries such as the United Kingdom, Canada, Australia, New Zealand and Papua New Guinea, amongst others. As Queen of Australia she holds an entirely distinct and different position from that which she holds as Queen of the United Kingdom or Canada. The separation of these 'Crowns' is underlined by the comment of Gibbs CJ in *Pochi v Macphee*[104] that 'The allegiance which Australians owe to Her Majesty is owed not as British subjects but as subjects of the Queen of Australia.'

The States and the Australia Act

2.139 The evolution outlined above[105] related to Australia's sovereignty in international law and relations and to the independence of the Federal Government. For many decades after the attainment of Australian nationhood, however, the States of Australia remained restricted by rules and procedures that were relics of the Imperial past. In this respect they were unique in that those restrictions did not apply to the central or regional Governments of any other country that was an independent member of the Commonwealth of Nations.[106] Some of these restrictions were as follows:

(a) The States remained subject to the *Colonial Laws Validity Act 1865* (Imp). The result was that a number of United Kingdom Acts passed in the last century or earlier this century were binding on the States, so they could not alter them. In order to change the law it was necessary to ask the British Government to introduce a Bill in the United Kingdom Parliament.

(b) State courts exercising State jurisdiction remained subject to appeals to the Privy Council. This right could not be abolished by State legislation. It resulted in the situation that a litigant who lost in a State court could often appeal either to the Privy Council or the High Court, depending on his or her view as to which court would be more likely to decide in that person's favour. The party who had won in the State court had no such choice. As the

104 (1982) 151 CLR 101, 109.
105 para 2.113-2.138.
106 Although the Canadian Constitution did not until 1982 contain provisions for its own amendment.

High Court was not bound by Privy Council decisions, the system of precedents threatened to become chaotic. If High Court decisions differed from those of the Privy Council, State courts were in great difficulty as to which decisions they should follow.[107]

(c) The State Governments could not give advice to the Queen on State matters. In relation to such matters as the appointment of a Governor or the assent to Bills on matters within the State's area of responsibility that were required to be 'reserved' for the Queen's assent, the advice to the Queen had to be formally that of a United Kingdom Minister of State.

(d) There was some doubt as to the extent to which the States could make laws that had extra-territorial operation.

2.140 These restrictions were all abolished by the *Australia Act 1986*. There are two versions of that Act. One was passed by the Parliament of the Commonwealth under section 51(xxxviii.) of the Constitution, which confers on the Parliament of the Commonwealth the power to make laws with respect to:

> The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

All the State Parliaments enacted legislation consenting to the enactment of the federal statute.

2.141 The Parliament of the Commonwealth then enacted a law under section 4 of the *Statute of Westminster 1931* (Imp) requesting and consenting to the enactment by the United Kingdom Parliament of a law in almost identical terms with the Australian version of the *Australia Act 1986* (Cth). The United Kingdom Parliament enacted the legislation requested. Both the Australian and British Acts came into force at the same time on 3 March 1986. Thus, by joint action of all the Parliaments of Australia and the United Kingdom, the legislative, executive and judicial institutions of the United Kingdom ceased to have any power, responsibility or jurisdiction in respect of Australian affairs. Constitutional government in Australia, in all its aspects, was brought into line with that of all other members of Commonwealth of Nations that recognise the Queen as Head of State.

2.142 The main provisions of the *Australia Act*, so far as they are relevant to the independence of Australia, are as follows:

(a) The power of the British Parliament to legislate for Australia is terminated (section 1). Consequently the provisions of the *Statute of Westminster 1931* (Imp) relating to a 'request and consent' to the enactment of laws by the British Parliament are repealed (section 12).

(b) The States are given power to make laws repugnant to Imperial legislation, and the application of the *Colonial Law Validity Act 1865* (Imp) to the States is terminated (section 3).

(c) The Governor of a State is declared to be Her Majesty's representative. All the powers and functions of the Queen are exercisable 'only' by the Governor except those to appoint, and terminate the appointment of, the Governor. However, the Queen is not precluded from exercising any of her powers when she is personally present in the State. Advice to the Queen on State matters is required to be tendered by the Premier (section 7).

107 *Viro v R* (1978) 141 CLR 88.

(d) Provisions for disallowance and reservation of State legislation are abolished (sections 8 and 9).

(e) It is declared that 'Her Majesty's Government in the United Kingdom shall have no responsibility for the government of any State' (section 10).

(f) Appeals to the Privy Council are abolished (except where, as stated in section 74 of the Constitution, the High Court grants a certificate in relation to certain constitutional questions. No such certificate has been given since 1912.) (section 11).

(g) The States are given power to make laws that have extra-territorial operation. The State Parliaments have the power to make any laws for the peace, order and good government of the State which might have been exercised by the United Kingdom Parliament (section 2).

(h) The increased legislative power given to the States does not affect the operation of the *Commonwealth of Australia Constitution Act 1900*, the Constitution or the *Statute of Westminster 1931* (Imp).

(i) The *Australia Act* and what remains of the *Statute of Westminster 1931* (Imp) can be repealed or amended only by (a) a Federal Act which has the concurrence of all the State Parliaments, or (b) alteration to the Constitution, under section 128, conferring power on the Commonwealth.

2.143 It is unnecessary for our purposes to examine the power of the Parliaments of the Commonwealth and the United Kingdom to enact each of the *Australia Acts*. The extent of the power of the Parliament of the Commonwealth under section 51(xxxviii.), upon which the Federal Act relies, has not been fully explored by the High Court. That was the reason for the enactment of legislation by both the Australian and British Parliaments. It seems clear that, on one basis or the other, the *Australia Act* is part of the law of Australia.

2.144 Historically, as the enacting clause of the *Commonwealth of Australia Constitution Act 1900* states, the Constitution derived its authority from the principle of subservience to the British Parliament. As that Parliament no longer has any authority in Australia, the legal basis of the Constitution no longer rests on any paramount rule of obedience to that institution. The legal theory that sustains the Constitution today is its acceptance by the Australian people as their framework of government. The Federal Parliament and Government are, themselves, created by the Constitution. It is our fundamental law.

2.145 Accepting, therefore, that Australia is in every respect an independent nation, both politically and legally, are there any alterations to the Constitution that are required to 'adequately reflect' this fact?

2.146 Some provisions of the *Commonwealth of Australia Constitution Act 1900*, including the Constitution, are based on the assumption that Australia is a dependency of Great Britain. This assumption was accurate at the time of the Constitution's enactment but it is no longer so. There has been doubt expressed as to whether, under section 128 of the Constitution, it is possible to alter the preamble and the first eight sections of the *Commonwealth of Australia Constitution Act*, known as the 'covering clauses'. We have concluded that such alterations can be made under section 128.[108]

The enacting clause

2.147 The enacting clause of the *Commonwealth of Australia Constitution Act 1900* declares that the Act is 'enacted by the Queen's most Excellent Majesty, by and with the

108 See Chapter 3 under the heading 'Bases for altering the preamble and covering clauses', para 3.103-3.123.

advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same.' A similar clause was omitted from the *British North America Act 1867* (now called the *Canadian Constitution Act)* by the *Statute Law Revision Act 1893* of the United Kingdom. The purpose seems to have been to facilitate the reprinting of British Acts.[109]

2.148 As explained above,[110] the British Parliament is no longer part of the Australian constitutional system. It cannot therefore be said that the authority of the Constitution now rests on the will of that Parliament. It could be argued, therefore, that the enacting clause gives a false impression of the present legal basis of the Constitution. It could give the impression to a reader who is uninformed by history or the provisions of the *Australia Act* (which are not part of the Constitution) that Australia is still subject to the will of the legislature of the United Kingdom. The *Constitution Acts* of most of the States now contain only enacting clauses that refer to the Parliament of the State concerned.[111]

2.149 We believe therefore that the enacting clause should be omitted and we *recommend* accordingly.

'The Crown of the United Kingdom of Great Britain and Ireland'

2.150 Of more practical moment, however, are references to the 'Crown' or 'The Queen' of the United Kingdom. The preamble declares the agreement of the people to unite 'under the Crown of the United Kingdom of Great Britain and Ireland'. Covering clause 2 of the *Commonwealth of Australia Constitution Act 1900* provides that: 'The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.' 'The Queen' is referred to in covering clauses 3 and 5 and, in the Constitution, in sections 1-4, 58-61, 64, 68, 74, 122, 126, 128, and the Schedule to the Constitution.

2.151 As discussed earlier,[112] the sovereignty of the United Kingdom in 1900 referred to the sovereignty of the entire empire of that country. There was in law and in fact no distinct Monarch of Australia, Canada, New Zealand, etc. There was just the one and indivisible sovereign of all parts of the Queen's dominions. When the Queen, as distinct from the Governor-General or a Governor, acted in relation to either the United Kingdom or overseas possessions of the Crown she acted on the advice of ministers of the United Kingdom. The Crown, therefore, was one Imperial Crown. That is no longer the case. The sovereignty of each of the countries that recognise Queen Elizabeth II as their Queen is separate and distinct from that of any other country. Whether in domestic or foreign affairs the 'Crown of the United Kingdom' may pursue quite different policies from that of the Crown of Australia. The Queen's advisers are different in each case. The reference to the United Kingdom is therefore a source of confusion and does not reflect the position of the Crown in Australia today.

2.152 The Advisory Committee on Executive Government[113] recommended against changing the preamble or covering clause 2. The Committee's reason was that it was unlikely that if the Monarchy was to survive in Australia, it would do so if it involved the

109 *Memorandum relating to Statute Law Revision,* 1891 (c-6420) LXIII 873 at 878. Section 1 of the Act provided that the omissions and repeals effected by *Statute Law Revision Act* should not affect the binding force, operation or construction of the Act affected. We do not consider such a provision is necessary in the case of an omission of the enacting clause of the *Commonwealth of Australia Constitution Act 1900.*

110 para 2.128.

111 Western Australia and Tasmania are exceptions.

112 para 2.114.

113 Executive Report, 8.

designation of any person other than the Monarch of the United Kingdom; so, in its view, while a reference to the Queen as Queen of Australia 'might be appropriate', there was 'no practical need' for the change.

2.153 We are unable to accept fully the Executive Committee's recommendation. First, our Terms of Reference require us to report on the revision of the Constitution to 'adequately reflect Australia's status as an independent nation'. We consider that covering clause 2 gives the impression that our Monarch must be chosen according to the law of another country and, further, it can mislead a person to the view that the institution of Monarchy in Australia is not an entirely separate institution from the Monarchy in the United Kingdom. It can hardly be said, therefore, that covering clause 2 reflects Australia's independent status. The reverse is the case.

2.154 Secondly, accepting for present purposes the Executive Committee's view that the Monarchy in Australia would not survive if the person holding the position of Sovereign in Australia was different from that in the United Kingdom, we do not understand how this conflicts with ensuring that the Constitution reflects existing legal and political reality.

2.155 The Australian Constitutional Convention at the Hobart (1976) session resolved that covering clause 2 be replaced by a provision referring to the Queen in the sovereignty of Australia.[114]

2.156 We *recommend*, accordingly, that:

(a) in covering clause 2 the words 'the United Kingdom' be omitted and the word 'Australia' be substituted; and

(b) in the Note to the Schedule to the Constitution the words 'the United Kingdom of Great Britain and Ireland' be omitted and the word 'Australia' be substituted.[115]

Succession to the Throne

2.157 The *Act of Settlement 1701* (Imp), which regulates Royal succession, requires that the Monarch be a member of the Church of England. The Executive Committee stated that 'this is certainly not appropriate to Australian conditions, and it certainly seems inconsistent with the spirit of section 116 of the Constitution'. They refrained, however, from recommending any change, and added: 'If any action were taken on this matter, it might be undertaken as part of the agenda of Commonwealth Heads of Government.'[116]

2.158 As a result of the *Australia Act 1986* (Cth) (and before that the *Statute of Westminster 1931* (Imp), unless there was a 'request and consent') no alteration of the law of Royal succession by the United Kingdom Parliament can operate in Australia. Subject to consideration of covering clause 2 of the *Commonwealth of Australia Constitution Act 1900*, therefore, if Britain changed its rules as to Royal succession, Britain and Australia could have different Monarchs. It might be argued, however, that covering clause 2 of the *Commonwealth of Australia Constitution Act 1900* requires Australia to have as its Sovereign the King or Queen of the United Kingdom. That is to say, even though a change to the law of the United Kingdom would not operate of its own force in Australia, covering clause 2 would automatically apply it to Australia.

114 ACC Proc, Hobart 1976, 140-4.

115 In any case we point out that the 'United Kingdom of Great Britain and Ireland' ceased to appear in the British Royal style and titles in 1953. 'The United Kingdom of Great Britain and Northern Ireland' was substituted.

116 Executive Report, 8.

2.159 We do not accept that view. It is inconceivable that in 1900 any attempt would have been made to provide for a separate law of Royal succession for Australia as distinct from the Empire as a whole. Covering clause 2 did not enact, but assumed, the existence of the Royal succession law operating in Australia, namely an Imperial law governing an Imperial crown. Covering clause 2 merely embodied an accepted principle of statutory interpretation that the reference to the reigning Monarch extended to her heirs and successors according to law, and was not confined to Queen Victoria.

2.160 This reasoning is, we think, confirmed by action taken in relation to the *British North America Act.* Section 2 of that Act was similar to covering clause 2 of the *Commonwealth of Australia Constitution Act 1900.* It was repealed by the *Statute Law Revision Act 1893* of the United Kingdom, which altered many other Acts. The reason for the repeal appears to have been the enactment of the *Interpretation Act 1889* of the United Kingdom which provided that in any Act references to the sovereign or the Crown should, unless the contrary intention appeared, be construed as references to the sovereign for the time being.[117]

2.161 It follows that if Britain altered the law of Royal succession it would not operate in Australia, despite the existence of covering clause 2 of the *Commonwealth of Australia Constitution Act 1900,* nor is it possible, since the *Australia Act 1986* and repeal of section 4 of the *Statute of Westminster 1931* (Imp), for the Commonwealth to request and consent to British legislation, as Canada did in relation to the abdication of King Edward VIII.[118] The alteration we have suggested to covering clause 2 of the *Commonwealth of Australia Constitution Act 1900* would of course put an end to any argument to the contrary.

2.162 No express power is given in the Constitution to make laws as to Royal succession. At present there are three possible bases of authority to make such laws. First, the power may be said to be derived from the existence of the Commonwealth as a national Government. Many High Court judges have recognised that the Commonwealth possesses powers which, while not expressly granted, are inherent in the fact of it being the national Government of Australia.[119] It may be that this implied power would support federal laws relating to Royal succession. It is not in competition with State power, there is no Imperial power and the throne is now clearly a national institution. Secondly, on the reasoning of some judges in *Kirmani v Captain Cook Cruises Pty Ltd [No 1]*[120] such a law could be supported under section 2 of the *Statute of Westminster 1931* (Imp) which grants power to the Parliament of the Commonwealth to repeal or amend any Imperial law (other than the *Commonwealth of Australia Constitution Act 1900* and the Constitution) which is not within the exclusive authority of the States. Thirdly, it may be possible for the Commonwealth, with the consent of all the States, to amend the law of Royal succession under section 51(xxxviii.) of the Constitution.

2.163 The members of the Executive Committee did not express a view on the Commonwealth's power to deal with the succession to the throne, confining themselves to the issue of Royal style and titles. They did, however, refer to the opinion of others that the Commonwealth had such power.[121] The Executive Committee did not recommend any alteration relating to legislative power with respect to Royal succession. In not doing

117 52 & 53 Vict 1889 Ch 63 section 30.
118 KH Bailey, 'The Abdication Legislation in the United Kingdom and in the Dominions' (1938) 3 *Politica* 1, 17-8; L Zines, *The High Court and the Constitution,* op cit, 280-3.
119 *Victoria v Commonwealth & Hayden* (1975) 134 CLR 338.
120 (1985) 159 CLR 351.
121 Executive Report, 7-8.

so, the members were no doubt influenced by their expressed view that it was not practical to envisage Australia as a Monarchy with a sovereign different from that of the United Kingdom.

2.164 If, however, the United Kingdom altered the rules of succession, as occurred during the abdication of 1936, those rules would not apply to Australia. On the assumption made by the Advisory Committee, a Federal Government and Parliament might, in those circumstances, wish to bring the rules in line with those of the United Kingdom. While, as explained above,[122] we believe that, on one basis or another, the Commonwealth would probably have the legislative power, the position should be made clear.

2.165 Connected with succession to the Throne is the issue of regency. The need for the appointment of a regent arises during the Sovereign's minority or incapacity or (in the case of the United Kingdom) her temporary absence from the realm.[123] We consider that the legislative power of the Commonwealth should extend to these matters.

2.166 We *recommend*, therefore, that it would be more appropriate to the status of Australia as an independent nation for the Constitution to confer on the Parliament of the Commonwealth an express power to make laws with respect to succession to the Throne, and regency, in the sovereignty of Australia.

Reservation and disallowance

2.167 Sections 58, 59 and 60 of the Constitution provide as follows:

> 58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.
>
> The Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.
>
> 59. The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.
>
> 60. A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it has received the Queen's assent.

2.168 As mentioned above,[124] provisions in colonial constitutions for reservation and disallowance were designed to ensure Imperial surveillance of colonial legislation. The convention in 1900 was that the Queen would in relation to such matters act on the advice of a British minister. This convention was changed at the Imperial Conference of 1926 which made it clear that the Queen would act in conformity with the views of the Dominion Government.

2.169 Some of the submissions made to the Commission and some public statements of various persons suggest that the provisions for reservation of Bills for the Queen's assent and the power of disallowance by the Queen provide a safeguard in extreme cases against

122 para 2.162.
123 *Regency Act 1937, Regency Act 1953* (Imp).
124 para 2.115.

harmful legislation. As explained above,[125] that is not so. The Monarch's duty in such cases, recognised by all, including the Queen herself, is to act on the advice of the appropriate Government, which in this case is the Federal Government. Whatever might be comprised in 'the reserve powers of the Crown', it clearly does not include the power of the Queen to refuse assent to a Bill duly passed or to disallow a law against ministerial advice. This was clearly recognised when the *Australia Act 1986* repealed provisions for reservation and disallowance in respect of State legislation. As we have indicated, the purpose of those provisions related to circumstances that no longer exist.

2.170 Further, section 59 as it exists is in fact a danger to parliamentary government and democratic institutions. It enables a Federal Government to advise the Queen to disallow a law that it is unable to have repealed by the Parliament of the Commonwealth.

2.171 The Australian Constitutional Convention resolved at the Hobart (1976) session that section 59 should be repealed.[126] At the Adelaide (1983) session of the Convention it was further resolved that the power of reservation in section 58 should be repealed.[127] The Advisory Committee on Executive Government recommended the removal of the power of reservation in section 58 and the repeal of sections 59 and 60.[128] Since that Report, the Government of Queensland has supported those aspects of the Advisory Committee's recommendations.[129]

2.172 We *recommend*, therefore:

(i) that section 58 be omitted and the following provision substituted:

> 58. (1) Subject to sub-section (2), when a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, the Governor-General shall, on being so advised by the Federal Executive Council, assent to it in the Queen's name.
>
> (2) The Governor-General in Council may return to the House in which it originated a proposed law so presented to him and may transmit with it any amendment that the Governor-General in Council recommends and the Houses may deal with the recommendation; and

(ii) that sections 59 and 60 be repealed.[130]

2.173 The Executive Committee recommended that section 58 be altered to provide simply that a Bill 'shall become law when the Sovereign or the Governor-General assents to it and signs it in token of such assent.'[131] In our above recommendation we have not adopted the view of the Executive Committee. We consider that the power to return a Bill to the Parliament to correct errors is of practical benefit.[132]

2.174 The only provision of the Constitution which expressly requires reservation of a Bill is that contained in section 74 dealing with Bills to limit appeals from the High Court to the Privy Council. This power has been exercised by the Commonwealth and all such

125 para 2.135.
126 ACC Proc, Hobart 1976, 207.
127 ACC Proc, Adelaide 1983, vol I, 321.
128 Executive Report, 9.
129 Government of Queensland S3290, 4 February 1988; see also Government of Tasmania S1453, 15 March 1987.
130 The reference to 'the Governor-General shall, on being so advised by the Federal Executive Council' in the proposed section 58 is in accordance with recommendations we make in Chapter 5.
131 Executive Report, 44.
132 The Government of Queensland saw no need for an alteration of the type proposed by the Advisory Committee. It pointed out that the power concerned would be exercised on ministerial advice. S3290, 4 February 1988, 31.

appeals have been abolished except those for which a certificate of the High Court is required under the first paragraph of section 74.[133] We deal with this question in Chapter 6.[134]

PARLIAMENTARY GOVERNMENT IN AUSTRALIA

2.175 The Terms of Reference of the Commission required us to consider recommendations for alteration of the Constitution to 'adequately reflect Australia's status as . . . a Federal *Parliamentary* democracy'. This assumes that Australia (a) has a system of parliamentary government, and (b) is a democracy. The two terms are not synonymous. Both Britain and the Australian colonies had a system of parliamentary government before the introduction of universal adult suffrage, which today would be regarded as essential to being a democracy. On the other hand, there are countries such as the United States which are democracies, but which do not have parliamentary government. It is proposed here to discuss the latter concept. The issue of democracy in Australia is dealt with in Chapter 4.

2.176 Professor O Hood Phillips, speaking of Great Britain, has said that parliamentary government

> expresses the idea that the Houses of Parliament, especially the Commons, claim the right to supervise every aspect of the administration. The government of the country is carried on by Ministers who sit in Parliament, and it is carried on through Parliament in the sense that Ministers submit their policies to the Houses for approval, they rely on Parliament to pass any laws that may be necessary to implement those policies, and they answer questions in the House concerning matters dealt with by their departments.[135]

The extent to which this description conforms to reality is discussed later.[136]

Responsible government

2.177 Part and parcel of the notion of parliamentary government is 'responsible government', whereby the ministers are individually and collectively answerable to the Parliament and can retain office only while they have the 'confidence' of the lower House, that is, the House of Representatives in the case of the Commonwealth and the Legislative Assembly or House of Assembly in the case of the States.

2.178 In general terms the governmental system in the federal sphere operates in the following manner: After a general election the Governor-General commissions a member of the Parliament to be Prime Minister. The person chosen is the leader of the party (or one of a coalition of parties) which obtained a majority of seats in the House of Representatives. If no party or coalition is in that position, then a commission will be offered to the person who the Governor-General thinks is able to obtain the general support or 'confidence' of a majority of that House. Other Ministers of the Government are appointed by the Governor-General on the 'advice' of the Prime Minister from among the members of Parliament. Although termed 'advice', it is never rejected by the Governor-General.

133 *Privy Council (Limitation of Appeals) Act 1968; Privy Council (Appeals from the High Court) Act 1975.*

134 para 6.97 and 6.109-6.110. Other provisions which do not relate to Australia's status as an independent nation, but which are in other respects outmoded or expended, are considered in later Chapters of this Report: Chapter 4, para 4.146-4.159; Chapter 5, para 5.100, 5.129, 5.222; Chapter 11, para 11.157, 11.283-11.284, 11.295, 11.316, 11.372-11.373.

135 O Hood Phillips, *Reform of the Constitution* (1970) 14-5.

136 para 2.187-2.199.

2.179 The nominations of the Prime Minister will depend upon the rules of his or her political party. In the case of the Australian Labor Party, for example, the members of Parliament of that Party (the caucus) vote on who should be Ministers, and the Prime Minister chooses the portfolios each Minister will hold. In the case of a coalition (Liberal/National Party) Government the nominations and portfolios may be the subject of an agreement between the two parties or between the leaders of the two parties. Since 1956, except during the years 1973, 1974 and 1975, about half the Ministers have constituted the Cabinet. The Governor-General plays no part in those appointments. (The nature of the Cabinet is described below.)[137]

2.180 The Ministry, which comprises all the Ministers and constitutes 'the Government', exercises all the powers of Government authorised by law. At common law a significant number of powers and responsibilities of Government are conferred on 'the Crown'. Some of these are called 'prerogatives'. These powers include the conduct of foreign affairs, such as the negotiation, conclusion and ratification of treaties, the making of war and peace, and the prerogative of mercy. Other powers include defence matters, Government expenditure and control of the public service and the Defence Force. Some of these matters are now regulated by Acts of Parliament. The Constitution confers specific powers on the Governor-General or 'the Governor-General in Council', such as the summoning and dissolution of Parliament, the issue of writs for a referendum, and the appointment of judges of federal courts. A great many Acts of Parliament also give specific powers to the Governor-General in Council relating to a wide variety of matters involving the making of regulations, the appointment to offices, and administrative decisions.

2.181 In these cases (and subject only to the rarest exceptions, discussed below)[138] it is the Government of the day or a Minister of the Government who makes the decisions. While the Constitution or the Act concerned may require the signification of the Governor-General's assent, the Governor-General must, in the long run, accept the advice offered. It is the Government that accepts the political responsibility for those acts. Many Acts of Parliament in fact confer power directly on 'the Minister'.

2.182 As indicated above,[139] various provisions of the Constitution confer power on 'the Governor-General', others on the 'Governor-General in Council'. The latter term is defined as the Governor-General acting with the advice of the Federal Executive Council.[140] This is explained below.[141] For present purposes it is necessary to emphasise that (except in rare cases to be mentioned) the different forms in which vice-regal power is conferred does not affect the application of the principles of responsible government. In each case Ministers of the Government accept the responsibility, and in each case the Governor-General acts on Ministerial advice. The distinction merely affects the form in which the advice is given and the formal steps that must be taken on the presentation of that advice.

2.183 For example, section 68 of the Constitution provides that 'The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.' In an address to the Joint Services Staff College in 1983,

137 para 2.186.
138 para 2.214-2.223.
139 para 2.180. See also para 2.189 below.
140 Section 63 of the Constitution.
141 para 2.190.

the present Governor-General, Sir Ninian Stephen, made it clear that under that provision the position of commander in chief was purely ceremonial and that in military, as in civil, matters the Governor-General has no independent discretion.[142]

2.184 In carrying out all these duties and powers the Government is said to be 'responsible' to the House of Representatives. Just as the Government is formed from those who have 'the confidence' of that House, so the House can cause the dismissal of the Government by expressing its lack of confidence in various ways; for example, by express resolution or by denying 'supply' (that is, authority to expend public funds for running the Government).

2.185 According to the doctrine of responsible government, Ministers are collectively and individually responsible for their actions and policies. What this means is that all Ministers must be regarded as equally responsible for, and bound by, the decisions of the Government. Whatever views they may have expressed in the Cabinet they must publicly support Government policy. A Minister who feels unable to do so is under an obligation to resign. If such a person does not resign the Prime Minister can cause the Governor-General to terminate his or her commission as a Minister. There have been many occasions in Australian history, however, where public Ministerial disagreement has not led to these consequences.[143]

2.186 Within the Government the most important and powerful body is the Cabinet. The most important and powerful person is the Prime Minister. Quick and Garran had this to say of the Cabinet:

> The principle of the corporate unity and solidarity of the Cabinet requires that the Cabinet should have one harmonious policy, both in administration and in legislation; that the advice tendered by the Cabinet to the Crown should be unanimous and consistent; that the Cabinet should stand or fall together. The Cabinet as a whole is responsible for the advice and conduct of each of its members. If any member of the Cabinet seriously dissents from the opinion and policy approved by the majority of his colleagues it is his duty as a man of honour to resign. Advice is generally communicated to the Crown by the Prime Minister, either personally or by the Cabinet minute. Through the Prime Minister, the Cabinet speaks with united voice. The Cabinet depends for its existence on its possession of the confidence of that House directly elected by the people, which has the principal control over the finances of the country.[144]

The provisions of the Constitution

2.187 The features set out above of our political system are not, except in minor respects, provided for in the Constitution. They are regarded by most people as part of the 'conventions of the Constitution' as distinct from the law of the Constitution (the notion of 'conventions' is discussed later).[145] Justice Mason (now the Chief Justice) in the course of a judgment of the High Court referred to the conventions with which we are concerned this way:

> ... ministerial responsibility means (1) the individual responsibility of Ministers to Parliament for the administration of their departments, and (2) the collective responsibility of Cabinet to Parliament (and the public) for the whole conduct of administration .... The principle that in general the Governor defers to, or acts upon, the advice of his Ministers, though it forms a vital element in the concept of responsible government, is not in itself an instance of the doctrine of ministerial responsibility. It is a convention, compliance with

142 Sir Ninian Stephen, 'The Governor-General as Commander-in-Chief' (1984) 14 *Melbourne University Law Review*, 563.
143 S Encel, *Cabinet Government in Australia*, (2nd edn, 1974) Ch12.
144 Quick and Garran, 705-6.
145 para 2.192-2.194.

which enables the doctrine of ministerial responsibility to come into play so that a Minister or Ministers become responsible to Parliament for the decision made by the Governor in Council, thereby contributing to the concept of responsible government .... Conformably with this principle there is a convention that in general the Governor-General or the Governor of a State acts in accordance with the advice tendered to him by his Ministers and not otherwise ....[146]

2.188 Nowhere in the Constitution is there to be found, either at all or in clear terms:

(a) the duty of the Governor-General to appoint a Government that has the confidence of the House of Representatives;

(b) the duty of the Governor-General to act on the advice of Ministers;

(c) the power of the House of Representatives to get rid of the Government, or the general answerability of the Government to the legislature;

(d) any mention of the Cabinet, the Prime Minister, or the notion of collective responsibility.

The Parliament and the Executive are referred to as two separate organs of government, the first having vested in it the legislative power (section 1) and the second the executive power (section 61).

2.189 In relation to the Executive Government, the main provisions of the Constitution are as follows:

> 61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.
>
> 62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.
>
> 63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.
>
> 64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.
>
> Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.
>
> After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

Other provisions give the Governor-General specific powers, for example, section 5 relating to the summoning and dissolution of the House of Representatives; section 57, dealing with the dissolution of both the Senate and the House of Representatives and the convening of a joint sitting of the two Houses; sections 58 and 59, assent to Bills; section 68, the command of naval and military forces; section 72, the appointment of federal judges and section 128, the submission of proposed alterations to the Constitution to a referendum.

2.190 The Federal Executive Council referred to in the above provisions is not the Cabinet. It is a purely formal body required to give legal effect to Cabinet or Ministerial decisions and appointments. Indeed it is rare for more than two or three Ministers to be

146 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 364-5.

present at its meetings. No argument or discussion takes place there relating to the determination of policies. As Dixon J said, a decision of the Governor-General in Council is merely 'the formal legal act which gives effect to the advice tendered to the Crown by the Ministers of the Crown.'[147]

2.191 The only provision that hints at our system of parliamentary government, outlined above, is that in section 64 which requires that no Minister of State shall hold office for a longer period than three months unless that person becomes a member of Parliament. Nearly all the elements and mechanism of parliamentary government are therefore missing from the Constitution, and rest largely on traditional rules and principles derived largely from British practice. So far as the express provisions of the Constitution are concerned, a person unfamiliar with our history and political development and practices would deduce that the Governor-General had enormous discretionary power similar to that claimed by the early Stuart Kings in England. Such a person could also deduce that the Government and the Parliament are separate institutions similar to the separation that exists between the Government (or the Parliament) and the judiciary.

2.192 This is where the concept of constitutional conventions becomes important. The above provisions of the Constitution were inserted on the assumption that certain conventions would operate, namely those principles of parliamentary government and Ministerial responsibility which have been described above.[148]

2.193 Generally speaking, constitutional conventions are not enforced by the courts. They are, none the less, regarded as imposing duties on those to whom they are directed. Most of the conventions with which we are concerned were the result of about 250 years of evolution of British parliamentary government. As they are the result of growth and change, conventions may vary in strength and clarity. Some will be more fluid and flexible than others. Argument may also take place as to whether a particular practice is just that, or whether, having regard to its place in the scheme of things, past acknowledgement of it as a rule of conduct and the consequences for the government of the country of not following it, the practice has become a convention. The argument, however, is not resolved in the courts.

2.194 Some rules, however, are firm, and clear and regarded by all as obligatory. It is with these that we are mainly concerned.

2.195 The Constitution, for example, requires an Act of Parliament to have received the assent of the Governor-General. It is the traditional view that the duty of the Governor-General to act on the advice of the appropriate Minister to assent to a Bill that has been passed by both Houses of Parliament rests on the conventions of the Constitution. If the Governor-General refused, the courts could not, on this view, enforce that duty as the Constitution does not prescribe it. The courts would be forced to declare that the Bill had not become law. In those circumstances the Governor-General would probably be replaced by action of the Queen on the advice of the Prime Minister acting under section 2 of the Constitution.

2.196 Indeed, the principle that the Governor-General cannot refuse to assent to a Bill because of his or her personal views is so well accepted as fundamental that Professor Sawer has suggested that 'it is likely enough that such action on the part of the Governor-General would be treated as evidence that he had gone mad, and that his removal on that ground alone would be endorsed by the Queen.'[149] While the courts could not enforce this

147 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 179.
148 para 2.177-2.186.
149 G Sawer, *Federation under strain* (1977) 184.

conventional duty of the Governor-General, however, the example has little to do with reality. The strength of these widely accepted practices rests on the basis of political and social power and general acceptance. A Governor-General who persisted in acting on personal political views would not be able to retain a Government for long and would eventually incur the opposition of all the political parties in the country.

2.197 An alternative view, relying in the main on sections 62 and 64, treats the incorporation of responsible government into the Constitution as having a legal as opposed to a merely conventional effect. This view would treat Governors-General as bound in law to exercise their powers to assent to laws as they were advised and not otherwise.

2.198 It proceeds upon the basis that the essential of responsible government is the responsibility of the Ministry to the Parliament for the advice tendered, at least in this respect, to the Crown. It proceeds then to point out that this responsibility postulates that for assent so given the Crown assumes no responsibility; that, accordingly, the introduction of responsible government as a constitutional imperative demands that the place of the Crown in the legislature is to assent or withhold assent to legislation in accordance with Ministerial advice. It is then said that the first paragraph of section 58 refers both to the Governor-General's discretion and to the Governor-General being subject to the Constitution, that that paragraph follows the provisions of the Act for the Government of New South Wales and Van Diemen's Land, 1842 (5 and 6 Vic c.76 section 31),[150] a provision which preceded responsible government in those areas, and that the reference to the Governor-General's discretion is not open to the construction that in point of law a legal right to disregard Ministerial advice was intended to be conferred.

2.199 As mentioned earlier,[151] parliamentary government requires a Government to resign if it has lost the confidence of the House. This is not a principle that is enforceable by the courts. It is generally recognised that this is one situation where a Governor-General could and should act on his or her own account to dismiss a Government with a view to a commission being given to a new Prime Minister who did have such confidence or with a view to obtaining advice to dissolve the House and call for a general election. If a Governor-General did not do so for any reason, it is clear that sooner or later the courts would be brought in to deal with acts on behalf of the Government that were illegal. Funds to carry on the Government would cease because the House would refuse to pass appropriation Bills. If Ministers attempted to spend public money that had not been appropriated for running the governmental service, they would be in breach of the law.

The courts and responsible government

2.200 Although the judiciary does not directly enforce these principles of responsible government, their existence is seen as so fundamental and obvious that they have often been relied on by the High Court in construing the Constitution and statutes and in developing the common law. The operation of responsible government is regarded as a social and political fact that must obviously have been in the minds of the Framers (when they drafted the Constitution) or Parliament when it considered legislation. Similarly in developing judge-made law, the courts cannot shut their eyes to such a significant institution as responsible government.

2.201 In the *Engineers' Case*,[152] for example, the Court justified its decision not to follow United States doctrines, by stating that Australia had, but the United States did not have,

150 Quick and Garran, 688.
151 para 2.178.
152 (1920) 28 CLR 129.

a system of responsible government. Decades later, Barwick CJ declared that 'Sections 62 and 64 of the Constitution introduced responsible government: on the one hand, leaving aside most exceptional circumstances, the Crown acts on the advice of its Ministers and, on the other hand, the Ministers are responsible to the Parliament for the actions of the Crown.'[153] In another case he stated that 'unlike the case of the American Constitution, the Australian Constitution is built upon confidence in a system of parliamentary Government with ministerial responsibility.'[154]

2.202 In the field of administrative law, the High Court has recently altered the earlier expressed view that a court could not examine the purposes of a vice-regal representative in exercising a statutory power. As it had been accepted that such review was available in the case of a power given to a Minister, the existence of responsible government made the earlier view irrational. As the Court stated, the Governor or Governor-General would always be acting on the 'advice' of Ministers.[155]

The Senate and responsible government

2.203 It has been stated above[156] that the responsibility owed by the Government is to the House of Representatives. It is necessary, however, to consider, the power and function of the Senate. Since proportional voting for the Senate was introduced at the 1949 elections, senators have often belonged to parties which are not represented in the House of Representatives. Since July 1962, except for the period from 1976 to June 1981, Government senators have been outnumbered by senators who are not members of the Government party or parties.[157]

2.204 From the commencement of Federation, the Senate has not claimed any joint part in the determination of the political composition of the Government. It was accepted from the beginning that that issue was one for the majority of the House of Representatives.

2.205 This is not declared in the Constitution in express terms, although there are a few provisions which point in some degree to primacy of the House of Representatives. These provisions all relate to Bills concerned with taxation or the appropriation of money. Section 53 requires taxation and appropriation Bills to originate in the House of Representatives. Unless the Government, therefore, had the support of a majority of that House, it could not even begin to obtain the funds necessary for carrying on the functions of government. That section also prevents the Senate from amending taxation Bills or Bills appropriating money for 'the ordinary annual services of the Government'; nor can it amend any Bill so as to increase any proposed charge or burden on the people. Even in relation to those Bills, the Senate may make suggestions for amendments. No appropriation Bill can be passed without a recommendation from the Governor-General, which in practical terms means the Government (section 56). This provision ensures that the Executive Government has sole responsibility over national expenditure.

153 *Seas and Submerged Lands Case* (1975) 135 CLR 337, 364-5.

154 *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 24.

155 *The Queen v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

156 para 2.178.

157 Proportional representation means that, within practical limits, the distribution of elected candidates is in proportion to the popular vote in each State. This can result in the election of senators who are not members of political parties or who are members of parties which have no members in the House of Representatives.

2.206 Nevertheless, in the field of legislation generally the powers of the Senate are great. Apart from the use of the deadlock provisions,[158] Acts of Parliament require the assent of both the House of Representatives and the Senate. Although some disagree, the predominant view is that this applies to *all* Bills, including those that the Senate cannot amend. The lack of power to amend Bills does not affect the Senate's power to reject or fail to pass such Bills.

2.207 While the Government will nearly always be assured of having its legislation passed by the House of Representatives, that will not necessarily be the case in respect of the Senate which, because of the different basis and method of election, may not contain a majority of Government supporters. Instances of bargaining and compromise, leading to amendments being accepted by the Government, are by no means rare. All parties have used the Senate to pursue their political ends, having regard to what they perceive as electoral advantages.

2.208 Generally, the inability to have legislation passed means that the Government's policies which require legislation must be tempered to the parliamentary wind. But that does not affect its ability to carry on as a Government in exercise of its other common law and statutory powers, while it retains the confidence of the House of Representatives.

2.209 The situation is different, however, in respect to appropriation and taxation Bills. It is a cardinal rule of all constitutions based on the British model that a Government cannot expend public funds that have not been appropriated by the Parliament for the purposes laid down in the Appropriation Acts. This rule is expressed in sections 81 and 83 of the Constitution which provide:

> 81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.
>
> 83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

Also, it is a fundamental feature of our constitutional system that taxation can only be levied by or under the authority of an Act of Parliament.

2.210 The issue arises in its starkest form when failure of the Senate to pass an appropriation Bill for the ordinary services of government is not caused by disagreement with any of the detailed provisions of that Bill, but is performed solely to force the Government to resign. The difficulty is in reconciling this use of power with the undoubted principle that it is the House of Representatives that determines the political complexion of the Government. A vote of no confidence in the House of Representatives can cause the resignation or dismissal of a Government, but a vote of no confidence in the Government passed in the Senate has no such effect.

2.211 The Framers debated at length the issue of reconciling the traditional notion of responsible government with the existence of a democratically elected upper House with power to refuse to pass appropriation and taxation legislation. Some considered that the two were incompatible and that responsible government should give way to the need, as they saw it, of a strong Senate. Others argued that the concept of responsible government was so fundamental to the British and Australian approach to government that the Senate

158 Section 57, which is discussed in Chapter 4 under the heading 'Relationship between the Senate and the House of Representatives', para 4.613-4.685.

would be most unlikely to use its power to cause a Government to be driven from office in the face of its support by a majority of the House of Representatives. In the end, the Framers did not resolve the issue, leaving it to future generations to do so.[159]

2.212 The issue can arise at two particular points in the financial year, which extends from 1 July in one year till 30 June in the following year. The practice is for a Government to introduce a set of appropriation Bills – 'supply' – in April or May to cover government services from 1 July to 30 November following and in August or September to introduce a set of appropriation Bills – 'The Budget' – to cover government services from the preceding 1 July to the following 30 June. If the Senate does not pass supply by 30 June or the Budget by 30 November the Government cannot meet its financial commitments.

2.213 The situation came to a head when the House of Representatives election in December 1972 brought about the first change of Government for 23 years. In April 1974 the Leader of the Opposition announced that his colleagues in the Senate would vote against the supply Bills for the period from July to November of that year. The Prime Minister thereupon advised the Governor-General to dissolve both Houses of Parliament on the basis that six other Bills had been twice rejected by the Senate and had satisfied the requirements of section 57 relating to double dissolutions.[160] The double dissolution procedure takes at least five months to complete and thus was not applicable to the appropriation Bills.

Reserve powers of the Crown

2.214 The 'reserve powers' of the Crown refer to those powers in the exercise of which the Governor-General retains a personal discretion; that is the Governor-General can act without, or contrary to, Ministerial advice.[161]

2.215 The reserve powers of the Crown are, therefore, seen as an exception to the fundamental principle of responsible government that the Crown acts on the advice of Ministers. Events which occurred in 1975 raised one aspect of the scope of these powers.

2.216 At elections in May 1974, the Government received more votes than the Opposition in both Houses and won more seats in the House of Representatives than the Opposition, but neither the Government nor the Opposition won a majority in the Senate. On 15 October 1975 the Leader of the Opposition announced that his Senate colleagues would not pass the Budget Bills 'until the Government agrees to submit itself to the judgment of the people'. On 16 October the Senate so resolved and on 22 October and 5 November persisted in its attitude, on all three occasions by a majority of one vote. On 11 November the Governor-General terminated the appointments of the Prime Minister and all Ministers on the ground that they could not obtain supply.

2.217 The Leader of the Opposition accepted a commission to form a Government on condition that he would advise a double dissolution on the basis of 21 Bills which had been twice rejected by the Senate and which he advised had satisfied the requirements of section 57. In fact, the Senate passed the Budget Bills before the two Houses were dissolved. If the Senate had rejected or failed to pass only the Budget, there could not

159 B Galligan, 'The Founders' Design and Intentions Regarding Responsible Government' in P Weller and D Jaensch, *Responsible Government In Australia* (1980) 1-10.

160 One of the Bills was later held not to have satisfied the requirements of section 57: *Victoria v Commonwealth and Connor (PMA Case)* (1975) 134 CLR 81.

161 Executive Report, 38.

have been a double dissolution; there could have been an election for the House of Representatives alone. Even if the Government had won that election it might still not have been able to secure the passage of the Budget through the Senate.

2.218 As mentioned above,[162] the Governor-General, in dismissing a Prime Minister who had the confidence of the House of Representatives, claimed to act on the basis of a principle that a Government that could not obtain the supply necessary to carry on the functions of government was required to go to the people. This action gave rise to public controversy.

2.219 The fundamental principle that the Crown acts on the advice of its Ministers may not operate where a Government is defeated at an election for the House of Representatives or where it loses the confidence of the House of Representatives. In such cases the Governor-General may give a commission as Prime Minister to a person who in his or her view is likely to have the confidence of the House.

2.220 Another occasion on which it is suggested that the Governor-General can dismiss the Government is in the case of illegal actions by the Government. In 1932 the Governor of New South Wales dismissed the State Government because of alleged illegal acts. His actions have been criticised on the ground that the courts had not pronounced on the matter of the alleged illegality. On the other hand, there seemed to be a prima facie case and the Premier, when asked to establish that his acts were legal, refused to do so.[163]

2.221 There has been considerable discussion as to whether the Governor-General may refuse a dissolution of the House of Representatives in mid-term when advised by the Prime Minister. No such advice has been refused since 1909. In any case, a Governor-General would have great difficulty refusing such advice where no alternative Government was possible and where the Ministry was not prepared to remain in office in the face of a refusal by the Governor-General to accept advice to dissolve.

2.222 The problem also arises regarding the Governor-General's power to refuse advice to dissolve both Houses under section 57 of the Constitution. This involves two issues, first, whether the conditions prescribed in section 57 have been satisfied and, secondly, whether the advice to dissolve should be accepted.[164] Again, there would be difficulty for a Governor-General where the Ministry was not prepared to remain in office in the face of a refusal by the Governor-General to accept advice to dissolve.[165]

2.223 Many of these matters, other than the events of 1975, were the subject of resolutions of the Australian Constitutional Convention.

Resolutions of the Australian Constitutional Convention

2.224 In 1985 the Australian Constitutional Convention agreed to the recognition and declaration of a number of principles and practices that should be observed as conventions of the Constitution.[166] They are as follows:

A. The basic principle is that the Ministry has the confidence of the House of Representatives.

162 para 2.216.
163 HV Evatt, *The King and his Dominion Governors* (1936) Ch 19.
164 PH Lane, 'Double Dissolution of Federal Parliament' (1973) 47 *Australian Law Journal* 290; L Zines, 'The Double Dissolutions and Joint Sitting' in G Evans (ed) *Labor and the Constitution 1972-1975,* 1977, 218-22.
165 Executive Report, 37-9.
166 ACC Proc, Brisbane 1985, vol I, 415-7.

B. Following a general election in which the Government is defeated, the Governor-General, having taken the advice of the outgoing Prime Minister as to the person who the outgoing Prime Minister believes can form a Ministry that has the confidence of the House of Representatives, appoints as Prime Minister the person who, in his opinion, can form a Ministry that has the confidence of the House of Representatives.

C. If the Prime Minister resigns, the Governor-General, having taken the advice of the resigning Prime Minister as to the person who the Prime Minister believes can form a Ministry that has the confidence of the House of Representatives, appoints as Prime Minister the person who, in his opinion, can form a Ministry that has the confidence of the House of Representatives.

D. If the Prime Minister dies in office, the Governor-General, having taken the advice of the next most senior Minister as to the person who that Minister believes can form a Ministry that has the confidence of the House of Representatives, appoints as Prime Minister the person who in his opinion can form such a Ministry.

E. If following a defeat in the House of Representatives, the Prime Minister, acting in accordance with Practice F, advises the Governor-General to dissolve the House of Representatives or to send for the person who the Prime Minister believes can form a Ministry that has the confidence of the House of Representatives, the Governor-General acts on the advice.

F. In advising the Governor-General for the purpose of Practice E, the Prime Minister acts in accordance with the basic principle that the Ministry should have the confidence of the House of Representatives and if, in his opinion, there is another person who can form a Ministry which has the confidence of the House of Representatives, he advises the Governor-General to send for that person.

G. The Governor-General appoints and dismisses other Ministers on the advice of the Prime Minister.

H. The resignation of a Prime Minister following a general election in which the government is defeated or following a defeat in the House of Representatives terminates the commissions of all other Ministers, but the death of a Prime Minister or his resignation in other circumstances does not automatically terminate the commissions of the other Ministers.

I. The Governor-General dissolves the House of Representatives only on the advice of the Prime Minister.

J. When a Prime Minister who retains the confidence of the House of Representatives advises a dissolution of the House of Representatives, the Governor-General acts upon that advice.

K. The Governor-General, having satisfied himself on the advice of the Prime Minister that the conditions in section 57 of the Constitution have been met and that a double dissolution should be granted dissolves both Houses of the Parliament simultaneously on the advice of the Prime Minister.

L. All advice tendered by the Prime Minister to the Governor-General in connection with a dissolution of the House of Representatives or a dissolution of both Houses of Parliament and the Governor-General's response thereto, should be committed to writing and published before or during the ensuing election campaign.

M. In advising a dissolution, the Prime Minister must be in a position to assure the Governor-General that the government has been granted sufficient funds by the Parliament to enable the work of the administration to be carried on through the election period or that such funds will be granted before the dissolution.

N. Subject to the requirements of the Constitution as to the sittings of Parliament, the Governor-General acts on prime ministerial advice in exercising his powers to summon and prorogue Parliament.

O. In advising a prorogation, the Prime Minister must be in a position to assure the Governor-General that the government has been granted sufficient funds by the Parliament to enable the work of the administration to be carried on through the period of prorogation or that such funds will be granted before the prorogation.

P. The Governor-General, having satisfied himself on the advice of the Prime Minister that the conditions in section 57 of the Constitution have been met, acts on prime ministerial advice in exercising his power to convene a joint sitting of the members of the Senate and of the House of Representatives.

Q. The Governor-General acts only on the advice of the Prime Minister in submitting a proposed law for the alteration of the Constitution to the electors, whether the proposed law has been approved by both Houses or by one House only.

R. In the exercise of his constitutional powers and responsibilities, the Governor-General always has the right to be consulted, to encourage and to warn in respect of Ministerial advice given to him.

Inter-governmental arrangements and responsible government

2.225 In one respect the Constitution cuts across the principles of responsible government (and, it might be added, federalism). Section 105A of the Constitution gives constitutional force to the Financial Agreement of 12 December 1927 as varied from time to time. This is an agreement to which the Commonwealth and the States are parties, and relates to borrowing by the Commonwealth and the States. Section 105A authorised the Governments concerned to enter into the agreement. Sub-section (4) provides that it can be varied or rescinded by the parties. Thus unanimous agreement is required. Under sub-section (5), the agreement is binding upon the Commonwealth and the States notwithstanding anything contained in the Constitution and laws of the Commonwealth or in those of the States.

2.226 The agreement created the Loan Council on which each Government is represented. With some exceptions, the only Government borrowing that can take place is that approved by the Council. This takes out of the hands of all Parliaments in Australia the power to regulate or control an important area of Government finance. It was, however, a step deliberately taken for reasons of coordinating borrowing so that competitive action by the Governments concerned would not put up interest rates, and so that greater economic efficiency would be achieved.

2.227 The extent to which the Agreement is an exception to ordinary principles of federalism and responsible government is illustrated by the attempt by the Premier of New South Wales to repudiate his Government's contractual obligations. Under the Agreement, New South Wales was required to pay an amount to the Commonwealth in respect of interest owing on State debts. By virtue of the Financial Agreement, the Commonwealth was obliged to pay to the creditors the amount due. The Premier refused to reimburse the Commonwealth, arguing that the economic depression required repudiation of the debts for the duration of the crisis. The Parliament of the Commonwealth enacted legislation to seize State revenues in order to discharge the State's obligation to the Commonwealth. This action was held valid by the High Court.[167]

2.228 It has, however, been argued that cooperative governmental arrangements in general make it difficult for Parliaments, and in particular State Parliaments, to exercise that oversight and control over their Executive Governments that is supposed to be assured under the doctrine of responsible government. Some cooperative arrangements between the Commonwealth and the States are designed to ensure uniformity of legislation and, perhaps, administration of laws.

167 *Garnishee Case* (1932) 46 CLR 155.

2.229 On other occasions, the purpose may be to create a body which will have powers conferred by both Federal and State Parliaments, either because of the lack of power in any level of government alone to deal with a specific problem, or because of the desire by the Federal Government to cooperate with State administrations rather than have its own body supersede them. The latter approach might be preferred either for reasons of 'federal policy' or for perceived greater efficiency and economy.

2.230 The types of agreements resulting in legislative and administrative programs are many and their effect on parliamentary control varies greatly.[168] The subject can be best illustrated by brief reference to the uniform companies and securities scheme established by an agreement of 22 December 1978 between the Commonwealth and the States. This scheme has the following elements:

(a) The Commonwealth enacted legislation and made regulations relating to companies and the regulation of the industry that applied to the Australian Capital Territory.

(b) Each State Parliament enacted laws to apply the provisions of that legislation to its State.

(c) There was established by the Federal Act, a Ministerial Council for Companies and Securities consisting of a Minister from the Commonwealth and each State. Its functions are to keep the legislation under review and to supervise the cooperative scheme. In many cases its resolutions are by simple majority.

(d) A National Companies and Securities Commission is established to administer the scheme. Its members are appointed by the Governor-General on the nomination of the Council. Most of the discretions that, under earlier State legislation, were exercised by State Ministers are within the authority of the Commission. In respect of most matters the Commission is subject to the direction of the Council only. The Commonwealth and States share the cost of the Commission.

(e) Much of the day-to-day administration is conducted by the State and Territorial officers who administered the former State and Territory legislation. But they are subject to the direction of the Commission.

(f) Under the agreement, the Commonwealth is obliged to secure amendments to the legislation approved by the Council. Any amendments made by the Commonwealth automatically apply to the States under existing legislation (except for minor regulations adapting the Federal Act to State circumstances).[169]

2.231 The effect of this scheme on the ordinary processes of responsible government of the Commonwealth and the States is very great, although somewhat greater for the States. Insofar as decisions are made by a majority of the Council, official action within a State or Territory may be contrary to the wishes of the responsible Minister in that State or Territory. He or she is not, with Ministerial colleagues, 'politically responsible' in the normal sense; therefore, the Minister's relationship to Parliament is outside the normal course.

168 The whole subject has been examined by Dr Cheryl Saunders in 'The Impact of Inter-governmental Arrangements on Parliament', *Papers on Federalism* 1, Intergovernmental Relations in Victoria Program 1984.

169 The power of the Commonwealth to make laws with respect to corporations is discussed at para 11.87-11.157.

2.232 Similarly, the Commission is not responsible to any particular Minister or Government that is in turn responsible to a specific Parliament. This causes difficulty in respect of review by parliamentary committees of the States because the Commission is created by federal law, even though it exercises powers conferred by State law. Above all, there may be a tendency for a Minister to avoid criticism in Parliament by emphasising the joint nature of the scheme. While some of these consequences for parliamentary supervision and Ministerial responsibility can be alleviated, the fact remains that there can be considerable tension between the desirable goal of Federal-State cooperation and the effective implementation of the principles of parliamentary government.

The decline of Parliament

2.233 It has often been argued that the system of responsible government as described above[170] does not operate as suggested to put Parliament in a position to control the Executive. It is asserted that the power position is precisely the reverse, namely the Government in fact controls the House or Houses which contain a majority of its supporters. This is a result of a number of factors, including the discipline of modern political parties, the extension of statutory power given to the Government, Ministers, officials and statutory bodies as a result of the expansion and increasing complexity of governmental affairs, and the power of the Prime Minister to cause the dissolution of Parliament and a general election.

2.234 The growth and the modern centralised organisation of political parties results in a situation where it is more realistic to say that the party, rather than the House of Representatives, determines who shall be Prime Minister. Insofar as members of Parliament outside the Ministry have an effect on policy, this is effected by debate and discussion within the caucus of the governing party rather than in the Houses. It has been suggested also that recent decades have seen the ascendancy of the Prime Minister over the Cabinet, partly as a result of the Prime Minister's power to obtain a dissolution of the House.

2.235 Political parties, highly organised and centralised, are now as much part of our political system as the formal organs of government. They received, for the first time, a modicum of reference in the Constitution as a result of the *Constitution Alteration (Senate Casual Vacancies) 1977*, which altered section 15 of the Constitution relating to the filling of casual vacancies in the Senate.

2.236 Whatever effect political parties have on the working of government institutions they are a social fact and are not likely to change as regards their centralised form and disciplinary control as long as we have a system that unites the legislative and executive branches of government. In any case, political parties are the only machinery we have for the formulation of policies that can be presented to the people for democratic choice. Any investigation of the operation of parliamentary government must begin with recognition of these social facts. In fact, one cannot identify a parliamentary democracy which does not operate on the basis of political parties. The High Court has recognised that members of Parliament were organised in political parties long before the Constitution was adopted, and that the method of voting for candidates by reference to a group or ticket now adopted in federal elections reflects political realities.[171]

170 para 2.177-2.186.
171 *McKenzie v Commonwealth* (1984) 57 ALR 747.

2.237 Some steps to make the executive branch of government more accountable have, over the past decade and a half, occurred in the establishment of a 'committee system' in the Senate. Senators from both sides of politics have taken an active and vigorous part on Senate committees investigating the Executive Government, the administration and public authorities.

2.238 The institution of the ombudsman, as an independent officer whose function it is to investigate complaints of the public against governmental officials, might be regarded, in part, as strengthening the opportunity for parliamentary control. If the ombudsman believes a person is justified in complaining of governmental action and the department or agency concerned remains obdurate or will not accept the view of the ombudsman, the latter may report the matter to Parliament. Generally speaking, however, it cannot be said that the Federal Parliament, has used the reports of the ombudsman to exert its influence on the Executive Government. The opportunity to do so, however, remains.

2.239 Nevertheless, most of the checks on the Executive that have been developed in recent times have not involved any strengthening of parliamentary control. Instead new institutions have been created, such as in the federal sphere, the Administrative Appeals Tribunal. The responsibility of the Executive to the people has also been enhanced by federal and some State legislation providing for freedom of information.[172] At the same time the courts have, over the past two decades, greatly expanded their power to review executive and administrative action and to reduce the power of the Executive to refuse, in the course of litigation, to disclose documents and other information on the ground that to do so would not be in the public interest. The tendency, therefore, has been to look outside Parliament to supervise and control the Executive.

RECOMMENDATIONS

2.240 We *recommend* as follows:

(i) It is unnecessary to alter section 51(xx.) of the Constitution so as expressly to prohibit discrimination against State statutory corporations.

(ii) The Constitution should *not* be altered so as to provide expressly that every legislative power of a State shall, subject to section 109, extend to the Commonwealth.

(iii) Section 117 of the Constitution should be omitted and the following provision substituted:

> 117. (1) A person who is resident, temporarily resident or domiciled in any State or Territory shall not be subject in another State or Territory to any disability or discrimination on the ground or substantially on the ground of that residence, temporary residence or domicile.
>
> (2) Sub-section (1) of this section is not infringed by a law that imposes reasonable conditions of residence as a qualification for an elector.

(iv) The enacting clause of the *Commonwealth of Australia Constitution Act 1900* should be omitted.

(v) The words 'the United Kingdom' and 'the United Kingdom of Great Britain and Ireland' should be omitted from covering clause 2 of the *Commonwealth of Australia Constitution Act 1900*, and the Note to the Schedule to the Constitution, respectively. The word 'Australia' should be substituted in each case.

(vi) There should be added to section 51 of the Constitution the following paragraph:

172 eg *Freedom of Information Act 1982* (Cth).

(xxxviiiA.) Succession to the Throne, and regency, in the sovereignty of Australia:

(vii) Section 58 of the Constitution should be omitted and the following provision substituted:

> 58. (1) Subject to sub-section (2), when a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, the Governor-General shall, on being so advised by the Federal Executive Council, assent to it in the Queen's name.
>
> (2) The Governor-General in Council may return to the House in which it originated a proposed law so presented to him and may transmit with it any amendment that the Governor-General in Council recommends and the Houses may deal with the recommendation.

(viii) Sections 59 and 60 of the Constitution should be repealed.

CHAPTER 3

PREAMBLE AND COVERING CLAUSES

3.1 This Chapter is concerned with those parts of the *Commonwealth of Australia Constitution Act 1900* which precede the Constitution proper (that is, the Constitution contained in section 9 of the Act). More particularly it is concerned with the preamble and what are known as the covering clauses – sections 1-8 of the Act. Attention is also given to the recommendation of the Advisory Committee on Individual and Democratic Rights that a separate preamble be inserted at the beginning of the Constitution proper.

PREAMBLE

Recommendations

3.2 We *recommend:*

(i) against altering or repealing the preamble to the *Commonwealth of Australia Constitution Act 1900*; and

(ii) against the inclusion of a preamble to the Constitution proper.

Current position

3.3 ***Existing preamble.*** The *Commonwealth of Australia Constitution Act* contains the following preamble:

> WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:
>
> And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:.

3.4 In *The Annotated Constitution of the Australian Commonwealth* (1901) Quick and Garran noted that the preamble contains eight 'separate and distinct affirmations or declarations', namely:

(i) the agreement of the people of Australia;

(ii) their reliance on the blessing of Almighty God;

(iii) the purpose to unite;

(iv) the character of the Union – indissoluble;

(v) the form of the Union – a Federal Commonwealth;

(vi) the dependence of the Union – under the Crown;

(vii) the government of the Union – under the Constitution; and

(viii) the expediency of provision for admission of other Colonies as States.[1]

Of these only the third, fifth, seventh, and eighth are also expressed elsewhere in the Act. Quick and Garran wrote that the remaining four:

1 Quick and Garran, 286.

have, therefore, to be regarded as promulgating principles, ideas, or sentiments operating, at the time of the formation of the instrument, in the minds of its framers, and by them imparted to and approved by the people to whom it was submitted. These principles may hereafter become of supreme interest and importance in guiding the development of the Constitution under the influence of Federal Statesmen and Federal Electors.[2]

3.5 The origins of the preamble are found in the preamble of the Commonwealth Bill of 1891. A revised version was further altered by representatives at sessions of the Australasian Federal Convention of 1897-8 and, following the suggestions of the legislatures of all but one of the colonies and receipt of numerous petitions, the reference to reliance on the blessing of Almighty God was included in 1898.[3]

3.6 ***Legal effect of the preamble.*** Quick and Garran suggested that the four 'promulgating principles, ideas, or sentiments' contained in the preamble to the *Commonwealth of Australia Constitution Act 1900:*

> may also be of valuable service and potent effect in the Courts of the Commonwealth, aiding in the interpretation of words and phrases which may now appear comparatively clear, but which, in time to come, may be obscured by the raising of unexpected issues and by the conflict of newly evolved opinions.[4]

3.7 There has been little judicial discussion of that preamble and it has not been relied on in the interpretation of the substantive provisions of the Constitution.

3.8 Quick and Garran were aware of the limited legal effect of a preamble to an Act of Parliament. As they noted, it can state the general object and meaning of a Parliament in passing the legislation and so:

> it may be legitimately consulted for the purpose of solving an ambiguity or fixing the connotation of words which may possibly have more than one meaning, or determining the scope or limiting the effect of the Act, whenever the enacting parts are, in any of these respects, open to doubt. But the preamble cannot either restrict or extend the legislative words, when the language is plain and not open to doubt, either as to its meaning or its scope.[5]

3.9 This view has been confirmed by the High Court.[6] Chief Justice Gibbs (with whom Aickin and Wilson JJ agreed) said, in *Wacando v The Commonwealth*, that, if the words of a section in an Imperial Act applying in Australia are plain and unambiguous, their meaning cannot be cut down by reference to the preamble.[7] In the same case, however, Mason J said:

> But this does not mean that a court cannot obtain assistance from the preamble in ascertaining the meaning of an operative provision. The particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object. There is, however, one difficulty in seeking to restrict the generality of the operative provision by reference to a suggested restriction expressed in the preamble: it is that Parliament may intend to enact a provision which extends beyond the actual problem sought to be remedied. Recognition of this difficulty led

2 ibid.
3 id, 204-5, 283-301.
4 id, 286. Apparently Mr HB Higgins argued in favour of including section 116 in the Constitution on the basis that the reference to Almighty God in the preamble might have yielded by implication a power in the Federal Parliament to legislate upon the topics mentioned in the section. See *Attorney-General (Vict); Ex rel Black v The Commonwealth* (1981) 146 CLR 559, 612 (Mason J); CL Pannam, 'Travelling Section 116 with a US Road Map' (1963) 4 *Melbourne University Law Review* 41, 53-5.
5 Quick and Garran, 284.
6 eg *Bowtell v Goldsbrough, Mort & Co Ltd* (1905) 3 CLR 444, 451 (Griffith CJ).
7 (1981) 148 CLR 1, 15-6; see also *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246, 258 (Gibbs J).

> Viscount Simonds in *Attorney-General* v. *Prince Ernest Augustus of Hanover* . . . to say 'that the context of the preamble is not to influence the meaning otherwise ascribable to the enacting part unless there is a compelling reason for it'.[8]

3.10 An illustration of how some have suggested the preamble to the *Commonwealth of Australia Constitution Act 1900* might be used is found in the arguments about whether a State may secede from the Commonwealth.[9] The fact that the only direct reference to the question of unilateral secession appears in the preamble (the agreement of the people to 'unite in one indissoluble Federal Commonwealth') has led some to argue that the preamble constitutes an effective and express prohibition of the unilateral secession of an Australian State.[10]

3.11 The possibility of a State attempting to secede was considered at the Australasian Federal Convention late last century. It was decided that the *Commonwealth of Australia Constitution Act 1900* should recognise the indissolubility of the Commonwealth in the preamble and hence outside the substantive provisions of the Constitution. The delegates to the Convention would have been well aware that a preamble to a statute has the status of a 'preliminary flourish', only to be used as an aid in the interpretation of the statute in certain very limited circumstances, and so would have been an inappropriate place in which to express any serious principle or provision.[11]

3.12 Although there has not been a case where the High Court has had to grapple with the issue, there are references to the expression 'one indissoluble Federal Commonwealth' in various judgments. Occasionally judges seem to have ascribed some significance to it. For example, Menzies J wrote, 'A constitution providing for an indissoluble Federal Commonwealth must protect both Commonwealth and States',[12] and Barwick CJ asserted that, 'The Constitution, unless altered in a constitutional manner, was intended to be permanent, just as the union of the people of the colonies "in one indissoluble Federal Commonwealth" upon the terms of the Constitution was intended to be permanent.'[13] Generally speaking, the words have been recited by judges of the High Court and Privy Council to describe the result of the union of the people of the colonies. They have not been relied on to support the conclusion that the Federal Commonwealth is indissoluble.[14] Nor have the words of the preamble been relied on to resolve questions about the meaning of other provisions of the Constitution.

Issues

3.13 Four main issues concerning the preamble have been raised during this review of the Constitution:

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8 id, 23. The fact that the enacting words go further than the preamble is not in itself a reason for resorting to the preamble to limit their operation: *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436, 463.

9 The matter is discussed in detail by Dr Gregory Craven in *Secession: the ultimate States right* (1986).

10 eg C Enright, *Constitutional law* (1977) 52-3; PH Lane, *An Introduction to the Australian Constitution* (2nd edn, 1977) 233.

11 See Craven, op cit, 20-30.

12 *Victoria v Commonwealth* (1971) 122 CLR 353, 386; see also 395 (Windeyer J).

13 *Queensland v Commonwealth* (1977) 139 CLR 585, 592.

14 It is clear from the substantive provisions of the Constitution and from the status of the Constitution as binding law that there is no unilateral right of a State to secede. For relatively recent examples of descriptive references to 'one indissoluble Federal Commonwealth' see *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 182 (Barwick CJ), 236 (Murphy J); *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 660 (Deane J); *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1, 197 (Wilson J), 207 (Brennan J). Isaacs J referred in 1909 to 'the pious aspirations for unity contained in the preamble to the Constitution': *Federated Saw Mill etc Employes of Australasia v James Moore & Son Proprietary Ltd* (1909) 8 CLR 465, 535.

(a) Should the existing preamble be retained?

(b) Is it appropriate and desirable to have a preamble to the Constitution, in addition to the existing preamble to the *Commonwealth of Australia Constitution Act 1900?*

(c) If it is appropriate and desirable to add a preamble, what should the preamble contain?

(d) What would be the legal effect, if any, of that preamble?

Advisory Committee's recommendation

3.14 The Rights Committee recommended that a preamble be inserted in the Constitution.[15] The Committee did not advocate deletion of the opening words of the *Commonwealth of Australia Constitution Act 1900.*[16] Rather, it suggested the inclusion of recitals at the start of the Constitution proper, presumably to follow the opening words of covering clause 9.

3.15 The Rights Committee was concerned that, despite developments since Federation, the present preamble does not reflect the change in Australia's status as a nation independent of the United Kingdom. The preamble is part of an Imperial Act. Although the *Commonwealth of Australia Constitution Act 1900* 'originally derived its force as a matter of legal technicality' from its enactment by the Parliament of the United Kingdom, the Advisory Committee argued that 'that technicality is now legally as well as politically irrelevant'.[17] The Advisory Committee also observed that 'the legitimacy of the Australian Constitution derives from its origins as an instrument approved directly by the people, for the purpose of creating a new nation.'[18]

3.16 The recommendation was made because the Committee considered that 'the preamble of the Constitution should embody the fundamental sentiments which Australians of all origins hold in common.'[19] It recommended a new preamble in the following terms:

- Whereas the People are drawn from a rich diversity of cultures yet are one in their devotion to the Australian traditions of equality, the freedom of the person and the dignity of the individual;
- Whereas Australia is an ancient land previously owned and occupied by Aboriginal peoples who never ceded ownership;
- Whereas the Australian people look to share fairly in the plenty of our Commonwealth;
- Whereas Australia is a continent of immense extent and unique in the world demanding as our homeland our respect, devotion and wise management.[20]

Submissions

3.17 Numerous submissions were received by the Commission in response to the Advisory Committee's proposed preamble. Some gave it general support. Others opposed it, preferring to do no more than retain the preamble to the *Commonwealth of Australia Constitution Act 1900.* Some supported the inclusion of a new preamble, though not

15 Rights Report, xix-xx, 30, 72, 104.
16 See id, 30.
17 ibid. For a discussion of the developments leading to legislative independence see Chapter 2 of this Report and G Lindell, 'Why is Australia's Constitution binding? – The reasons in 1900 and now, and the effect of independence' (1986) 16 *Federal Law Review*, 29.
18 ibid.
19 ibid.
20 id, xix-xx, 30, 104.

necessarily in the terms suggested by the Advisory Committee. One person suggested that it be a 'piece of prose that is simple, concise and easily learnt by rote' so that school children could be taught to recite at least part of 'our most important document'.[21]

3.18 Some were critical of the preamble recommended by the Advisory Committee because, in their view, it was 'too wordy and pretentious',[22] or because the terms were unclear, undefined and subject to varying interpretations or were inappropriate for a Constitution.[23] Some suggested it was unnecessary and, rather than promoting unity, could prove to be divisive.[24]

3.19 Many submissions were received from people expressing concern or protesting about what they thought was a proposal to remove from the preamble reference to reliance on 'the blessing of Almighty God' and unity 'under the Crown'.[25] Although these submissions were made as a result of a misunderstanding of what the Advisory Committee recommended, they show that for many people these notions are either the major underpinnings of our Constitution or at least cherished sentiments. It is clear that, in the same way as there was substantial support at the end of last century for the inclusion of reference to reliance on God, there would be considerable opposition to any attempt to remove the reference to God from the preamble.

3.20 The idea of unity under the Crown (now the Queen of Australia) is so central to the scheme and substantive provisions of the Constitution that its removal from the preamble would not be practicable or desirable. The Queensland Government (whose submission was made on the basis that the existing preamble would be replaced) also argued that the proposed preamble did not fully recognise another element contained in the existing preamble, namely, 'The sovereignty of the People and the fact that the Constitution was and is founded on their will and continued concurrence'.[26]

3.21 There were some submissions that the preamble suggested by the Advisory Committee was incomplete or inadequate. The main point of most of these was that any preamble should contain a provision declaring the equal rights of women and men.[27] The National Women's Consultative Council argued that a statement of commitment in the preamble to equality of the sexes would be '"an act of good faith and symbolic importance" in redressing the historic and current discrimination against women in Australia.'

3.22 Ms Carmel Niland, President of the Anti-Discrimination Board of NSW, submitted that men and women 'form the two great divisions of the human race' and such a reference to the need for equality 'makes the point that we both have contributed to "the plenty of our Commonwealth".' The women members of the South Australian

21 C Marshall S3082, 15 November 1987.

22 K Crombie S2946, 4 November 1987; see also AP O'Donnell S2210, 4 June 1987, who favoured a republican preamble written in simple, unequivocal language; NH Barnfield S2907, 29 October 1987.

23 D Bensley S3119, 2 December 1987; Country Women's Association of Australia S3090, November 1987; AC Stewart S2904, 3 October 1987.

24 eg Soroptomist International of Western Australia S2899, 28 October 1987; NH Barnfield S2907, 29 October 1987; Country Women's Association of Australia S3090, November 1987; D Bensley S3119, 2 December 1987.

25 eg Australian Catholic Bishops' Conference S2610, 9 September 1987; Christian History Research Institute S2671, 14 October 1987; Queensland Government S3069, 17 November 1987, and numerous individuals.

26 Queensland Government S3069, 17 November 1987.

27 eg National Women's Consultative Council S2542, 11 December 1987; Ms C Niland, President, NSW Anti-Discrimination Board S3077, 20 November 1987; Justice Elizabeth Evatt S205, 13 October 1987; The Women Members of the South Australian Parliament S3011, 29 October 1987; NSW Women's Advisory Council to the Premier S3207, 29 January 1988.

Parliament[28] submitted that a Constitution reviewed in the late twentieth century 'should surely incorporate equality of men and women as an important principle.' In their view, recognition of the equality of men and women is of equal significance to the recognition of Aboriginal prior ownership and the diversity of cultures which have formed this nation.[29]

3.23 These submissions were not limited to recommending inclusion of a statement of equality in the preamble, but also called for inclusion of a substantive constitutional right to equality and a federal legislative power with respect to equality and non discrimination.[30]

3.24 ***Aborigines and the preamble.*** The part of the recommended preamble to attract most comment was the statement:

> Whereas Australia is an ancient land previously owned and occupied by Aboriginal peoples who never ceded ownership ....

By way of background to this recital, the Committee drew attention to the opening words of the existing preamble, 'Whereas the people ...'. The Committee noted that '[t]hese words reflect a fundamental compact between the Australian people of the colonies joining together in a federation'.[31] Owing to restrictions in most colonial electoral laws, few Aborigines could have been parties to that compact, even though they are all subject to the Constitution and to the laws of the Commonwealth and of the States of Territories in which they respectively reside.[32] The Constitution, in section 51(xxvi.), originally gave the Federal Parliament power to make laws with respect to:

> The people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws: [emphasis added].

It also provided, in section 127:

> In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

3.25 In May 1967 both section 127 and the parenthetic clause in section 51(xxvi.) were removed with the approval of 91% of the electors voting at the referendum, the largest majority in the history of referendums. Those alterations gave the Federal Parliament increased power to make laws with respect to Aborigines, and Aborigines are now counted as 'people of the Commonwealth'. The Committee was concerned, however, that the existing preamble makes no reference to Aborigines. The preamble should, in the Committee's view:

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28 The eight women represent both the major political parties and both Houses.

29 The submissions also drew attention to the Convention on the Elimination of All Forms of Discrimination Against Women (to which Australia is a party), Article 2(a) of which provides:

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
>
> (a) To embody the principle of the equality of men and women in their national constitutions ....

The Convention is a Schedule to the *Sex Discrimination Act 1984* (Cth).

30 See also Womens Electoral Lobby S2724, 21 October 1987; E Fisher, Womens Electoral Lobby S2525, 18 October 1986. The matter of constitutional guarantees of equality rights and freedom from discrimination is dealt with in Chapter 9, para 9.438-9.489.

31 Rights Report, 70.

32 *Coe v Commonwealth* (1979) 24 ALR 118, 129 (Gibbs J); see also *Re Phillips; Ex parte Aboriginal Development Commission* (1987) 72 ALR 508.

acknowledge the historical truth of the settlement of Australia by Europeans in 1788. It is appropriate to recognise in the preamble that prior to the arrival of European settlers, Australia was owned by the Aboriginal people. Such recognition in the Constitution would be an act of good faith and symbolic importance in furthering reconciliation between Aboriginal and non-Aboriginal Australians.[33]

3.26 The argument in favour of a provision in the form suggested by the Committee can be supported by contrasting history with the legal doctrine that, at the time of European colonisation, the land now known as Australia was *terra nullius.*

3.27 According to that doctrine the colony was 'desert and uncultivated', a term which includes 'territory in which live uncivilized inhabitants in a primitive state of society'.[34] Consequently courts have proceeded on the basis that the colony was 'settled' (the land, being desert and uncultivated, was claimed by right of occupancy) rather than a 'conquered' or 'ceded' colony. The legal consequence is that all English laws applicable to the colony were immediately in force upon its foundation. By contrast, the laws of a conquered or ceded colony would have remained in force until altered.[35]

3.28 In the 1971 *Gove Land Rights Case* and other cases, courts generally have accepted that the attribution of the colony to the 'settled' class is a matter of law which is not to be questioned upon a reconsideration of the historical facts.[36] Two High Court judges, however, have suggested that, in the absence of any decision which is binding on that Court, it may be argued that the lands were acquired by conquest.[37]

3.29 A number of submissions were made to the effect that, as a first step, there should be constitutional recognition that the land now known as Australia was used and occupied by Aborigines who had their own systems of laws which governed their relationships with each other and regulated their links with different tracts of land. Such a statement would set the record straight without fundamentally altering the basis on which the legal system, and hence the government of Australia, rests.[38] Some submissions recommended further that there be recognition of substantive pre-existing and continuing Aboriginal rights.

3.30 Some submissions were made in support of part of a preamble in the terms suggested by the Advisory Committee,[39] in the hope that it might operate as a safeguard for the interests of Aborigines in the future.[40]

3.31 Other submissions, critical of the Advisory Committee's recommendation, can be divided into four broad categories.

33 Rights Report, 72.
34 *Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 FLR 141, 201 (Blackburn J).
35 ibid.
36 id, 202-3, 242-4, 249, citing *Cooper v Stuart* (1889) 14 App Cas 286 (Privy Council); *Coe v Commonwealth* (1978) 18 ALR 592, 596 (Mason J); *Coe v Commonwealth* (1979) 24 ALR 118, 129 (Gibbs J, with whom Aickin J agreed); *Re Phillips; Ex parte Aboriginal Development Commission* (1987) 72 ALR 508 (Neaves J); see also *Wacando v Commonwealth* (1981) 148 CLR 1, 27-8 (Murphy J); *Gerhardy v Brown* (1985) 159 CLR 70, 149-50 (Deane J).
37 *Coe v Commonwealth* (1979) 24 ALR 118, 136 (Jacobs J), 137-8 (Murphy J).
38 See comments in *Coe v Commonwealth* (1978) 18 ALR 592, 596-7 (Mason J); *Coe v Commonwealth* (1979) 24 ALR 118, 128-9 (Gibbs J, with whom Aickin J agreed).
39 eg Hon F Arena MLC S2505, 15 December 1986; E Sprigg S3094, 23 November 1987; B O'Driscoll S2745, 22 October 1987; C Niland S3077, 20 November 1987.
40 GM McDevitt S3124, 29 November 1987.

3.32 First, there were those which argued that the words did not go far enough towards recognising the position in 1788 and since then. For example, it was argued that the expression 'previously owned' implied that the Aborigines' ownership had effectively ceased at some time when, in their view, it subsists today.[41]

3.33 Secondly, there were those who argued that the suggested words misrepresented the historical or legal position at and since 1788.[42]

3.34 Thirdly, some people argued that to include such words in a preamble to the Constitution would be divisive rather than representative of the beliefs of most Australians,[43] and so would not assist Aborigines.[44]

3.35 Fourthly, it was submitted that such a preamble would have undesirable legal consequences. One academic lawyer argued, for example, that it would make Australia probably the only nation in the world to acknowledge in its basic law that its legal title to its territory is allegedly doubtful.[45] The Queensland Government submitted that the suggested words could have concrete consequences, in particular some impact on the common law as expounded by Mr Justice Blackburn in the *Gove Land Rights Case*.[46] In that Government's submission, this part of the suggested preamble is 'neither factual nor inspirational' and 'could be construed as a constitutional rejection of the terra nullius doctrine and lead to presumably unintended and unfortunate consequences.'[47]

3.36 We note, however, that the Federal Parliament and at least two State Parliaments have considered some formal acknowledgement of the prior ownership of land by Aborigines.[48] A resolution was passed by the Senate on 20 February 1975[49] and another was introduced in, but not voted on by, the House of Representatives on 8 December 1983.[50] A preamble to proposed federal legislation is being considered.[51]

3.37 The scope of federal legislative powers is analysed in Chapter 10. At this stage we note that there are real difficulties in preparing an appropriate recital and that words such as 'owned' and 'ceded' need to be carefully considered in this context.[52]

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41 eg ACT Council of Social Services Inc S2717, 21 October 1987. In correspondence after the publication of the Rights Report, Committee members suggested that some modification to the words would be acceptable. Mr Keneally and Mr Purcell said that this part of the proposed preamble could read 'Whereas Australia is an ancient land traditionally owned and occupied by Aboriginal peoples who never ceded that ownership' and Mr Castan said he could see the benefit of replacing 'previously owned' with 'traditionally owned'.

42 eg A Richardson S2915, 29 October 1987; D Bensley S3119, 2 December 1987; FW Garbett S2936, 31 October 1987; M Warren S2856, 28 October 1987; RJ Robinson S2905, 27 October 1987; FM Shepherd S3237, 7 February 1988.

43 eg C Gray S2693, 15 October 1987; AC Stewart S2904, 30 October 1987; Country Women's Association of Australia S3090, 20 November 1987; M Roberts S2770, 22 October 1987.

44 eg Dr C Gilbert S2824, October 1987; PE Pechey S3104, 24 November 1987; NH Barnfield S2907, 29 October 1987; Soroptomist International of Western Australia S2899, 28 October 1987.

45 Dr C Gilbert S2824, 9 October 1987.

46 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

47 Queensland Government S3069, 17 November 1987.

48 Two Acts contain relevant recitals: *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth), which recites that the Government of Victoria acknowledges a number of matters concerning traditional Aboriginal rights over certain land but that the Commonwealth does not acknowledge those matters, and *Aboriginal Land Rights Act 1983* (NSW), which recites that land in the State of New South Wales was traditionally owned and occupied by Aborigines.

49 *Hansard*, 367-70, on a motion moved by Senator Bonner on 19 September 1974.

50 *Hansard*, 3485-6 (text), 3486-97 (speeches).

51 See policy statement of Minister for Aboriginal Affairs of 10 December 1987: *Hansard*, House of Representatives, 3152-61.

52 See *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, especially 268-73 (Blackburn J), and *Gerhardy v Brown* (1985) 159 CLR 70, 149-50 (Deane J).

3.38 The range of criticisms indicates the sensitivity of these issues and problems inherent in preparing an appropriate preamble. Difficulties can be raised with respect to the other proposed recitals. For example, the Advisory Committee recommended commencing with the statement:

> Whereas the People are drawn from a rich diversity of cultures yet are one in their devotion to the Australian traditions of equality, the freedom of the person and the dignity of the individual ....

3.39 We accept that 'the People' have been 'drawn from a rich diversity of cultures',[53] but recognise that within Australia there is debate about some of the multi-cultural aspects of our society.

Reasons for recommendations

3.40 We consider that a preamble to the Constitution in the same or similar terms to those recommended by the Rights Committee would not confer any substantive rights, nor would it be relied on in interpreting other provisions of the Constitution or in limiting the use to which such provisions could be put. At most the preamble could be regarded in the same way as the preamble to any other Act, that is, as an aid only in the event of ambiguity in the substantive provisions of the Constitution.[54]

3.41 The use, if any, to which a preamble might be put must be considered in light of the broad approach taken by the High Court when interpreting the substantive provisions of the Constitution.[55] It is unlikely that the Court would take a different approach merely because of the inclusion of such a preamble, nor would an expansively worded preamble seem to add anything where the Court approaches the Constitution in this way.

3.42 The Committee's Report referred to the inclusion of 'fundamental sentiments' and 'common sentiments' in the preamble, and to the 'symbolic importance' of one aspect of it. We agree that any new preamble should rest on that basis. The range of criticisms of the proposed preamble indicates the difficulties of isolating 'the fundamental sentiments which Australians of all origins hold in common'[56] and stating them in a concise and 'inspirational' form.

3.43 Even if all the matters mentioned by the Committee are accepted, the question would be raised as to why other matters, which are important to many people and groups, are not referred to. The suggestion to include a recital about sexual equality is one instance. Others may suggest that reference should be made to such things as our common

53 At 30 June 1986, the preliminary estimated resident population of Australia of 15,973,900 comprised 12,576,000 Australian-born persons (78.7%) and 3,397,900 overseas-born persons (21.3%). The most common country of birth of overseas-born persons was the United Kingdom and Ireland (1,185,100 persons, 7.4%). Overseas born persons came from other European countries (1,173,200 persons, 7.3%), Asia (553,400 persons, 3.4%), America (120,300 persons, 0.7%), Africa (114,100 persons, 0.7%) and Oceania (251,900 persons, 1.5%): *Estimated resident population by country of birth and sex: Australia, June 1986,* Australian Bureau of Statistics, Catalogue No 3221.0.

54 A reference in the preamble to some relevant matter will make evidence of that matter admissible in court: See *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735. The recital of facts in a preamble does not mean, however, that the recitals are conclusive evidence of those facts; they are prima facie evidence only: *Dawson v Commonwealth* (1946) 73 CLR 157, 175 (Latham CJ); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 224 (Williams J), 243-4 (Webb J); see also 205-6 (McTiernan J), 263-4 (Fullagar J).

55 See the unanimous judgment of the High Court in *The Queen v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297, 314 where the Court gave its approval to the broad approach adopted by O'Connor J in *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309, 367-8; see also *The Queen v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225 (Full High Court).

56 Rights Report, 30.

language, our British cultural, legal and political heritage, our democratic institutions, triumphs over war and adversity, and our peaceful relations with other nations. In other words, there are real problems in knowing what to say and how to say it.

3.44 In summary, it seems to us that a preamble (which would almost certainly have to be approved as a separate question at a referendum) could be a source of passionate debate which would be a significant distraction from other substantive and more important proposals submitted to the electors.

3.45 Furthermore, it is undesirable to attempt to graft a preamble on the Constitution nearly ninety years after Federation, even though significant changes may be made to the Constitution as a result of our Reports. Had we been writing a new Constitution we may have been concerned to prepare an opening statement, though not in the terms suggested by the Rights Committee.

3.46 For these reasons we recommend against the inclusion of an additional preamble to the Constitution and against any alteration of the preamble to the *Commonwealth of Australia Constitution Act 1900.*

THE COVERING CLAUSES

Recommendations

3.47 We *recommend* that the covering clauses of the *Commonwealth of Australia Constitution Act 1900* be altered as follows:

(i) covering clause 5 should be altered by omitting all words appearing after the words 'laws of any State'; and

(ii) covering clauses 7 and 8 should be repealed.

3.48 We have already recommended in Chapter 2 that covering clause 2 should be altered by omitting the words 'the United Kingdom' and substituting the word 'Australia'.

Present provisions

3.49 The covering clauses of the *Commonwealth of Australia Constitution Act 1900* refer to sections 1-8 of that Act. Section 9 of the Act contains the Constitution proper. Although the Constitution was drafted in Australia by Australians,[57] it is still technically part of an Act of the Parliament of the United Kingdom.

3.50 The text of the covering clauses is as follows:

1. This Act may be cited as the Commonwealth of Australia Constitution Act.

2. The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.

3. It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.

57 Section 74, relating to appeals to the Queen in Council, was the only exception.

4. The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several colonies may at any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

5. This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

6. 'The Commonwealth' shall mean the Commonwealth of Australia as established under this Act.

'The States' shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called 'a State.'

'Original States' shall mean such States as are parts of the Commonwealth at its establishment.

7. The Federal Council of Australasia Act, 1885, is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by the Parliament of the Commonwealth, or as to any colony not being a State by the Parliament thereof.

8. After the passing of this Act the Colonial Boundaries Act, 1895, shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act.

Issues

3.51 From time to time the question has been raised whether it is any longer appropriate for the Constitution of the Commonwealth of Australia to derive its legal force and effect from its enactment as part of an Act of the Parliament of the United Kingdom. It has generally been accepted that at the time the Australian federation was formed there was no other way of establishing a constitution for the federation than by having the constitution enacted as a statute of the sovereign Imperial Parliament. Some may take the view that it would be more consistent with Australia's present status as a sovereign independent nation if the Constitution ceased to be part of a United Kingdom statute and that, accordingly, the preamble, the enacting words and the covering clauses of the *Commonwealth of Australia Constitution Act 1900* should, somehow, be repealed. In Chapter 2 we have recommended the repeal of the enacting clause for the reasons there stated.[58]

3.52 The total repeal of these parts of the Act would not, however, alter the facts of history about the genesis of the Constitution or about the constitutional theory which informed its making and which, for many years afterwards, sustained it as document having the status of a higher or basic law. Our view is that no useful purpose would be achieved by total repeal of the covering clauses, and that the clauses should be changed only to the extent that particular clauses or parts of them are demonstrably expended or outmoded.

58 See paras 2.147-2.149.

3.53 There is still a question about whether the covering clauses can in any way be altered, either in accordance with the procedure laid down in section 128 of the Constitution for amendment of the Constitution proper, or in some other way. We are satisfied that the covering clauses can be altered and, moreover, can now be altered pursuant to section 128 of the Constitution. We give reasons for this conclusion at the end of this Chapter.[59]

Covering clause 5 – Operation of the Constitution and of laws of the Commonwealth

Recommendation

3.54 We *recommend* that covering clause 5 be altered by omitting all words appearing after the words 'the laws of any State'.

Current position

3.55 The effect of covering clause 5 (which is set out earlier in this Chapter[60]) is to make the *Commonwealth of Australia Constitution Act* and the laws made by the Federal Parliament under the Constitution binding on 'the courts, judges, and people of every State and of every part of the Commonwealth', notwithstanding anything to the contrary in the laws of a State. It also declares laws of the Commonwealth to be in force on British ships, excluding warships, 'whose first port of clearance and whose port of destination are in the Commonwealth.' Covering clause 5 overlaps to some extent with section 109 of the Constitution, which provides that, where a valid federal law is inconsistent with a valid State law, the federal law prevails. But it goes further in making it clear that where a State or federal law conflicts with the Constitution, the latter prevails.[61]

3.56 The effect of the last part of covering clause 5 is to give the laws of the Commonwealth a geographical operation they might not otherwise have had. At the time the Constitution was brought into being, the Commonwealth of Australia was merely a colony of the United Kingdom and because of this it was thought to have very limited power to make laws which would operate outside the territorial limits of the Commonwealth. The last part of covering clause 5 overcame this assumed limitation in relation to the class of ships specified.

3.57 In the context of covering clause 5, the term British ship was held by the High Court to mean a public or private ship belonging to a British subject, including a British corporation.[62] On the other hand the reference in covering clause 5 did not mean that the laws of the Commonwealth could never apply to non-British ships.[63]

3.58 As a result of section 3 of the *Statute of Westminster 1931* (Imp) and the *Statute of Westminster Adoption Act 1942* (Cth), the Federal Parliament was recognised to have, as from 3 September 1939 and subject to the Constitution, full power to make laws having extra-territorial operation. It now seems to be accepted that the Federal Parliament has power under section 51(xxix.) – 'External affairs' – to make laws on any subject which operate outside the limits of Australia.[64] Consequently, the last part of covering clause 5

59 See paras 3.103-3.123.
60 para 3.50.
61 *Brown v The Queen* (1986) 160 CLR 171, 197 (Brennan J).
62 *Merchant Service Guild of Australasia v Commonwealth Steamship Owners Association* (1913) 16 CLR 664.
63 *Ex parte Oesselmann* (1902) 2 SR (NSW) 438.
64 *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337, 360 (Barwick CJ), 470 (Mason J), 497 (Jacobs J); *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1, 98 (Gibbs CJ), 172 (Murphy J), 255 (Deane J).

has ceased to have any real significance. As Windeyer J observed in 1959, 'Today the only result of covering cl. 5 is that, as a matter of construction, any valid Commonwealth legislation prima facie applies in such ships,[65] whereas prima facie it does not apply elsewhere outside the territorial limits of the Commonwealth.'[66]

Reasons for recommendation

3.59 Since the Federal Parliament now has full power to make laws having extra-territorial operation, no useful purpose is served by the part of covering clause 5 which provides that 'the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth'. It should also be noted that the class of ships which would now be classified as British ships is much smaller than it would have been in 1900 and that with the disappearance of the concept of 'British subject', doubts could arise over precisely what ships are 'British ships'.

3.60 The last part of covering clause 5 is, in our view, outmoded. Amendment of the covering clause by omitting all words after the words 'of any State' would in no way diminish the legislative powers of the Federal Parliament.

Covering clause 7 – Repeal of Federal Council of Australasia Act 1885

Recommendation

3.61 We *recommend* that covering clause 7 be repealed.

Current position

3.62 The Federal Council of Australasia was a legislative body established by the Imperial Parliament in 1885. It consisted of representatives of the colonies of Fiji, Queensland, Tasmania, Victoria and Western Australia, and for a short period South Australia. It was endowed with very limited powers to make laws for those colonies.[67]

3.63 The effect of covering clause 7 was to repeal the Act establishing the Federal Council but to continue in force those laws which had been passed by the Council and were still in operation at the time the Commonwealth was established. Had there not been a savings clause, the repeal of the *Federal Council of Australasia Act* would have meant that laws made by the Council would have ceased to operate.

3.64 The law-making powers given by the Constitution to the new Federal Parliament included all, or substantially all, of the legislative powers previously invested in the Federal Council of Australasia. Additionally, the new Parliament was given a general power to make laws with respect to 'The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia' (section 51(xxxviii.)). And by the second paragraph of covering clause 7 the Parliament was given an express power to repeal any law of the Federal Council applying in any State.

65 ie ships of the class specified in the clause.

66 *The Queen v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 309 (Windeyer J).

67 The Acts enacted by the Federal Council of Australasia are listed in Quick and Garran, 377 and reproduced in GS Knowles, *The Commonwealth of Australia Constitution Act* (1936).

3.65 Federal laws enacted since 1901 have repealed and superseded all of the laws of the Federal Council, except the *Australasian Orders in Lunacy Act 1891.* [68]

Previous proposals for reform

3.66 ***Australian Constitutional Convention.*** The covering clauses were reviewed by Standing Committee C of the Australian Constitutional Convention (and a Working Party of that Committee) in 1973-74, in the course of a more general review of the Constitution to determine which of its provisions could be regarded as expended or outmoded. The Committee recommended that covering clause 7 be repealed.[69] This recommendation was later endorsed at the Melbourne (1975) and Hobart (1976) sessions of the Convention.[70]

Reasons for recommendation

3.67 We *recommend* that covering clause 7 should be repealed. We note that, once the requisite steps have been taken to dispose of the *Australasian Orders in Lunacy Act 1891,* the covering clause will become otiose.

3.68 The repeal of covering clause 7 will, of course, repeal the repeal in 1900 of the *Federal Council of Australasia Act 1885,* but that does not mean that the Act of 1885 will thereby be resuscitated. It is true that, under the common law, there is a presumption that when an Act repeals a prior Act which repealed an even earlier Act, the latest Act revives the Act first repealed. So if Act X is repealed by Act Y and Act Z repeals Act Y, it is presumed that Act Z has the effect of reviving Act X. But this presumption is rebutted if the subject-matter and terms of Act Z indicate an intention that Act X is not to be revived.[71]

3.69 We are in little doubt that the repeal of covering clause 7 would not be held to revive the *Federal Council of Australasia Act 1885,* but if it is thought desirable that the matter be placed beyond doubt, the proposed law to repeal covering clause 7 should expressly declare that the *Federal Council of Australasia Act 1885* is not thereby revived.

3.70 Since the same doubt may arise in relation to other proposed laws involving repeal of sections or parts of sections of the Constitution or the *Commonwealth of Australia Constitution Act 1900* it may be desirable to include in the Constitution a general provision dealing with the effect of alterations by way of repeals in order to negate the operation of common law rules relating to revival on repeal. The model for such a provision would be section 38(2)(a) of the United Kingdom *Interpretation Act 1889* and its counterpart in section 7 of the federal *Acts Interpretation Act 1901.*[72]

3.71 Another possible way of achieving the same result would be to amend the *Acts Interpretation Act* (Cth), prior to the introduction of any further Bills to alter the Constitution, to make it clear that the present provision on revival on repeals applies to proposed laws for alteration of the Constitution.

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68 54 Vic No 1.

69 ACC, Standing Committee C, Interim Reports to Executive Committee (Oct 1974) 10 (printed in ACC Proc, Melbourne 1975).

70 ACC Proc, Melbourne 1975, 114-9; ACC Proc, Hobart 1976, 140-4.

71 *Marshall v Smith* (1907) 4 CLR 1617, 1634 (Barton J).

72 Although the Imperial Act of 1889 still has some bearing on the interpretation of the *Commonwealth of Australia Constitution Act 1900* and thus the Constitution, we think there can be no doubt that laws to alter the Constitution which take effect under section 128 of the Constitution are not Acts for the purposes of section 38(2)(a) of the 1889 Act.

Covering clause 8 — Application of Colonial Boundaries Act 1895

Recommendation

3.72 We *recommend* that covering clause 8 be repealed.

Current position

3.73 The *Colonial Boundaries Act 1895* is an Act of the United Kingdom Parliament which provides that:

> (1) Where the boundaries of a colony have, either before or after the passing of this Act, been altered by Her Majesty the Queen by Order in Council or letters patent the boundaries as so altered shall be, and be deemed to have been from the date of the alteration, the boundaries of the colony.
>
> (2) Provided that the consent of a self-governing colony shall be required for the alteration of the boundaries thereof.[73]

The Act went on to define which colonies were to be regarded as self-governing colonies for the purposes of the Act. They included all of the Australian colonies which later became States of the Australian federation.

3.74 The effect of covering clause 8 of the *Commonwealth of Australia Constitution Act 1900* was to delete the States from the list of self-governing colonies to which the *Colonial Boundaries Act 1895* applied and to substitute in their place the Commonwealth of Australia.

3.75 The application of the *Colonial Boundaries Act* to the Commonwealth presents some problems. To appreciate them requires some knowledge of the antecedents of the Act and its purpose. At the time the Act was enacted, it was well understood that the prerogatives of the Crown extended to the acquisition of sovereignty over territories and to the enlargement of the boundaries of those of its colonies which were not self-governing. But it was also accepted that the Crown could not, under the prerogative, alter colonial boundaries if those boundaries had been defined by Act of Parliament. In such a case, any boundary alteration required another Act of Parliament.

3.76 Where a colony's boundaries had not been defined by Imperial legislation, the power of the Crown to alter those boundaries once the colony had been granted a representative legislature and self-government was more doubtful. One view was that the Crown could alter the boundaries of a self-governing colony with the consent of the colonial legislature. But others considered that the boundaries of such a colony could not be altered except by Act of the United Kingdom Parliament. In fact the boundaries of some self-governing colonies had been altered by Queen Victoria without the backing of Imperial legislation and in some cases had been altered notwithstanding that the original boundaries had been defined by legislation. Doubts were expressed about the validity of those alterations and it was to resolve those doubts that the *Colonial Boundaries Act 1895* was enacted.[74]

3.77 The Act both ratified prior alterations of colonial boundaries by the Queen and authorised future alterations of the boundaries of self-governing colonies with the concurrence of those colonies, or, to be more exact, the concurrence of the colonial legislatures.[75]

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73 Section 1.

74 The history of the Act is described in *Wacando v Commonwealth* (1981) 148 CLR 1.

75 See Quick and Garran, 378-9.

3.78 It remains now to explain the nature of the problems which arise from the application of the *Colonial Boundaries Act* to the Commonwealth of Australia.

3.79 The first problem concerns the relationship between the Act and section 123 of the Constitution which deals with alteration of the limits of States of the federation. Section 123 empowers the Federal Parliament to alter the limits of a State but only with the consent of the Parliament of the State and with the approval of a majority of electors of the State voting on the question.[76]

3.80 An alteration of the boundaries of the Commonwealth of Australia could involve an alteration of the limits of a State or States, in which event the question would arise whether the alteration could be effected under the *Colonial Boundaries Act* or only in the manner prescribed by section 123 of the Constitution.

3.81 According to Dr Wynes, section 123 applies only to alteration of State limits; not to alterations of the boundaries of the Commonwealth. In his view, if the Federal Parliament were to consent to an alteration of the limits of the Commonwealth by the Queen, it would not be effecting any alteration of State limits but would be 'merely complying with the conditions precedent to the exercise of a power by a superior body.' The purposes of section 123 and the Act, Wynes thought, were different: 'sec.123 has nothing to do with the *Colonial Boundaries Act;* it is altogether *alio intuitu*'.[77]

3.82 In contrast, Quick and Garran, and more recently, Professor Lumb have suggested that section 123 qualifies both the Act and covering clause 8 so that if an alteration of the boundaries of the Commonwealth also involves alteration of the limits of a State or States, the State limits cannot be altered except in accordance with section 123. In Lumb's view, the effect of the Act is probably restricted to the alteration of the boundaries of Australia's external Territories.[78] But the Act could also apply to alterations of the boundaries of the 'internal' Territories of the Northern Territory and Jervis Bay other than those which affect State boundaries.

3.83 We prefer the view taken by Quick and Garran and by Lumb.

3.84 The Act presents some other problems. One is whether it has any application to Australia at the present time, and, if so, what that application is.

3.85 The Act presupposes the existence of a Royal prerogative to establish and vary boundaries of colonies, albeit a prerogative which does not extend to variation of boundaries fixed by statute or to variation of the boundaries of self-governing colonies without their consent. It supplies authority to the Queen to alter the boundaries of self-governing colonies, even when those boundaries have fixed by statute, provided that the legislature of the colony consents to the alteration. But it does not acknowledge that the legislatures of self-governing colonies might have an independent capacity to legislate to alter colonial boundaries. Indeed, at the time the Act was enacted, it was taken for granted that they did not.[79] And, for the purposes of the Act, the Queen meant the Queen in the sovereignty of the United Kingdom.

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76 Section 123 reads:

> The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

77 W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (3rd edn, 1962) 147.

78 Quick and Garran, 378-9; RDLumb, *The Constitution of the Commonwealth of Australia Annotated* (4th edn, 1986) 35.

79 *Wacando v Commonwealth* (1981) 148 CLR 1.

3.86 It can be argued that, as far as the Commonwealth of Australia is concerned, the Act is, for all intents and purposes, a dead letter, and its continued application is justifiable only to give validity to certain pre-Federation variations of Australian colonial boundaries. The Commonwealth may still be a self governing colony within the meaning of the Act, even though, by the *Statute of Westminster 1931* (Imp), its status was upgraded to that of a Dominion to which later Imperial Acts referring to colonies did not apply (section 11).

3.87 But, as a result of Australia's growth to nationhood, it can no longer be said that the Royal prerogative to bring new territory within the sovereign domain of the Commonwealth of Australia is exercisable by the Queen in the sovereignty of the United Kingdom. This prerogative is now, under section 61 of the Constitution, exercisable by the Queen in the sovereignty of Australia, or by the Governor-General, in each case acting on Ministerial advice.[80]

3.88 The Federal Parliament, too, can now draw on several heads of federal legislative power, for example the external affairs power (section 51(xxix.)) and the Territories power (section 122), to extend or vary the territorial limits of areas under Australian sovereignty, because any former limitations on its capacity to make laws having extra-territorial effect were swept away by section 3 of the *Statute of Westminster.* It is also worth noting that section 121 gives the Federal Parliament a capacity to extend the boundaries of the Commonwealth by admitting as a new State a Territory not previously within the sovereignty of the Commonwealth.

3.89 There is some uncertainty about whether, for the purposes of the *Colonial Boundaries Act* as modified by covering clause 8, the boundaries of the Commonwealth include the boundaries of Territories which are external to the continent of Australia. In both the Constitution and the covering clauses the term 'Commonwealth' is used in several different senses. In covering clauses 3, 4 and 6 the term refers to the political entity – the federation of States. Covering clause 5 seems to refer to the Commonwealth in a geographical sense.[81] The consent required for a boundary alteration under the 1895 Act, as modified by covering clause 8, is that of the Parliament of the Commonwealth. But what is not clear is whether a boundary alteration to which the Act applies includes an alteration to a boundary of a Territory of the Commonwealth, not affecting the limits of a State, or the placing of a new geographical area within the sovereignty of the Commonwealth.

3.90 We are inclined to think that any such action would nowadays be construed as involving an alteration of the boundaries of the Commonwealth and thus requiring the consent of the Federal Parliament. We note, however, that the High Court has recognised that, under the old Imperial regime, a distinction was drawn between an alteration of the boundaries of a self-governing colony by the Crown, and the annexation of territory by the Crown and placement of it under the administration of a self-governing colony. The latter was considered not to require the consent of the legislature of the colony because the annexed territory did not become part of the colony.[82]

3.91 These questions concerning Territories can now be regarded as academic. The Commonwealth does not need to rely on the *Colonial Boundaries Act* to achieve alterations to the boundaries of its Territories. It can acquire new Territories, pursuant to sections 61 and 122 of the Constitution, on its own initiative. It is free to accept or reject

80 See eg the Torres Strait Treaty concluded between Australia and Papua New Guinea (annexed to *Torres Strait Fisheries Act 1984* (Cth)). This concerns sovereignty over islands and maritime boundaries.

81 See *Spratt v Hermes* (1965) 114 CLR 226, 246 (Barwick CJ).

82 *Wacando v Commonwealth* (1981) 148 CLR 1, 21-2 (Mason J).

placement of territory under its authority by the Queen (section 122),[83] and since the adoption of the *Statute of Westminster,* no dependent Territory of the United Kingdom has been placed under Australian authority except by Act of the United Kingdom Parliament, enacted at the request and with the consent of the Government and Parliament of the Commonwealth.[84]

Reasons for recommendation

3.92 We have recommended the repeal of covering clause 8 from the *Commonwealth of Australia Constitution Act 1900,* and with it whatever further action is necessary to repeal the *Colonial Boundaries Act 1895* so far as it applies to the Commonwealth of Australia, for several reasons. In summary they are these:

(a) The continued application of the *Colonial Boundaries Act* to the Commonwealth, on the basis that the Commonwealth is a self-governing colony of the United Kingdom, is not consistent with Australia's status as a sovereign, independent nation.

(b) Under the Constitution, the Commonwealth already has ample executive and legislative power to alter the boundaries of the Commonwealth.

(c) The co-existence of the *Colonial Boundaries Act* and the Constitution gives rise to uncertainty about the precise relationship between the two.

(d) The *Colonial Boundaries Act* has, as far as we know, never been relied upon as a means of altering the boundaries of the Commonwealth.

3.93 Having regard to the opinions of the majority of the High Court in *Kirmani v Captain Cook Cruises Pty Ltd [No 1]*[85] it would seem that under section 51(xxix.) of the Constitution and section 2 of the *Statute of Westminster,* 1931 the Federal Parliament already has power to repeal the *Colonial Boundaries Act* so far as it is part of the law of Australia. We recognise that repeal of the Act could give rise to doubts about the effectiveness of certain pre-Federation instruments affecting the boundaries of colonies which became States of the Australian federation, and more particularly, those instruments which were intended to be validated by the *Colonial Boundaries Act.*[86]

3.94 We therefore recommend that the Bill for the Act to repeal the *Colonial Boundaries Act 1895* include a suitable savings clause.

3.95 A recommended alteration of section 123 of the Constitution is found in Bill No 4, proposed section 121C (Appendix K).

Other covering clauses

Clause 2

3.96 The reasons why we have recommended that this clause should be altered have already been explained in Chapter 2 of the Report.[87] We there recommended that the clause be altered to read:

> The provisions of this Act referring to the Queen shall extend to Her Majesty's Heirs and Successors in the sovereignty of Australia.

83 The Act of acceptance has been that of the Federal Parliament. See eg *Ashmore and Cartier Islands Acceptance Act 1933* (Cth); *Australian Antarctic Territory Acceptance Act 1933* (Cth).

84 See eg *Cocos (Keeling) Islands (Request and Consent) Act 1954* (Cth); *Christmas Island (Request and Consent) Act 1957: t (Cth).*

85 (1985) 159 CLR 351.

86 See *Cantley v Queensland* (1973) 1 ALR 329 and *Wacando v Commonwealth* (1981) 148 CLR 1.

87 para 2.150-2.156.

Clause 3

3.97 The principal effect of this clause was to enable Queen Victoria, acting on the advice of her Privy Council, to appoint a day on which the federation to be called the Commonwealth of Australia would come into being. The proclamation appointing that day was duly made on 17 September 1900,[88] and, as a result of it, the federation came into being on 1 January 1901.

3.98 Once the proclamation was made in accordance with clause 3, it was not something the Queen could revoke or amend, and thus either prevent the federation coming into being or dissolve the federation once it had been established.[89] So in a sense the force of covering clause 3 is expended.

3.99 Although generally we recommend that provisions in the Constitution the force of which is expended should be repealed, we do not think that any good purpose would be served by the formal repeal of covering clause 3. Like the Working Party of Standing Committee C of the Australian Constitutional Convention which reported on expended and outmoded provisions in the constitutional instruments, we are conscious of the need 'to strike a balance between those who see the Constitution as a purely legal instrument, and between those who see it as a legal instrument but also an important historical document.'[90]

Clause 4

3.100 This clause is closely linked with clause 3. It contains several provisions:

(a) A declaration that the Commonwealth of Australia was to be established on the day appointed by the Queen in the proclamation made by her under clause 3.

(b) A declaration that the Constitution set out in clause 9 was to take effect on and after the day so appointed.

(c) Between the time of the passing of the *Commonwealth of Australia Constitution Act 1900* (9 July 1900) and the day appointed for establishment of the Commonwealth (1 January 1901), the Parliaments of the colonies to be federated could make 'any such laws, to come into operation on the day so appointed,[91] as they might have made if the Constitution had taken effect at the passing of' the *Commonwealth of Australia Constitution Act 1900.* This provision in clause 4 was meant to empower the legislatures of the colonies destined to come into the federation to enact legislation which they had no power to make under their existing constitutions, but which they would have power to enact under the federal Constitution. Examples were the power under section 9 of the Constitution to make laws prescribing the method of choosing senators for the State, and for determining the times and places of elections of senators for the States; and the power under section 29 of the Constitution to make laws for determining the electoral divisions in each State for which members of the House of Representatives might be chosen, and the number of members for each division.

88 *Commonwealth Statutory Rules* 1901-1956, vol V, 5300.
89 See *Palais Parking Station v Shea* (1977) 16 SASR 350, 358 (Bray CJ), 367 (King J).
90 ACC, Standing Committee C: Interim Reports to Executive Committee (Oct 1974) 21 (printed in ACC Proc, Melbourne 1975).
91 ie, the day appointed under clause 3.

3.101 For the reasons we gave in relation to covering clause 3 we do not think that clause 4 should be altered or repealed. We note also that a number of sections in the Constitution take 'the establishment of the Commonwealth' as a reference point[92] so that, if clause 4 were to be repealed, it might still be necessary to include in the Constitution itself a provision specifying the date on which the Commonwealth was established and the Constitution took effect.

Clause 6

3.102 This clause defines the terms 'the Commonwealth', 'the States' and 'Original States'. It should, in our opinion be retained. Were it to be repealed, its provisions would need to be re-enacted (albeit in a modified form) as part of the Constitution proper.

BASES FOR ALTERING THE PREAMBLE AND COVERING CLAUSES

3.103 The orthodox view has been that nothing in the *Commonwealth of Australia Constitution Act 1900* which precedes 'the Constitution', as set out in covering clause 9, can be altered by the procedure provided for in section 128 of the Constitution because section 128 relates only to alterations of the Constitution. 'This Constitution', it declares, 'shall not be altered except in the following manner:-'. The parts of the Act which precede 'the Constitution' are not part of that Constitution and for that reason, it has been argued, they are not provisions to which section 128 applies.

3.104 Until recently, it was generally assumed that the only way in which the preamble and covering clauses 1-8 of the Act could be altered was by an Act of the United Kingdom Parliament passed at the request and with the consent of the Government and Parliament of the Commonwealth.[93] But as a result of the enactment by the Federal and the United Kingdom Parliaments of the *Australia Acts 1986,* the authority of the United Kingdom Parliament to legislate for Australia has been terminated. It cannot even legislate for Australia at the request and with the consent of the Government and Parliament of the Commonwealth.[94] The question therefore is whether we are left with provisions in the *Commonwealth of Australia Constitution Act 1900* which are immutable – provisions which no one can validly alter or repeal. The answer must surely be 'No'.

3.105 The problem is: Who now has authority to alter or repeal those provisions? Or rather: Whose amendments or repeals of those provisions is the High Court of Australia most likely to recognise as legally effective?

3.106 One commentator has suggested that the way to alter or repeal the first eight covering clauses would be, first, for the Federal Parliament, at the request and with the concurrence of all State Parliaments, to legislate pursuant to section 15 of the *Australia Act 1986* (Cth) to alter so much of that Act and the *Statute of Westminster* as prevents the United Kingdom Parliament legislating to alter or repeal those clauses. The next step would be for the Parliaments and Governments of the Commonwealth and the States to request and consent to the enactment of amending legislation.[95]

92 See sections 69, 70, 73(ii), 84-88, 96, 106 and 107. See also section 51(xxxviii.) which takes 'the establishment of this Constitution' as a reference point.
93 *Statute of Westminster 1931,* sections 4 and 9(3).
94 The effect of the *Australia Acts* is explained in Chapter 2 at para 2.139-2.146.
95 PH Lane, *The Australian Constitution* (1986) 2.

3.107 Having regard to the clear purpose of section 1 of the *Australia Act 1986* (Cth) to terminate British legislative power in relation to Australia and section 1 of the *Australia Act 1986* (UK) to abdicate such power, this proposal is hardly practical.

3.108 Another possible basis on which the covering clauses might be altered is section 51(xxxviii.) of the Constitution, the section relied upon to support the Australian version of the *Australia Act*. Section 51(xxxviii.) empowers the Federal Parliament to make laws with respect to the exercise of any power which, at the establishment of the Commonwealth, could be exercised only by the United Kingdom Parliament or by the Federal Council of Australasia. The power can, however, be exercised only at the request or with the concurrence of the Parliaments of all the States directly concerned. The power is also expressed to be subject to the Constitution, so any law made pursuant to it which conflicts with the Constitution is invalid.[96]

3.109 The reason why section 51(xxxviii.) might sustain a law to alter or repeal the preamble or covering clauses 1-8 of the *Commonwealth of Australia Constitution Act* is that, at the time the Constitution was established, these provisions could be altered only by the Parliament of the United Kingdom. They could not be altered by the Federal Parliament or by State Parliaments, or, so it would have to be argued, by the Federal Parliament and the Australian electors, pursuant to section 128 of the Constitution. A law of the Federal Parliament to repeal or alter the preamble or any of covering clauses 1-8 would, according to this argument, be a law with respect to the exercise within the Commonwealth of a power which at the establishment of the Constitution could be exercised only by the United Kingdom Parliament. But, depending on what the federal law provided, that law might still not be valid because it was inconsistent with the Constitution.

3.110 We consider it would be unsafe and unwise to rely on section 51(xxxviii.) as a basis for the alterations we have proposed.

3.111 Our reasons are as follows. Any law which changes the meaning or operation of the Constitution is a law to alter the Constitution. A law to alter covering clauses 2, 5 or 6 might clearly alter the operation and meaning of the Constitution. It could therefore not be enacted pursuant to section 51(xxxviii.). While the same argument cannot be made about the use of section 51(xxxviii.) to repeal the enacting clause or covering clauses 1, 3, 4, 7 and 8, and while that section could possibly be relied on to give effect to some of our recommendations, our view of the operation of section 128 makes it more appropriate that the consent of the electors be obtained. This is because all of the provisions of the *Commonwealth of Australia Constitution Act 1900* were enacted to create, explain, or give effect to, the Constitution or to make legislative changes that were necessary having regard to the establishment of the Commonwealth.

3.112 It is our opinion that, having regard to all matters that the High Court is likely to take into account in determining any question which might turn on who has authority to alter the preamble and covering clauses 1-8 of the *Commonwealth of Australia Constitution Act 1900* it is both safe and proper to proceed on the basis that alterations to these provisions can be made, and should only be made, by constitutional alteration pursuant to section 128 of the Constitution. This section, from the establishment of the Commonwealth, gave to the Parliament and to the electors of Australia the power to alter the Constitution which had been formally enacted by the Imperial Parliament.

96 Section 51(xxxviii.) is set out in Chapter 2 at para 2.140.

3.113 We now set out the reasons for our conclusion that alterations to the preamble, covering clauses 1-8 and also the enacting words in the *Commonwealth of Australia Constitution Act 1900* can be made by the process of constitutional alteration provided for in section 128 of the Constitution.

3.114 The power conferred by section 128 to alter 'this Constitution' is not expressly limited as regards the subjects or content of laws for alteration of the Constitution. There is nothing in section 128 which expressly prohibits alterations to the Constitution which involve additions of sections to deal with matters which are not dealt with in the Constitution as enacted in 1900. Nor is there anything in section 128 which expressly prohibits alterations to the Constitution which relate to matters dealt with in the provisions of the *Commonwealth of Australia Constitution Act 1900* which precede covering clause 9. There is, for example, nothing in section 128 which expressly prohibits alterations of the Constitution which involve incorporation within the Constitution, with some changes, of definitions of words and phrases in the Constitution which are presently defined in the covering clauses.

3.115 If section 128 were to be construed as not permitting alterations to the Constitution at variance with the provisions in the Act which precede the Constitution, it could only be because the latter have the status of higher law – law paramount over laws made in accordance with section 128.

3.116 Section 8 of the *Statute of Westminster,* which has not been altered by the *Australia Acts,* might appear to give the preamble and covering clauses 1-8 the status of higher law, but the section does not have that effect. The section was enacted as a rider to section 2 of the Statute – a section designed to make it possible for the Federal Parliament to make laws which would override United Kingdom legislation which was expressed to apply to Australia or which applied by necessary intendment.

3.117 Section 8 of the Statute was meant to make it clear that nothing in the Statute should 'be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia . . . otherwise than in accordance with the law existing before the commencement of' the Statute. In other words, nothing in the Statute was to be construed as changing the law governing alteration of the Constitution or the Imperial Act by which the Constitution was enacted. So section 8 of the Statute did no more than preserve existing law about how the Constitution and the Constitution Act could be altered. At the least it ensured that the Federal Parliament could not use the powers given to it by section 2 of the Statute to make laws in disregard of the requirements of section 128 of the Constitution.

3.118 Section 8 of the *Statute of Westminster* did not introduce any new rules governing the construction of section 128 of the Constitution. The meaning and effect of section 128, like that of any other section in the Constitution, has not been frozen in point of time by any Imperial Act or by judicial interpretation, and the High Court of Australia has on many occasions shown that it will interpret provisions of the Constitution in the light of changes which have taken place in the constitutional relationships between the United Kingdom and the Commonwealth of Australia. The relevant pronouncements by Justices of the High Court have, admittedly, been made only in relation to the ambit of federal legislative and executive powers, but those pronouncements are equally applicable to

section 128 of the Constitution.[97] Section 128 now has to be interpreted in the light of the fact that under *Australia Act 1986* (UK) the United Kingdom Parliament renounced authority to legislate for Australia.

3.119 An amendment or repeal of, or addition to, entrenched provisions relating to the organisation and powers of government in a country is, in its ordinary meaning, concerned with 'the Constitution'.

3.120 Our view merely leads to giving to the notion of 'alteration of the Constitution' the broad and natural meaning that the High Court has applied to any other expressions of power in the Constitution. In the past, limitations which were an inherent part of the Imperial system may have prevented the power being given its full scope.[98] The Constitution and the covering clauses were enacted by a superior law maker. They were therefore both higher law, binding by virtue of the *Colonial Laws Validity Act 1865,* with the difference that there was express provision to alter the Constitution, but not the covering clauses.

3.121 Whatever may have been the position before 1986, section 1 of the *Australia Acts* has, in our view, the effect of doing away with the concept of the Constitution having an inferior status to any other law. It is anachronistic to base the fundamental nature of the Constitution on the *Colonial Laws Validity Act 1865* (Imp). That Act merely defined the operation of the basic rule of the Imperial legal system that the will of the British Parliament was supreme throughout the Empire. That principle has gone, as far as Australia is concerned.

3.122 The *Commonwealth of Australia Constitution Act 1900* (including the Constitution) remains part of our law. It *was* law because it was made by an external sovereign power (although, of course, that power acted in accordance with the will of the electorates in the colonies). It is *now* law because it is the constitutive instrument that creates the Commonwealth and defines the structure and powers of the organs of government in Australia.

3.123 As a result of these changes, the provisions for alteration of the Constitution operate to their full extent encompassing all matters relating to our mode of government.[99]

97 See *Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393, 413 (Isaacs J); *Attorney-General for Ontario v Attorney-General for Canada* [1947] AC 127; *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337, 373 (Barwick CJ), 497 (Jacobs J); *Bonser v La Macchia* (1969) 122 CLR 177, 223 (Windeyer J); *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351, 379-80 (Mason J), 441-2 (Deane J).

98 There are no decisions to this effect however.

99 For present purposes it is unnecessary to consider a possible limitation of power in section 128 arising from the provisions of section 15 of the *Australia Act.* See L Zines, *The High Court and the Constitution* (2nd edn, 1987) 271-3.

CHAPTER 4

THE PARLIAMENTS

INTRODUCTION

4.1 In our inquiry and report on revision of the Constitution, we are required by our Terms of Reference to make such recommendations for change as will, amongst other things, 'adequately reflect Australia's status as . . . a Federal Parliamentary democracy' and 'ensure that democratic rights are guaranteed.' The salient features of the Australian federal parliamentary system have already been described in Chapter 2.[1]

4.2 This Chapter of the Report deals with aspects of the parliamentary system which, in our view, are not entirely satisfactory and which should be the subject of laws for alteration of the Constitution. Some of the recommendations we make need to be read in conjunction with recommendations contained in Chapter 5, 'The Executive Government of the Commonwealth', and in Chapter 7, 'New States'.

4.3 In this Chapter we also, as required by our Terms of Reference, make recommendations for revision of the Constitution to 'ensure that democratic rights are guaranteed'. We discuss the general question of what rights can be regarded as democratic rights and then consider how they should be constitutionally protected.

4.4 Although our recommendations relate primarily to the Federal Parliament, some of them also affect the Parliaments of the States and the legislatures of the Territories of the Commonwealth. The Federal Constitution does not, at present, control the structures of the Parliaments of the States. It does, however, limit the legislative powers of those Parliaments and makes the exercise of certain powers by the Federal Parliament conditional on the consent of State Parliaments.[2] It also gives State Parliaments certain powers to enact laws governing Senate elections and empowers the Houses of State Parliaments to choose senators to fill casual vacancies in the Senate.

4.5 For reasons we have set out in Chapter 2,[3] we have concluded that there is nothing in the Constitution which precludes alteration of the Constitution, in accordance with the procedures laid down in section 128, to include provisions which impinge upon existing State and Imperial legislation to do with the structures of State Governments. Nor do our Terms of Reference preclude us from making recommendations for alteration of the Constitution which would affect internal State constitutional arrangements. On the other hand, we have proceeded on the basis that our Terms of Reference do not permit us to make recommendations for alteration of the Constitution which impinge on existing constitutional arrangements within the States, and which are now exclusively the province of the State Parliaments, unless the alterations to be recommended can be justified as necessary for, or instrumental to, the maintenance of 'a Federal Parliamentary democracy', or ensuring 'that democratic rights are guaranteed'.

4.6 In the preparation of this Chapter of the Report we have been assisted by the reports of several of the Advisory Committees appointed by the Attorney-General. The particular matters reported on by those Committees which are dealt with in this Chapter are:

1 para 2.175-2.240.
2 See, for example section 51 (xxxvii.) and (xxxviii.) and sections 123 and 124.
3 para 2.92 and following.

(a) the Senate's powers in relation to 'supply', which was the subject of recommendations by the Advisory Committee on Executive Government;

(b) recommendation of money votes to the Parliament, which was also the subject of a recommendation by that Committee; and

(c) constitutional guarantees of democratic rights, which were the subject of several recommendations by the Advisory Committee on Individual and Democratic Rights.

For the most part, however, the matters dealt with in this Chapter are ones which did not come within the purview of the Advisory Committees. The principal matters dealt with are:

(d) the right to vote and parliamentary elections;

(e) meetings of parliaments;

(f) the composition of the Houses of the Federal Parliament;

(g) the maximum term of the Federal Parliament and the circumstances in which the term of a particular Parliament may be brought to an end before the expiry of its maximum term;

(h) senators' terms of office;

(i) the role of States in the election of senators, including the enactment of legislation governing Senate elections, the issue of writs for Senate elections, and the filling of casual vacancies in the Senate;

(j) the powers of the Senate and the House of Representatives *inter se,* particularly as regards taxing and expenditure measures;

(k) procedures for resolution of disagreements between the two Houses of the Federal Parliament;

(l) qualifications and disqualifications of members of the Federal Parliament; and

(m) privileges of the Federal Parliament.

4.7 Other matters which concern the Federal Parliament but which have been dealt with in Chapter 2 of the Report rather than in the present Chapter are:

(n) assent to Bills;

(o) reservation of Bills for the Queen's personal assent; and

(p) disallowance of Federal Acts.[4]

DEMOCRATIC RIGHTS AND PARLIAMENTARY ELECTIONS

Introduction

4.8 Our Terms of Reference required us to consider what changes should be made to the Constitution to ensure that it 'adequately reflect Australia's status as . . . a Federal Parliamentary democracy', and 'that democratic rights are guaranteed.' The main features of the federal parliamentary system in Australia have already been described in Chapter 2. Here we are concerned primarily with the question of how democratic rights should be constitutionally guaranteed.

4.9 But what are democratic rights? More fundamentally, what constitutes a democracy?

4 para 2.167-2.174.

4.10 Democracy, like other forms of government, has to do with power relationships – the power which different people, in different capacities, have over one another. What distinguishes a democracy from other forms of government is that the people who are to be governed have an opportunity to decide, freely and at regular intervals, who is to have authority to govern them and according to what policies. The people express their choices by voting at periodic elections of candidates for legislative office, and sometimes other governmental offices as well. The franchise – entitlement to vote – in a democratic system is broadly based and each elector has only one vote.

4.11 Essential elements of representative democracy, Stephen J has said, include 'the enfranchisement of electors, the existence of an electoral system capable of giving effect to their selection of representatives and the bestowal of legislative functions upon the representatives thus selected.'[5] But, he pointed out, 'the particular quality and character of the content of each one of these three ingredients of representative democracy . . . is not fixed and precise.' The franchise, for example, may be defined in many different ways; electoral systems may vary 'and no one formula can preempt the field as alone consistent with representative democracy.'[6] In truth, Stephen J concluded:

> representative democracy is descriptive of a whole spectrum of political institutions, each differing in countless respects yet answering to that generic description. The spectrum has finite limits and in a particular instance there may be absent some quality which is regarded as so essential to representative democracy as to place that instance outside those limits altogether; but at no one point within the range of the spectrum does there exist any single requirement so essential as to be determinative of the existence of representative democracy.[7]

4.12 A democratic system of government is commonly thought to require a good deal more than the basic elements described above. The electoral system has to ensure that electors are able to vote freely so that 'neither the incumbent government nor any other group can determine the electoral result by means other than indications of how they will act if returned to power.'[8] Those who compete for governmental office must have the facility to organise for that purpose, to communicate freely with those whom they wish to persuade – to let them know what they think is deficient in the performance and policies of the present incumbents of Government, and what they themselves propose to do if they are elected to office.

4.13 These same freedoms of association and expression must be accorded to people who, while they do not aspire to governmental office, have claims to make of Governments, grievances to express and opinions about who is best qualified to govern. There must, Jeremy Bentham once said, be security for every person to 'make known his complaints' and for 'malcontents' to 'communicate their sentiments, concert their plans, and practise every mode of opposition short of actual revolt'.[9]

4.14 Whether or not freedoms such as freedom of expression, assembly and association should be constitutionally guaranteed is a matter dealt with in Chapter 9. We will deal with it there as part of a broader consideration of whether there should be an entrenched set of constitutional rights and freedoms. Our concern here is rather with those proposed rights which, in Australia, seem to be commonly regarded as distinctively democratic in character, and with associated questions such as whether there should be a universal requirement that members of legislatures be directly elected. Prior proposals for

5 *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 56.
6 ibid.
7 id, 57.
8 J Lively, *Democracy* (1975) 43.
9 *A Fragment on Government*, ed W Harrison (1948) 94-5.

alteration of the Constitution to guarantee democratic elections suggest that the rights which are generally regarded as distinctively democratic are the right to vote in parliamentary elections and the right of electors to have their votes accorded the same value as the votes of other electors – the one vote one value principle. Given that our Terms of Reference required us to report on revision of the Constitution to 'ensure that democratic rights are guaranteed', the main questions we have had to consider are:

(a) the scope of the guarantees; and

(b) whether the guarantees should apply to all spheres of government.

4.15 In considering those questions we have had regard not merely to the law operating in Australia and its development, but also to the law in other comparable countries, especially those in which democratic rights are constitutionally protected. Since Australia is a party to the International Covenant on Civil and Political Rights of 1966 and has thereby undertaken to adopt such measures as may be necessary to give effect to the rights recognised in the Covenant, we have also had regard to the provisions of that international instrument.[10] For present purposes the most relevant provisons are Articles 2 and 25. Article 25, when read in conjunction with Article 2, provides that every citizen shall have the right and opportunity, without any distinction as to 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' and 'without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and

(c) To have access, on general term of equality, to public service in his country.'

The right to vote

Recommendations

4.16 We *recommend* that the Constitution be altered to provide that:

(i) the laws made by the Federal and State Parliaments and by the legislature of a Territory prescribing qualifications of electors shall provide for enfranchisement of every Australian citizen who has attained the age of eighteen years;

(ii) the Federal and State Parliaments and the legislature of a Territory may make entitlement to vote dependent on compliance with reasonable conditions as to:

- residence in Australia or in a part of Australia or in a Territory, in the case of federal elections; or
- residence in the State or Territory, or a part thereof, in the case of State and Territorial elections; or
- enrolment;

(iii) the Federal and State Parliaments and the legislature of a Territory may make laws disqualifying from voting Australian citizens who have attained the age of eighteen years who:

- are incapable of understanding the nature and significance of enrolment and voting by reason of unsoundness of mind; or

10 Australia signed the Convention in December 1972 and ratified it in August 1980.

- are undergoing imprisonment for an offence;

(iv) in choosing a member of a House of a State Parliament or of a legislature of a Territory, each elector shall vote only once; and

(v) section 41 of the Constitution be repealed.

4.17 We have also *recommended* that section 25 of the Constitution should be repealed. That is dealt with later in this Chapter.[11]

4.18 The recommendations we have made in relation to the qualification of electors preserve the present constitutional requirement that each elector shall vote only once in elections where senators and members of the House of Representatives are chosen.

Current position

4.19 Nowhere in the Constitution is the right to vote in parliamentary elections, federal or State, or in elections for Territorial legislatures, effectively guaranteed. Sections 7 and 29 provide that the Senate and House of Representatives shall be composed of senators and members who are directly chosen by the people. Section 30, read together with section 51(xxxvi.), empowers the Federal Parliament to prescribe the qualifications of electors of members of the House of Representatives. Under section 8 any person who is qualified as an elector of members of the House of Representatives is also qualified as an elector of senators. Both sections 8 and 30 require that in choosing senators and members of the House of Representatives, 'each elector shall vote only once.'

4.20 Section 41 of the Constitution provides:

> No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

4.21 At first sight this section might appear to grant a right to vote. But in 1983 the High Court held that it does not have that effect.[12] The section has to be read in conjunction with sections 8 and 30 which declare that, until the Federal Parliament otherwise provides, the qualification of electors of senators and members of the House of Representatives 'shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of the Parliament of the State'.

4.22 According to the High Court, section 41 means that even when the Federal Parliament enacted legislation to prescribe qualifications of electors, those who, by State laws, were then entitled to vote at elections of the more numerous House of the State, could not be prevented by the Commonwealth from voting in federal elections. The only purpose of section 41 'was to ensure that those who enjoyed the constitutional franchise [under sections 8 and 30] should not lose it when the statutory franchise was enacted. The statute was to govern the subsequent acquisition of the right to vote at federal elections.'[13] But once the *Commonwealth Franchise Act 1902* came into force, 'no person could acquire the right to vote at federal elections save in accordance with its terms'.[14] So for practical purposes section 41 is now a dead letter and the Constitution does not effectively guarantee anyone a right to vote.

11 para 4.146-4.159.
12 *The Queen v Pearson; Ex parte Sipka* (1983) 152 CLR 254.
13 d, 279 (Brennan, Deane and Dawson JJ).
14 bid.

4.23 The *Commonwealth Franchise Act 1902* granted the franchise to all British subjects who had attained the age of 21 years and who had been resident in Australia for at least six months. Persons of certain races, including Aborigines, were disqualified;[15] likewise persons of unsound mind and certain criminal offenders were disqualified. In 1911 further legislation was enacted to make it compulsory for qualified electors to be enrolled as electors. Voting did not, however, become compulsory until the general elections of 1925, pursuant to the *Commonwealth Electoral Act 1924.*

4.24 Since 1902 there have been numerous changes to the legislative provisions defining the federal franchise. The most important were the enfranchisement of Aborigines in 1962[16] and the reduction of the minimum voting age in 1973 from 21 to 18 years.

4.25 Prior to 1962, Aborigines had not been entitled to be enrolled and to vote as federal electors unless they were entitled to enrol as electors and to vote in elections for the more numerous House of the Parliament of the State in which they resided. In two States, Queensland and Western Australia, persons with a preponderance of Aboriginal blood had no such right and were thus not eligible to be enrolled as federal electors.

4.26 While the 1962 amendments secured Aborigines the right to be enrolled as federal electors, they did not make enrolment compulsory. This was in accordance with a recommendation of the Select Committee that enrolment should not become compulsory until a significant number of eligible Aborigines were in fact enrolled. Enrolment did not become compulsory until 1983.

4.27 Aborigines continued to be disqualified from enrolling as State electors in Queensland and Western Australia until 1966 and 1962 respectively. Enrolment and voting were not, however, made compulsory until 1971 in Queensland and 1983 in Western Australia. Although in all the other States, except South Australia, Aborigines were both qualified and required to enrol as State electors,[17] the requirement to enrol had not been strictly enforced. In consequence many Aborigines who were qualified to enrol did not do so and did not exercise their franchise.

4.28 This state of affairs has to a large extent been rectified as a result of the amendment of the *Commonwealth Electoral Act* in 1983 to make enrolment of qualified Aborigines as federal electors compulsory. Aborigines in New South Wales, Victoria, South Australia and Tasmania will now be automatically enrolled as State electors at the same time as they are enrolled as federal electors.

4.29 In Queensland and Western Australia, State electoral rolls are still compiled by State officials. Between late 1979 and 1984, Western Australian law made the process of enrolment sufficiently difficult to deter many Aborigines from enrolling. Whereas at the time the law was changed in 1979 there were only 5,000 more electors on the federal electoral rolls than on the State rolls, within 15 months the disparity had risen to 42,000. Most of the electors omitted from the State rolls were Aborigines. When the provisions discriminating against Aborigines were removed in 1983, it became possible to use the same claim card for enrolment on both the federal and State rolls. Queensland is now the only State in which separate enrolment claims are required for State elections.

15 Unless entitled to enrol under section 41 of the Constitution.
16 *Commonwealth Electoral Act 1962,* section 2; following a report from a Select Committee of the House of Representatives on the Voting Rights of Aborigines.
17 In South Australia, enrolment of all qualified electors was optional.

4.30 Aborigines in the Northern Territory now have the same rights to enrol and vote as electors of the Territory legislature as other residents of the Territory. This has not always been the case. During the 1950s, section 22 of the *Northern Territory Electoral Regulations* made it practically impossible for them to enrol and vote. The regulations provided that Aborigines who were wards, as defined by the *Welfare Ordinance,* could neither enrol nor vote. The practice was to have nearly all Aborigines declared wards before they attained voting age. In August 1960 the Minister for the Territories admitted that 15,277 persons had been declared wards under the Ordinance, all except one being Aborigines. None had appealed to the Wards Appeal Tribunal for revocation of the declarations of wardship.

4.31 The qualifications for enrolment as federal and State parliamentary electors are now similar. Subject to specified disqualifications and residence requirements, all persons who have attained the age of 18 years[18] and are Australian citizens are entitled to enrol as electors and, once having enrolled, to vote. British subjects (or persons who would be British subjects if the *Australian Citizenship Act 1948* were in force on a specified date) who are not Australian citizens, are also entitled to enrol if they were enrolled as electors on a specified date or within a certain time of a specified date.[19]

4.32 Under federal, New South Wales, Victorian and Western Australian law, persons who are, under the Federal *Migration Act 1958,* prohibited non-citizens or holders of temporary entry permits are disqualified from enrolling as electors.[20]

4.33 Under South Australian, Tasmanian and Western Australian law, unsoundness of mind is a disqualification.[21] Under federal and Victorian law, unsoundness of mind is not *per se* a disqualification. A person is disqualified from enrolling only if 'by reason of being of unsound mind', he or she 'is incapable of understanding the nature and significance of enrolment and voting'.[22] In Queensland the corresponding disqualification is being 'mentally ill – and incapable of managing . . . [one's] estate'.[23] In New South Wales it is being a temporary patient, a continued treatment patient, or a protected person within the meaning of the *Mental Health Act 1958* (NSW), or a person under detention under Part VII of the Act.[24] In the Northern Territory, insanity is not a disqualification.

4.34 There are considerable variations in the laws governing the entitlement of prisoners to enrol as electors. In Tasmania any person in prison under conviction is disqualified from enrolling, regardless of the offence or of the length of the sentence.[25] In South Australia, on the other hand, the disqualification of prisoners was, in 1976, removed altogether. Under federal law a person is disqualified if he or she 'has been convicted and is under sentence for an offence punishable under the law of the Commonwealth or of a State or Territory by imprisonment for 5 years or longer'.[26]

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18 NSW and Western Australia reduced the minimum voting age to 18 years in 1970, South Australia in 1971 and the other States in 1973.

19 There are slight variations in the formulations of the 'British subject' qualification. See *Commonwealth Electoral Act 1918,* section 93(1)(b)(ii); *Parliamentary Electorates and Elections Act 1912* (NSW), sections 20-1; *Elections Act 1983* (Qld), section 21; *Constitution Act 1934* (SA), section 33; *Constitution Act 1934* (Tas), sections 28 and 29; *Constitution Act 1975* (Vic), section 48; *Electoral Act 1907* (WA), section 17(1).

20 *Commonwealth Electoral Act 1918,* section 93 (7)(a); *Parliamentary Electorates and Elections Act 1912* (NSW), section 21(b); *Constitution Act 1975* (Vic), section 48; *Electoral Act 1907* (WA), section 18(d).

21 *Constitution Act 1934* (SA), section 33(2); *Constitution Act 1934* (Tas), section 14(2); *Electoral Act 1907* (WA), section 18(a); see also section 18(c).

22 *Commonwealth Electoral Act 1918,* section 93(8)(a).

23 *Elections Act 1983* (Qld), section 23(a).

24 *Parliamentary Electorates and Elections Act 1912* (NSW), section 21.

25 *Constitution Act 1934* (Tas), section 14(2).

26 *Commonwealth Electoral Act 1918,* section 93(8)(b).

Victoria has a like provision.[27] In contrast, in New South Wales, Queensland and Western Australia, a prisoner is disqualified only if he or she is serving a sentence for a specified term of years; in New South Wales and Western Australia, twelve months or more; in Queensland six months or more.[28]

4.35 Under federal and Victorian law a person is disqualified from enrolling as an elector if convicted of treason or treachery under a law of the Commonwealth, State or Territory and not pardoned.[29] Attainder of treason is also a disqualification in Western Australia.[30]

Previous proposals for reform

4.36 ***Constitution Alteration (Democratic Election of State Parliaments) 1968.*** In March 1968 Senator Murphy was granted leave to introduce a Bill which proposed to insert a new section 106A in the Constitution:

> The Houses of Parliament of the States shall be composed of members directly chosen by the people of the States under a system which shall provide that every citizen, unless disqualified by a law of the State as an infant, person of unsound mind, or prisoner, shall be entitled to vote and, so far as practicable, each vote shall be of equal value.

Senator Murphy gave his second reading speech in November 1968, but no debate took place and no vote was taken.

4.37 ***Constitutional referendum.*** In 1974 the *Constitution Alteration (Democratic Elections)* Bill was passed by the Houses of the Federal Parliament and put to referendum. The proposed law to alter the Constitution was designed to entrench two principles in the Constitution: the right to vote in federal and State parliamentary elections and one vote one value. We are concerned here only with the right to vote; the one vote one value principle is dealt with later in this Chapter.[31]

4.38 As regards the right to vote, what was proposed in 1974 was, first, that section 30 be altered by adding at the end of it the following paragraph:

> Laws made by the Parliament for the purposes of this section shall be such that every Australian citizen who complies with any reasonable conditions imposed by those laws with respect to residence in Australia or in a part of Australia and with respect to enrolment and has attained the age of eighteen years is, subject to any disqualification provided by those laws with respect to persons of unsound mind or undergoing imprisonment for an offence, entitled to vote.

4.39 Secondly, it was proposed that a new section be added after section 30 to provide, *inter alia,* that:

> 106A. Each House of the Parliament of a State or, where there is only one House of the Parliament of a State, that House, shall be composed of members directly chosen by the people of the State in accordance with an electoral system under which, at a general election of members of that House –

27 *Constitution Act 1975* (Vic), section 48.

28 *Parliamentary Electorates and Elections Act 1912* (NSW), section 21; *Electoral Act 1907* (WA), section 18(c); *Elections Act 1983* (Qld), section 23(b). In Western Australia a person is also disqualified if subject to an order, direction or sentence to be detained or kept in any kind of custody or prison under specified sections of *The Criminal Code 1913* (WA).

29 *Commonwealth Electoral Act 1918,* section 93(8)(c) and section 93(10); *Constitution Act 1975* (Vic), section 48.

30 *Electoral Act 1907* (WA), section 18(c).

31 para 4.102-4.145.

(a) every Australian citizen who complies with any reasonable conditions imposed by law with respect to residence in Australia or in the State or a part of the State and with respect to enrolment and has attained the age of eighteen years is, subject to any disqualification provided by law with respect to persons who are of unsound mind or are undergoing imprisonment for an offence, entitled to a vote, and to one vote only; . . . .

4.40 It was further proposed that section 75 of the Constitution be altered to give the High Court original jurisdiction in matters arising under certain sections of the Constitution, including sections 30, 41 and 106A, and to give electors standing to invoke that jurisdiction.

4.41 Opponents of the proposed law to alter the Constitution objected primarily to the clauses dealing with the one vote one value principle. In the referendum campaign much less attention was given to the right to vote aspects of the Bill. The proposed law was approved by 47.23% of electors nationwide, but was defeated in all States except New South Wales.

4.42 ***Australian Constitutional Convention.*** At the Adelaide (1983) session of the Australian Constitutional Convention another democratic elections proposal (moved by the Premier of Western Australia, Hon Brian Burke), again seeking to guarantee the right to vote and one vote one value, was debated but was rejected by 47 votes to 35.[32] As in the 1974 referendum campaign, the criticisms of the proposal were directed principally to the guarantee of one vote one value. The right to vote proposal differed slightly from the 1974 proposal since it made no reference to the possible disqualification of prisoners. What was proposed was simply that:

> . . . every Australian citizen over the age of eighteen years who is of sound mind and who complies with reasonable residence conditions imposed by law shall have the right to vote at elections for the Houses of the Commonwealth Parliament and the Houses of Parliament of the States and Territories.

4.43 ***Constitution Alteration (Democratic Elections).*** Another *Constitution Alteration (Democratic Elections)* Bill was introduced in the Senate in 1985 and re-introduced in 1987, on both occasions by Senator Macklin (Australian Democrats). This proposed law for alteration of the Constitution is similar to the proposal put to referendum in 1974 and, like it, is concerned with both the right to vote and one vote one value. As regards the right to vote what is proposed in the 1987 Bill is:

(a) section 41 be repealed;

(b) the following paragraph be added at the end of section 30:

> Laws made by the Parliament for the purposes of this section shall be such that every Australian citizen who complies with any reasonable conditions imposed by those laws with respect to residence in Australia or in a part of Australia and with respect to enrolment and has attained the age of 18 years or such lower age as the Parliament may determine is, subject to any disqualification provided by those laws with respect to persons who are of unsound mind or are undergoing imprisonment for an offence, entitled to vote, but nothing in this paragraph prevents the Parliament from making laws permitting voting by other persons who were, immediately before the commencement of the *Constitution Alteration (Democratic Elections) 1987,* entitled to vote;

(c) the following new section be added after section 106:

32 ACC Proc, Adelaide 1983, vol I, li and 199.

106A. Each House of the Parliament of a State or of a self-governing Territory or, where there is only one House of the Parliament, that House, shall be composed of members directly chosen by the people of the State or Territory.[33]

In the choosing of members of a House of the Parliament of a State or self-governing Territory, each elector shall vote only once.[34]

In this section:

'Parliament', in relation to a self-governing Territory, means that the body, other than the Parliament of the Commonwealth, for the time being having power to make laws for the peace, order and good government of the Territory:

'self-governing Territory' means a territory, or 2 or more territories, referred to in section 122 of this Constitution where, apart from the powers of the Parliament of the Commonwealth, the power to make laws for the peace, order and good government of the territory or territories is exclusively vested in a body the members of which are chosen by the people of the territory or territories.

4.44 In December 1985 the Senate referred the 1985 proposed law to the Joint Select Committee on Electoral Reform. The Committee did not present a report prior to the dissolution of both Houses in June 1987. In October 1987 the Senate referred the 1987 proposed law to the Joint Standing Committee on Electoral Matters. (The Committee's Report No. 1, *One Vote, One Value*, was published in April 1988, shortly after publication of this Chapter in the First Report of the Constitutional Commission.)

Advisory Committee's recommendations

4.45 Among the questions considered by the Advisory Committee on Individual and Democratic Rights were whether the right to vote should be constitutionally guaranteed and likewise the one vote one value principle. In relation to the former the Committee recommended that the Constitution be altered as follows:

(a) Delete section 30 and substitute a new section in the following terms:[35]

30. All citizens who are of or over the age of 18 years are qualified to be electors of members of the House of Representatives.

(b) Add the following provision:

106B. All citizens who are resident in a State and are of or over the age of 18 years are qualified to be electors of members of the Parliament . . . .

4.46 In addition the Committee recommended 'that the status of citizen should be provided for and protected in the Constitution' by the addition of the following provision:

126A. All persons who are:

(i) born in Australia;

(ii) natural-born or adopted children of an Australian citizen;

(iii) naturalised as Australians

are citizens of Australia and shall not be deprived of citizenship except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice.[36]

33 There follows a paragraph similar to the proposed addition to section 30.
34 There follow two paragraphs enshrining the one vote one value principle.
35 Rights Report, 103.
36 id, 104. The Committee also recommended that section 51(xix.) be altered to make it clear that the Federal Parliament has power to make laws with respect to citizenship.

4.47 The reasons given by the Committee in support of its recommendations in relation to the right to vote were 'that voting is a fundamental democratic right which should be protected by the Constitution so that in no circumstances can it be eroded by laws passed by the Parliament.'[37]

4.48 The Committee was 'not convinced by the argument that a constitutional guarantee is quite unnecessary because existing franchise laws throughout Australia are adequate.' It pointed out that it is 'Implicit in this argument . . . that Federal and State parliaments will never seek to alter or erode existing voting rights.' Equally the Committee was 'not persuaded by the argument that voting in State elections should be a matter for the State Parliaments. In a democracy, the right to vote is so fundamental that it should be guaranteed to the people at each level of government'.[38]

4.49 Under the Committee's proposals, every Australian citizen who attained the age of 18 years would be qualified to be an elector of members of both the Federal Parliament and the appropriate State Parliament. No Parliament would have power to disqualify persons meeting these qualifications, even on grounds such as incapacity to understand the nature and significance of enrolment or voting by reason of unsoundness of mind, or imprisonment for criminal offences. The Committee's reasons for denying the Parliaments this power were:

(a) as to unsoundness of mind – 'permitting persons to be disenfranchised on the basis of unsoundness of mind is open to abuse. Insofar as the exercise of the right to vote is concerned confinement to a hospital or a restraint on liberty are not the proper tests to apply. Any test should relate to the extent of a person's incapacity in understanding the nature and significance of enrolment and voting. In the circumstances the Committee believes that it is neither appropriate nor desirable in an enlightened society to retain such a disqualification';[39]

(b) as to imprisonment – 'Society's approach to the treatment of offenders has changed significantly since the end of the nineteenth century. Since then methods of dealing with offenders have become more complex. The emphasis has shifted to rehabilitation of offenders as useful members of society rather than meting out harsh penalties in retribution for wrongs inflicted on society. Notwithstanding this there are difficulties in determining whether an offence is punishable for a year or longer. In addition there are the practical problems in tying the disqualification to a specific term of imprisonment not the least of which is the difficulty of determining whether a sentence in fact meets the prescribed period. . . . it is unacceptable to deny such a fundamental right as the right to vote to a person on the basis of imprisonment because:

- it is a relic of the old common law concept of civil death, a concept which is inappropriate in a modern democracy;
- it amounts to double deprivation of some offenders;
- it is inconsistent with the rehabilitative aspect of imprisonment, and
- its practical effect is to condone the operation of laws which allow some prisoners to vote but not others, depending variously on the jurisdiction, the statutory penalty for the offence or the specific term of imprisonment.'[40]

37 id, 84.
38 ibid.
39 id, 87.
40 id, 86-7.

4.50 The Committee considered that the Federal Parliament should not have power to make the right to vote conditional on residence in Australia, though it seems that the Committee contemplated that the Parliament should continue to have power to legislate so as to require that a qualified elector be resident in the electorate for which he or she enrols.[41] It is not, however, entirely clear from the Committee's Report what would be the constitutional basis for federal legislation conditioning the right to vote on enrolment as an elector and requiring residence in the electorate for which an elector enrols if section 30 of the Constitution were to be altered in the way the Committee proposed.

4.51 Under the Committee's proposed section 106B residence in a State remains one of the qualifications to be an elector of the State.[42]

Submissions

4.52 Many submissions were received on the right to vote. The overwhelming majority of these favoured the entrenchment of the right to vote in the Constitution on the ground that it is the essential prerequisite of democratic citizenship. Democracy is concerned with the concept of equal participation in the political process and the right to vote is fundamental to that concept.[43] It is also fundamental to responsible government. Citizens for Democracy argued that the right to vote is an expression of popular sovereignty: 'democratic rights ensure, or provide some guarantee that other rights will be respected by responsible government.'[44] Senator Tate said he considered the right to vote to be absolutely paramount: 'it is the right of a person to engage in the election of those who will exercise supreme law-making power in our society.'[45] It was asserted that the right to vote is required if the representative character of Federal and State Parliaments is to be maintained.[46]

4.53 It was noted in the submissions that the Constitution at present includes no safeguards of the rights of voters. According to the Proportional Representation Society, 'There is nothing in the Constitution to prevent a future government from legislating for less satisfactory electoral arrangements than those that we have now'.[47] A number of submissions suggested that there is a real possibility, particularly in State elections, that a group may be denied the vote at some time in the future. Their conclusion was that the right to vote should be protected by a powerful constitutional guarantee.[48]

4.54 Some submissions, while supporting the constitutional entrenchment of the right to vote, canvassed concerns on a variety of issues. For example, it was argued that there should be a correlative right not to vote.[49] WGS Smith said that our political rights arise out of man's capacity for reason and choice; these rights are abrogated when they are

41 id, 87.

42 cf the passage in the Report where the Committee observed that:
Some State franchises have for many years included a residence requirement, usually three months. There is no strong basis for retaining such residential requirements when citizenship is the basic nationality criterion and persons are required to be resident in the electorate for which they enrol. Indeed a residential qualification can totally prevent enrolment for transitory workers and prisoners. ibid.

43 DH Lewis S1260, 18 February 1987.

44 Ms Zetlin, Citizens for Democracy S3528, 2 December 1986.

45 Senator Michael Tate S712, 1 November 1986.

46 Associate Professor Peter Hanks S0369, 27 January 1987.

47 J Wright, Proportional Representation Society S3643, 25 October 1986.

48 R Russell S1103, 16 February 1986; D Brand S1865, 14 April 1987.

49 R de Fegely S3222, 16 February 1987; BE McMillan S252, 10 September 1986; D Bone S1947, 24 April 1987; P D Scott-Maxwell S287, 24 September 1986; F Imray S1489, 10 March 1987; S Holme S2569, 1 December 1987.

allied to compulsion.[50] D Bone said that compulsory voting inflates the number of informal votes and so devalues the voice of the serious voter.[51] On the other hand, P Smyth argued that the right to vote should entail a corresponding duty to vote and, therefore, compulsory voting should be entrenched in the Constitution.[52] The need for political education for the citizen was also expressed.[53]

4.55 Other submissions dealt with specific issues relating to voter-eligibility. The Australian Society for the Study of Intellectual Disability and the Australian Association of Special Education said that intellectually disabled persons should have a right to vote.[54] The right of prisoners to vote was also advocated.[55] PV Wardrop said it would, *inter alia,* 'ensure a greater accountability of those in power for the conditions inmates face'.[56]

4.56 In a detailed submission, the Australian Electoral Commission said the relevant formulation in Senator Macklin's 1985 *Constitution Alteration (Democratic Elections)* Bill was a good model, but suggested that it should be modified in four ways:

(a) the guarantee should apply to natural born and/or naturalised Australians, rather than to 'Australian citizens';

(b) treason should be retained as a possible ground for disqualification;

(c) under the proposed guarantee of the right to vote, 'Parliament would still have the power to impose reasonable conditions of residence; however there is no guidance in the Bill as to what conditions might be regarded as reasonable.' As the 'scope of the power to impose residential qualifications could give rise to real problems' it would be preferable overall 'for the rules regarding "reasonable conditions . . . with respect to residence" to be spelt out explicitly in the Constitution, rather than being left to the High Court'; and

(d) Parliaments should have the power to make laws allowing voting by any persons to whom the general guarantee does not apply.[57]

4.57 Almost all those submissions opposing a constitutional guarantee of the right to vote did so in relation to a general antipathy to the entrenchment of rights in the Constitution.[58] The Queensland Government said that the extension of the right to vote to the States would constitute an intrusion into an area fundamental to the existence of the States as political entities.[59]

The right to vote in Canada and the United States

4.58 In considering whether the right to vote in parliamentary elections should be constitutionally guaranteed, and, if so, to whom and on what terms, it seemed to us

50 WGS Smith S3326, 7 March 1988.
51 D Bone S1947, 24 April 1987.
52 P Smyth S1259, 17 March 1987.
53 Dr RJ Brown MHA S296, 23 June 1987; BE McMillan S252, 10 September 1986; BJ Joyce S2553, 30 November 1987.
54 Australian Society for the Study of Intellectual Disability and the Australian Association of Special Education S761, 4 December 1986.
55 Offenders' Aid and Rehabilitation Service of South Australia S421, 22 October 1986; VG Breadon S149, 25 June 1986; J Mewton S3209, 16 February 1987; G Zdenkowski S3374, 24 March 1988.
56 PV Wardrop S742, 11 December 1986. Only one submission actively opposed prisoners' voting rights: AJ Dunn S3229, 16 February 1987.
57 Australian Electoral Commission S1200, 28 August 1986.
58 The Tasmanian Government S1361, 30 March 1987; B Francis S370, 30 September 1986; EA Greer S3132, 29 December 1987; JM Miller S67, 23 April 1986.
59 The Queensland Government S3069, 25 November 1987.

desirable to have regard to the experience of other comparable countries whose constitutions protect the right to vote. The countries whose experience in this regard seemed most relevant were Canada and the United States of America.

4.59 ***United States.*** The United States Constitution does not confer on any one a right to vote. 'The right to vote, *per se'*, it has been said, 'is not a constitutionally protected right'.[60] On the other hand, the Constitution does impose a number of inhibitions on what Governments can validly do in deciding who is qualified to be an elector of members of an elective legislature and who is disqualified.

4.60 Section 2 of Article I provides that electors for members of the House of Representatives in each State 'shall have the qualifications requisite for Electors of the most numerous branch of the State legislature'.[61] This provision means that the States have power to determine who may vote in elections of members of the House of Representatives.

4.61 But various amendments to the Constitution have placed restrictions on this power and also on the power to legislate in relation to the State franchise. For example the Fifteenth Amendment (1870) declared that, 'The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.' The Nineteenth Amendment (1920) imposed a similar prohibition on discrimination on the ground of sex. The Twenty-Fourth Amendment (1964) prohibited denial of voting rights on the ground of failure to pay any tax. The Twenty-Sixth Amendment (1971) declared that 'The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.'

4.62 In all of these amendments the United States Congress was empowered to enforce the prohibition by appropriate legislation.

4.63 The provision in the Constitution which has proved to be the most important in the protection of rights to vote has been Section 1 of the Fourteenth Amendment (1868). This provides, *inter alia,* that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' This equal protection clause has been interpreted to mean that when the members of a legislature are to be elected, then *prima facie* every citizen has a constitutionally protected right to participate in the election of those members on an equal basis with other citizens within the jurisdiction.[62] Laws which confer and define voting rights, but which discriminate between classes of citizens, must therefore 'be carefully and meticulously scrutinized' by the courts.[63]

4.64 The United States Supreme Court has upheld laws which limit the right to vote to persons who satisfy reasonable residential requirements.[64]

60 *San Antonio Independent School District v Rodriguez,* 411 US 1, 35 n.78 (1973).
61 cf Australian Constitution, sections 8 and 30.
62 *Dunn v Blumstein,* 405 US 330, 336 (1972).
63 *Reynolds v Sims,* 377 US 533, 562 (1964).
64 For example, a requirement of fifty days' residence was upheld, *(Marston v Lewis,* 410 US 679 (1973); *Burns v Fortscon,* 410 US 686 (1973)) but a law providing that a person be resident in the State for a year in order to be entitled to vote in State elections has been held to impose an unreasonable requirement. (*Dunn v Blumstein,* 405 US 330 (1972)).

4.65 The Court has also upheld literacy tests so long as they are not used to promote discrimination,[65] but the Congress has since banned the use of such tests.[66]

4.66 Disenfranchisement of persons who have been convicted of felonies has been held permissible, but largely because of the implied sanction of this disqualification in Section 2 of the Fourteenth Amendment.[67] But a State law denying the right to vote to persons convicted of 'any crime . . . involving moral turpitude' has been held unconstitutional on the ground that it operated in a discriminatory way against black persons.[68] In another case, State authorities were held to have acted unconstitutionally when they refused to provide to prisoners who were legally qualified to vote any facilities which would enable them to exercise their voting rights.[69]

4.67 ***Canada.*** In Canada the right to vote has been guaranteed by section 3 of the *Canadian Charter of Rights and Freedoms 1982.* This provides:

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly . . . .

Section 3 is, however, qualified by section 1 of the *Charter* which provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

4.68 It has been held that section 1 allows for laws which restrict voting rights with reference to age, mental capacity, residence and enrolment so long as those restrictions are reasonable.[70] Restriction of the right to vote in Provincial elections to persons resident in the Province during the preceding six months has been regarded as reasonable;[71] likewise with restriction of the right to vote in elections for the legislature of the Yukon Territory to persons resident in the Territory over the preceding twelve months.[72]

4.69 Several cases have come before the courts in which prisoners have alleged unconstitutional denial of their rights under section 3 of the *Charter* and in most of them the law or practice complained of has been held unconstitutional. Prison officials were held to have acted contrary to section 3 when they refused to allow prisoners on remand and awaiting sentence to vote in Provincial elections.[73] Denial of the right to vote to persons on probation has also been held to contravene section 3.[74] In two cases it was held to be contrary to section 3 to deny the right to vote to persons serving sentences of

65 *Lassiter v Northampton County Board of Elections,* 360 US 45 (1959); *Alabama v United States,* 371 US 37 (1962); *Louisiana v United States,* 380 US 145 (1965).
66 *Voting Rights Act 1965* – upheld as an exercise of Congress's power under the Fifteenth Amendment – *Oregon v Mitchell,* 400 US 112, 131-4 (1971).
67 *Richardson v Ramirez,* 418 US 24 (1974).
68 *Hunter v Underwood,* 85 L Ed 2d 222 (1985).
69 *O'Brien v Skinner,* 414 US 524 (1974).
70 *Re Scott and Attorney-General of British Columbia* (1986) 29 DLR 4th 545 (BCSC).
71 *Re Storey and Zazelenchuk* (1984) 36 Sask R 103 (Sask CA).
72 *Reference Re Yukon Election Residency Requirement* (1986) 27 DLR 4th 146 (YTCA).
73 *Re Maltby et al and Attorney-General of Sasketchewan* (1982) 143 DLR 3rd 649 (Sask QB); appeal dismissed (1984) 13 CCC 3d 308.
74 *Re Reynolds and Attorney-General of British Columbia* (1982) 143 DLR 3d 365 (BCSC); affirmed 11 DLR 4th 380 (BCCA).

imprisonment.[75] But there is an earlier case in which the Supreme Court of British Columbia took a different view.[76] The reasoning in support of these different views will be examined later in this Chapter when we explain our own recommendations.[77]

4.70 Another effect of section 3 of the *Charter* has been to make it obligatory for legislation on elections to provide for absentee voting by those who are eligible to vote.[78]

4.71 Finally, it is worth noting that the right to vote conferred by section 3 relates only to voting in elections of members of legislative assemblies. It does not extend to voting in plebiscites,[79] or in elections of members of Local Government councils.[80]

Proposed New Zealand Bill of Rights

4.72 In 1985 the Government of New Zealand published a White Paper setting out a Bill of Rights which would, if enacted, have the status of a higher law, that is, as a law according to which the validity of other laws would be adjudged. The proposed Bill of Rights was modelled on the *Canadian Charter of Rights and Freedoms* and, like the *Charter,* contained a clause designed to guarantee a right to vote in parliamentary elections. The proposed clause on voting rights provides as follows:

> 5. Electoral rights
>
> Every New Zealand citizen who is of or over the age of 18 years
>
> (a) has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot . . .[81]

Article 3 of the proposed Bill of Rights is similar to section 1 of the Canadian *Charter.*

4.73 The reason why Article 5 relates only to voting in elections for the House of Representatives is that New Zealand is a unitary state and its Parliament is unicameral. The reference to 'equal suffrage' was intended to enshrine the one vote one value principle.

Reasons for recommendations

4.74 The right to vote in elections of legislatures is, in our view, a basic democratic right and one which merits constitutional protection. As the United States Supreme Court observed in *Reynolds v Sims*:[82]

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.
>
> . . .
>
> It is a fundamental matter . . . Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

75 *Levesque v Attorney-General of Canada* (1985) 25 DLR 4th 184 (FCTD); *Badger et al v Attorney-General of Manitoba* (1986) 30 DLR 4th 108 (Man QB).
76 *Re Jolivet and Barker and The Queen and Solicitor-General of Canada* (1983) 7 CCC 3d 431.
77 para 4.84-4.93.
78 *Re Hoogbruin et al and Attorney-General of British Columbia* (1985) 24 DLR (4th) 718 (CA).
79 *Re Allman et al and Commissioner of the Northwest Territories* (1983) 144 DLR 3d 467 (NWTSC); affirmed on other grounds, 8 DLR 4th 230 (NWTCA).
80 *R v McKitka,* BC Prov Ct, 5 Nov 1986.
81 *A Bill of Rights for New Zealand: A White Paper* (1985).
82 377 US 533, 555, 562-3 (1964).

4.75 The alterations to the Constitution which we propose are not in the form of grants of rights to vote. Rather they preserve the power of parliaments to make laws defining who shall be qualified to vote in parliamentary elections, and elections for Territorial legislatures, but make those powers subject to certain limitations.

4.76 One limitation, which is already contained in sections 8 and 31 and which we recommend be extended to States and Territories, is that in choosing members of a legislature, each elector shall vote once only. In other words, it is not open to a legislature to provide that some electors may cast more than one vote in the same election.

4.77 The more substantial limitation involved in our proposals is that any laws prescribing qualifications of electors must provide for enfranchisement of every Australian citizen who has attained the age of 18 years. In so providing, the legislature may make entitlement to vote dependent on compliance with reasonable conditions as to:

(a) residence in Australia or in part of Australia or in a Territory, in the case of federal electors;

(b) residence in the State or Territory, or a part thereof, in the case of State and Territorial electors;[83] and

(c) enrolment.

4.78 What are reasonable conditions as to residence and enrolment would ultimately be for the High Court of Australia to decide. We have had regard to the Australian Electoral Commission's concerns about the use of the term 'reasonable'. We do not, however, think it desirable to include in the Constitution provisions which would, for example, prescribe required periods of residence. We note also that courts have, for a long time, had to interpret statutes which require that certain things be reasonable. We note also that in interpreting the *Canadian Charter of Rights and Freedoms,* courts have not experienced great difficulty in deciding whether residential qualifications are justifiable in a free and democratic society.[84]

4.79 Were our proposals to be adopted they would not preclude legislatures from enfranchising persons who are not Australian citizens or from lowering the minimum voting age.

4.80 The question of whether Australian citizenship should be constitutionally protected we examine later in this Chapter.[85]

4.81 A further limitation on legislative powers which our proposals entail is in regard to grounds on which a parliament can provide that persons who are otherwise qualified to vote are disqualified from voting. At present there are no constitutional constraints on who may be disqualified. Under our proposals, any legislature which wished to disqualify certain categories of Australian citizens of 18 years or over from voting could disqualify only:

(a) persons who are incapable of understanding the nature and significance of enrolment and voting by reason of unsoundness of mind; and

(b) persons who are undergoing imprisonment for an offence.

4.82 ***Persons of unsound mind.*** The terms of the provisions we propose correspond with those presently employed in section 93(8)(a) of the *Commonwealth Electoral Act 1918* and section 48 of the *Constitution Act 1975* (Vic). The provision would not allow, as the

83 See also our recommendations in relation to section 117 in Chapter 2: para 2.82-2.91.
84 para 4.67-4.71.
85 para 4.177-4.198.

Constitution Alteration (Democratic Elections) Bills of 1974, 1985 and 1987 would have done, a legislature to prescribe unsoundness of mind *per se* as a disqualification. For a person of unsound mind to be disqualified it would be necessary for the legislature prescribing the disqualification to state also that the disqualification applies only where, by reason of unsound mind, a person is unable to understand the nature or significance of enrolment and voting.

4.83 Precisely how it should be established that a person is disqualified on this ground would be for the legislature to determine. We note that, in its Second Report, the Joint Select Committee on Electoral Reform has recommended amendment of provisions of the *Commonwealth Electoral Act 1918* to give greater protection to persons who are at risk of being removed from the electoral rolls on grounds of mental illness.[86]

4.84 ***Prisoners.*** Our recommendations would, if adopted, permit a legislature to disqualify persons who are undergoing imprisonment for a criminal offence. We are not saying that such persons should be disqualified; merely that we think that legislatures should have power to disqualify on this ground if they think fit. Such a power would have been preserved under the *Constitution Alteration (Democratic Elections)* Bills of 1974, 1985 and 1987.

4.85 We have concluded that the power should be preserved because we recognise that the question of whether prisoners should be disenfranchised is one on which opinions are divided. That they are divided is shown by cases which have arisen under the *Canadian Charter of Rights and Freedoms.*

4.86 In most of the Canadian cases it has been held that disenfranchisement of prisoners is not demonstrably justified in a free and democratic society. However, in one case it was held[87] that it was so justified – not because prisoners are unfit to vote, or as an additional penalty, but rather because the right to vote was thought to involve 'more than the right to cast a ballot'. It meant rather 'the right to make an informed electoral choice reached through freedom of belief, conscience, opinion, expression, association and assembly – that is to say with complete freedom of access to the process of "discussion and the interplay of ideas" by which public opinion is formed.' Persons undergoing imprisonment for sentences were, because of the controls it is necessary to impose on them to preserve order and discipline in prisons, denied the freedoms 'necessary for the making of a free and democratic electoral choice . . .'.[88]

4.87 In a subsequent case, another Canadian court conceded that disenfranchisement of prisoners could, in some circumstances, be justified in a free and democratic society. Reference was made to the fact that although in some democratic systems (eg Norway, Sweden and Denmark) it is not an automatic disqualification, in many others imprisonment for offences is, in some circumstances, a disqualification. In the opinion of the court, what cannot be demonstrably justified in a free and democratic society is a blanket disenfranchisement of prisoners – disenfranchisement irrespective of the length of the sentence and irrespective of whether the offence is one of absolute liability or involves proof of *mens rea.*[89]

86 PP 1/1987, paras 3.36-3.47.
87 para 4.69.
88 *Re Jolivet and Barker and the Queen and the Solicitor-General of Canada* (1983) 7 CCC 3d 431, 433-4; see also 436.
89 *Badger v Attorney-General of Manitoba* (1986) 30 DLR 4th 108, 113-4.

4.88 We note that, in its Second Report, the Joint Select Committee on Electoral Reform has recommended[90] complete repeal of section 93(8)(b) of the *Commonwealth Electoral Act 1918* – the provision which disqualifies from enrolment and voting any person who has been convicted and is under sentence for an offence punishable by imprisonment for 5 years or longer. The Committee drew attention to practical difficulties which this provision has raised. One of these is that prison authorities are aware only of the actual sentences imposed on prisoners, not of the maximum sentence for the offence of which a prisoner has been convicted.

4.89 The Committee also drew attention to some other unsatisfactory features of the present law, for example, lack of consistency in the laws prescribing penalties; the fact that some offences which can be serious are punishable only by fine; and the fact that a person is regarded as still under sentence even though he or she has been released from custody under licence. A majority of the Committee concluded that section 93(8)(b) 'can apply in an inconsistent and inequitable way and serves no useful purpose'. It was of the opinion:

> that an offender once punished under the law should not incur the additional penalty of loss of the franchise . . . a principal aim of the modern criminal law is to rehabilitate offenders and orient them positively toward the society they will re-enter on their release . . . [T]his process is assisted by a policy of encouraging offenders to observe their civil and political obligations.[91]

4.90 Many may agree with that view, but we cannot assume that it is one that would be generally shared. It is largely for this reason that we recommend that it should be open to legislatures to disqualify from enrolment and voting persons undergoing imprisonment for offences.

4.91 Under our proposed alterations to the Constitution, it would not be open to legislatures to disqualify persons who are still, technically, under sentence but who have been released from custody. It would also not be open to legislatures to disqualify persons merely because they had been convicted of an offence, even for serious offences or ones which, like treason, have traditionally been treated as ones for disqualification.

4.92 We have noted in Chapter 2[92] the argument that such matters as the right to vote in State elections are of concern only to the Government and people of each State. We have set out our response to that argument: essentially it is that constitutional provisions guaranteeing basic democratic rights in relation to all Governments in Australia are consistent with the concept of a federal society.

4.93 Our object with regard to the qualification of electors is to entrench in the Constitution a basic principle of representative democratic government. It is the rights of people we seek to protect, not those of Governments or States. Our proposals, which largely reflect existing arrangements, lay down minimum requirements and impose minimum limitations. They do not impose uniform arrangements on the States. They are, however, a recognition of the fact that a federal system entails cooperation between its component parts. As a result of the interdependence of Federal and State Governments the Australian people as a whole have a concern for the maintenance of representative

90 PP 1/1987, paras 3.48-3.58.
91 id, para 3.57.
92 para 2.89-2.111.

government in individual States.[93] The proposals we recommend are appropriate to a federal society and consistent with the guarantees that exist in the Constitutions of other major federal countries.

4.94 ***Models considered.*** In considering how the right to vote should be constitutionally protected we have had regard to the various *Constitution Alteration (Democratic Elections)* Bills, the Advisory Committee's recommendations, and relevant provisions in other constitutions, notably those of Canada and the United States. We have also had regard to Australian law and its development.

4.95 In form, the alterations we propose are much the same as clauses in the *Constitution Alteration (Democratic Elections)* Bills. We have not adopted the very simple formulations recommended by the Advisory Committee, because they do not, in our view, make sufficient allowance for the imposition of reasonable conditions as to residence and enrolment, or reasonable disqualifications from enrolment and voting.

4.96 Although in Chapter 9 we recommend inclusion in the Constitution of a new Chapter on rights and freedoms, modelled to some extent on the *Canadian Charter of Rights and Freedoms,* we have concluded that, on balance, it would be preferable for provisions on the right to vote not to be incorporated in that Chapter, but to be dealt with separately. The reasons which led us to this conclusion were:

(a) There could be much greater support for constitutional protection of voting rights than for a much more comprehensive chapter guaranteeing individual rights and freedoms.

(b) Having regard to Canadian experience, it seemed to us better that permissible limitations which legislatures may impose on the right to vote should be spelled out in the Constitution rather than left to be determined by courts according to an open-ended standard such as whether the limitations are demonstrably justified in a free and democratic society.

4.97 ***Section 41.*** We have explained earlier that the right to vote guaranteed by this section of the Constitution no longer guarantees to any living person a right to vote in federal parliamentary elections.[94] The section is, in fact, a dead letter. It is for this reason that we recommend that the section be repealed.

Compulsory Voting

4.98 The requirement that a person who is qualified to be an elector must enrol as an elector and vote in parliamentary elections is, in every case, a requirement imposed by statute. Voting in parliamentary elections was first made compulsory in Queensland in 1918. It was made compulsory in 1924 in federal elections. By 1944 voting in parliamentary elections was compulsory in all of the States.

4.99 We make no recommendations on whether enrolment and voting should or should not be mandatory. Australia is, we recognise, one of the few countries in which enrolment and voting is required of those who enjoy the franchise. While we agree that compulsion to enrol and vote is not a necessary element of a democratic system of government, we accept that it is not something which is demonstrably inconsistent with democratic principles. Those who originally supported the idea of compulsory voting did so mainly

93 This interdependence is evident in the joint action required by Federal and State Parliaments under section 15 of the *Australia Act 1986* and the Federal-State Financial Agreement which is underwritten by section 105A of the Constitution.

94 para 4.22.

for the reason that it would ensure more or less perfect competition between political parties at the polls and thus guarantee that the parliaments were truly representative of popular opinion.

4.100 Compulsory voting is, however, defended on another, more fundamental ground, namely that the right to vote in elections of persons who are to exercise powers of Government should be conjoined with an obligation to exercise that right. In other words, all of the claims made in support of a right to participate in the choice of persons who will have powers of Government – powers to impose all manner of legal compulsions – are legitimate only if the claimants are fixed with a responsibility to so participate.

4.101 Given that the matter of compulsory enrolment and voting is still controversial, and not central to the maintenance of a democratic governmental system, we have concluded that it is not appropriate to recommend any alterations to the Constitution which would either (a) entrench a principle that persons eligible to be electors should both enrol and vote, and be penalised if they do not; or (b) entrench a principle that persons eligible to be enrolled and to vote as electors shall not be compelled to enrol or vote.

One vote one value

Recommendations[95]

4.102 We *recommend* that the Constitution be altered to provide as follows:

(i) The number of enrolled electors in the electoral divisions where members of the House of Representatives or the legislatures of a State or Territory are chosen shall not vary by more than 10% above or below the relevant quota prescribed for that division (that is, one vote one value).[96]

(ii) Federal, State and Territorial electoral divisions shall be determined at such times as are necessary to ensure that the principle of one vote one value is maintained.

(iii) A federal electoral division shall not be formed out of parts of different States. A division may be formed out of different Territories, out of parts of different Territories or out of a Territory and part of another Territory.

(iv) In the absence of an applicable law for a federal or Territorial electoral division, a particular State or Territory respectively shall be one electorate. Where State electoral divisions do not comply with the prescribed quota, the State shall be one electorate and the method of choosing members of a House of a legislature shall be, as nearly as practicable, the same as the method of choosing senators for the State.

(v) A formula shall be prescribed in the Constitution to ensure that the principle of one vote one value is maintained for elections for the House of Representatives and State and Territorial legislatures for electoral divisions where two or more members are to be chosen.

We also *recommend* no change to the existing provision:

(vi) in section 24 that each Original State is entitled to representation by at least five members in the House of Representatives; and

(vii) in section 7 that each Original State is entitled to equal representation in the Senate.

95 We have made some modifications to the expression of these recommendations since the First Report to ensure they do not have the unintended effect of precluding proportional representation.

96 This principle is referred to hereafter as 'one vote one value'.

Current position

4.103 The principle of one vote one value means that each vote in a democratic election should have approximately the same weight in determining the outcome. This requires that members of the legislature represent approximately the same number of electors.

4.104 The principle of one vote one value is not entrenched in the Constitution. The only sections which might be said to bear upon the matter are:

> 24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.
>
> 29. Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States.
>
> In the absence of other provision, each State shall be one electorate.

4.105 In *Attorney-General (Cth); Ex rel McKinlay v Commonwealth (McKinlay's Case)* (1975),[97] the High Court held by a majority[98] that one vote one value for federal electoral divisions is not implied by the phrase 'directly chosen by the people of the Commonwealth' in the opening paragraph of section 24. The majority was not prepared to follow the interpretation which the United States Supreme Court gave to the corresponding words in Article 1, Section 2, Clause 1 of the United States Constitution in *Wesberry v Sanders* (1964).[99]

4.106 Warnings were sounded in *McKinlay's Case* against too great a divergence in numbers between electoral divisions.[100] However, the majority held that neither the Constitution's language nor its history required adherence to the principle of one vote one value.[101] Section 29 was said to be the provision which deals specifically and comprehensively with electoral divisions.[102]

4.107 While the principle of one vote one value is not entrenched in the Constitution, the Federal, New South Wales, Victorian and South Australian Parliaments have all passed laws to ensure that electoral divisions contain approximately equal numbers of electors, with an allowable variation of 10% above or below the average. (Henceforth this is referred to as ± 10% tolerance.)

4.108 ***Federal electoral divisions.*** At the joint sitting in August 1974, section 19 of the *Commonwealth Electoral Act 1918* was amended to allow departures of no more than 10% above or below the quota for the distribution of a State or Territory into federal electoral divisions where members of the House of Representatives are chosen. Between 1902 and

97 135 CLR 1.

98 Barwick CJ, McTiernan, Gibbs, Stephen, Mason and Jacobs JJ; Murphy J dissenting.

99 371 US 1. The relevant clause reads:

> 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States . . . .

100 135 CLR 1, 36 (McTiernan and Jacobs JJ). The Court also held that a redistribution was required after a new determination of the number of members of the House of Representatives to be chosen for each State: id, 34 (Barwick CJ).

101 Barwick CJ maintained that the relevant phrase in section 24 means only that the election of members should be direct and not indirect and that it shall be by popular election (id, 21).

102 id, 61 (Mason J).

1974 a ±20% tolerance had been allowed.[103] In 1974 there was also a reduction in the number of the considerations required to be taken into account by the Distribution Commissioners when reapportioning electoral boundaries.[104]

4.109 These reforms were incorporated in the 1984 amendments to the *Commonwealth Electoral Act 1918*.[105] Section 59(2)(b) specifies that a redistribution shall occur within a State when one-third of the electoral divisions within it no longer comply with a ±10% tolerance. The 1984 reforms embody two further major principles:

(a) that a redistribution should remain in force for two general elections, though not for more than seven years; and

(b) that growing electoral divisions should at the time of the redistribution be given lower than average enrolments and shrinking divisions higher than average enrolments. In this way, the average will be achieved midway between redistributions.

By legislation, therefore, the Federal Parliament has ensured that elections where members of the House of Representatives are chosen comply with the principle of one vote one value. However, these arrangements may be repealed by legislation.

4.110 ***State electoral divisions.*** In New South Wales and South Australia a ±10% tolerance for State electoral divisions where members of the Legislative Assemblies are chosen, is an entrenched provision of their respective Constitutions.[106] Regular redistributions of electoral boundaries are also provided for in these Constitutions.[107] In Victoria the ±10% tolerance for the Legislative Assembly and the Legislative Council is part of the *Electoral Commission Act 1982*.[108] Arrangements for the Tasmanian House of Assembly follow federal electoral divisions and so adopt a ±10% tolerance.

4.111 In the other States, and in relation to the Tasmanian Legislative Council, there are wide disparities in the size of electoral divisions. In Queensland, the *Electoral Districts Act 1985* (Qld) established four electoral zones, each with a different prescribed quota of electors.[109] The quotas for the four zones are:

South Eastern Zone	19,357
Provincial Cities Zone	18,449
Country Zone	13,131
Western and Far Northern Zone	9,386

103 *Commonwealth Electoral Act 1902*, section 16.

104 Five criteria to guide the Commissioners were established in section 19, namely, community of interests, including economic, social and regional interests; means of communication and travel; the trend of population changes; physical features; and existing boundaries.

105 Section 66(3)(b) of the Act specifies ±10% as the maximum deviation from the quota allowed at the time of a redistribution.

106 *Constitution Act 1902* (NSW), section 28; *Constitution Act 1934-1975* (SA), section 77. In both cases, for elections where members of the Legislative Councils are chosen the States are treated as one electorate.

107 Sections 27 and 82 respectively.

108 Section 9(2); section 5 provides for regular redistributions to maintain the prescribed quota for electoral divisions.

109 Section 14 of the Act sets out the conditions under which either a complete or partial redistribution *may be made* to maintain the applicable quota for a zone.

A ±20% tolerance from the quota for that particular zone is permitted in three of the electoral zones. There is no equivalent limitation operating in the Western and Far Northern Zone. Queensland's zoning system inflates the value of the rural vote. As at December 1987 the electorates for the Queensland Legislative Assembly with the highest and lowest number of electors were Logan with 25,398 and Roma with 8,256.

4.112 As at January 1988, the electorates for the Tasmanian Legislative Council with the highest and lowest numbers of electors were Pembroke with 18,878 and Gordon with 5,424. No specified quota operates in relation to these electoral divisions, nor do the electoral laws prescribe the timing of redistributions.

4.113 At the time the Advisory Committee on Individual and Democratic Rights reported in June 1987, reforms were being introduced in Western Australia in relation to elections for the Legislative Assembly and Legislative Council. These reforms are embodied in the *Acts Amendment (Electoral Reform Act) 1987* (WA) and the *Electoral (Procedures) Amendment Act 1987* (WA). Their purpose was to reduce the disparities between rural and urban electoral divisions which had arisen as a result of the policy of district zoning. However, sizeable disparities remain in enrolments per member of the Western Australian Parliament.[110] There are six electoral regions operating in Western Australia for both the Legislative Assembly and the Legislative Council. Each of these regions has a different electoral quota and within each a ±15% tolerance is permitted.[111] As at November 1987 the electorates for the Western Australian Legislative Assembly with the highest and lowest number of electors were Maylands with 22,374 and Murray with 9,002.[112] The ratio between metropolitan and country enrolments per member after the reforms is:

Legislative Assembly	1.88 : 1
Legislative Council	2.77 : 1

Prior to reform the ratio was:

Legislative Assembly	8.5 : 1
Legislative Council	11 : 1

The reforms represent a significant step towards the concept of one vote one value.

4.114 ***Territorial electoral divisions.*** Section 14 (a) of *Electoral Act 1980* (NT) allows for a ±20% tolerance in the size of electoral divisions for the election of members of the Legislative Assembly.[113] The average quota for each electoral division is 2,800-2,850 electors. As at 22 January 1988 the electorates with the highest and lowest numbers of electors were Palmerston with 4,147 and Braitling with 2,467.

110 This is despite the Western Australian Government's commitment to the principle of one vote one value. It has sought to introduce appropriate legislation on a number of occasions, notably the *Acts Amendment (Constitution and Electoral) Bill* of 1983, the *Acts Amendment (Fair Representation) Bill* of 1984 and the *Electoral Amendment Bill* of 1985. The first two were defeated in the Legislative Council and the third lapsed after a disagreement between the Houses when the Legislative Council would not permit the printing of party names on ballot papers. The legislation enacted in 1987 was a compromise package of proposals for reform.

111 *Electoral Districts Act 1947-85* (WA), section 6; section 2A provides for regular redistributions.

112 A similar comparison cannot be made for the Legislative Council as the electoral regions do not choose the same number of Council members. However, an indication of the existing disparities can be gained from the following figures : both the East Metropolitan region and the Mining and Pastoral region elect 5 Legislative Council members – as at November 1987 the first had 196,592 electors, the second only 60,545.

113 The ±20% to tolerance was originally established in section 13 of the *Northern Territory (Self-Government) Act 1978.* Section 12 of the *Electoral Act 1980* (NT) states that the Administrator may direct the Distribution Committee to divide or redivide the Territory into proposed electoral divisions; the Act does not prescribe regular redistributions.

Position in other countries

4.115 In considering whether one vote one value should be constitutionally entrenched, it seemed to us desirable to note the current position in other countries with comparable electoral systems.

4.116 We have noted that the United States Supreme Court has held that Article 1, Section 2, Clause 1 of the Constitution means that 'as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's'.[114] It has also been held that the constitutional provision of one vote one value for districts in the State legislatures is required by the Fourteenth Amendment's guarantee of 'equal protection of the laws'.[115] Thus, one vote one value is entrenched in the American Constitution. Indeed, in *Kirkpatrick v Preisler*[116] the Supreme Court further held that, for congressional districts, no fixed population variance was small enough to be dismissed as negligible. Absolute equality was required.[117]

4.117 The concept of equal suffrage is employed in Article 5 of the draft New Zealand Bill of Rights.[118] The commentary on that proposed legislation notes that 'equal suffrage' does not require an exact equality of population for electorates. However, it adds that the present ± 5% tolerance allowed under section 17 of the *Electoral Act* (itself an entrenched provision) is already one of the narrowest in Western democracies.[119]

4.118 The equal value of a vote is not guaranteed in the *Canadian Charter of Rights and Freedoms*. In Canada the main consideration has been to solve the problems associated with gerrymandering, that is, with the manipulation of electoral district boundaries designed to favour one political grouping.[120] Thus, the concern has been to establish impartial Boundary Commissions, rather than to impose a uniform standard of equal suffrage in all the Provinces.[121]

4.119 In the United Kingdom separate quotas are maintained for England, Northern Ireland, Scotland and Wales. There, historical claims of nationhood have been regarded as overriding the argument for strict adherence to the principle of equal suffrage.

Issues

4.120 Six main issues concerning the principle of one vote one value are:

(a) Is one vote one value a fundamental principle of political equality?

(b) Would a ± 10% tolerance ensure the realisation of that principle in practice?

(c) Is the ± 10% tolerance the most suitable formula available?

(d) Is it appropriate to extend one vote one value to all State and Territorial electoral divisions by constitutional alteration?

114 *Wesberry v Sanders* 376 US 1(1964).

115 *Gray v Sanders* 372US 368 (1963); *Reynolds v Sims* 377 US 533 (1964); *Swann v Adams* 385 US 440 (1967); *Kilgarlin v Hill* 386 US 120 (1967).

116 394 US 526 (1969).

117 In *Karcher v Daggett* 462 US 725 (1983) the Court overturned New Jersey electoral boundaries with a population difference of only 0.69%. The key case with regard to the election of State legislatures and Local Government districts is *Connor v Finch* 431 US 407 (1977), which required justification for deviation greater than ± 5%.

118 Cited fully at para 4.72.

119 *A Bill of Rights for New Zealand: A White Paper* (1985), 78.

120 This can occur even if electoral divisions are equal in population size.

121 RK Carty, 'The Electorial Boundary Revolution in Canada', XV, *American Review of Canadian Studies*, 1985, 273. Carty suggests (at 286) that the 'continuing poor apportionment of Canadian legislatures might be challenged in the courts as a violation of a citizen's right to vote' under section 3 of the *Charter of Rights and Freedoms*.

(e) Should variations greater than ± 10% be permitted for relevant geographic, demographic or economic factors?

(f) Should the relevant electoral quotas be calculated in terms of population or electors?

Previous proposals for reform

4.121 ***Joint Committee on Constitutional Review.*** The Committee, which comprised eight members of the House of Representatives (four from the Australian Labor Party and two each from the Liberal and Country Parties) and four Senators (two Liberal and two Labor), unanimously recommended that section 29 of the Constitution be altered to require, for the purposes of House of Representatives elections, that:

(a) States be divided into electoral divisions containing approximately equal numbers of electors, with an allowable variation of ± 10%;

(b) electoral divisions be reviewed at least once in every ten years; and

(c) the establishment of an Electoral Commission for each State.[122]

4.122 ***Constitution Alteration (Democratic Election of State Parliaments) 1968.*** We have noted[123] that in 1968 Senator Murphy introduced the *Constitution Alteration (Democratic Election of State Parliaments)* Bill to alter the Constitution to provide that for State elections 'so far as practicable each vote shall be of equal value.' The proposal was not voted upon.

4.123 ***Constitutional referendum.*** Among the four proposals submitted to the electors in May 1974 was the Bill for *Constitution Alteration (Democratic Elections).* The proposal was that 'the number of people in each division . . . shall be, as nearly as practicable, the same'.

4.124 The proposal was approved by 47.23% of all the electors and by a majority of electors in New South Wales.

4.125 ***Australian Constitutional Convention.*** At the Hobart (1976) session of the Convention a proposal based on the 1959 Joint Committee's recommendation, but extending the principle to apply also to the States, was put forward by Hon G Scholes. It was not debated or voted on.[124]

4.126 At the Perth (1978) session a proposal was foreshadowed by Hon LF Bowen, the Deputy Leader of the Federal Parliamentary Labor Party, to entrench in the Constitution a ± 10% tolerance for federal, State and Territory electoral divisions. It was not debated.[125]

4.127 At the Adelaide (1983) session, the 1978 proposal was considered and rejected by 47 votes to 35 along party lines. The motion was moved by the Premier of Western Australia, Hon B Burke. He argued that, while ours is a federal system in which regional, cultural and geographic differences should be recognised, there are some matters which must be treated uniformly. He said that the right to vote and one vote one value are matters of this kind.[126] In that debate, Mr Bowen said he recognised the disabilities of

122 1959 Report, 52.
123 para 4.36.
124 ACC Proc, Hobart 1976, lxxv.
125 ACC Proc, Perth 1978, lv.
126 ACC Proc, Adelaide 1983, vol I, 181.

distance, but maintained that these were much less severe than at the time of Federation. Also, he noted that many Australians suffer disadvantages other than those associated with isolation.[127]

4.128 Delegates opposing the motion argued that entrenchment of one vote one value would offend against the principle of States' rights. Further, its application would lead to the creation of electorates which 'ignore community of interest or the capacity of a single member of Parliament to adequately represent the electorate.'[128]

4.129 At the Brisbane (1985) session, Mr Burke listed a proposal on the agenda which sought to alter the Constitution in the form, or to the effect, of the *Constitution Alteration (Democratic Elections)* Bill introduced by Senator Macklin (Australian Democrats) on 17 April 1985. This Bill provides that the number of electors in federal and State electoral divisions shall be 'as nearly as practicable, the same'. The Bill's proposals were approved by 39 votes to 29.[129] On 23 September 1987 Senator Macklin's Bill was reintroduced into the Federal Parliament in a revised form. The 'as nearly as practicable' formula was supplemented with a ± 10% tolerance. On 28 October 1987, on Senator Macklin's motion, the Bill was referred to the Joint Standing Committee on Electoral Matters for inquiry and report.[130]

Advisory Committee's recommendation

4.130 The Rights Committee recommended in relation to federal electoral divisions that a new section 24A be added in the Constitution in the following terms:

> 24A. The number of electors in each electoral division who may vote for each member shall not vary by more than 10 per cent.[131]

The Committee also recommended that the one vote one value principle be extended to the States with a new section 106A being added in the Constitution in the following terms:

> 106A. Where a State is divided into electoral divisions the number of electors in each electoral division who may vote for each member of a House of Parliament in a State shall not vary by more than 10 per cent.[132]

The formulation adopted by the Committee for the proposed new sections 24A and 106A would seem to recommend a ± 5% tolerance for federal and State electoral divisions. It is our understanding, gained from other comments made in the Committee's report, that, in fact, it intended to propose a ± 10% tolerance for these electoral divisions.

4.131 The Committee acknowledged that its recommendation was controversial, particularly in relation to State electoral divisions. The Committee noted that there had been many submissions for and against one vote one value from all parts of Australia. However, after analysing the arguments on both sides, the Committee came to the view that 'legislators are elected by voters, not farms or cities or economic interests'.[133] The unique concerns and interests of rural electors should not be expressed in terms of an unequal representation. The Committee concluded: 'The representation of interests is

127 id, 182.
128 id, 186, Mr NF Moore, Western Australia.
129 One argument used in opposing the proposal was that the formula, 'as nearly as practicable, the same', was radically deficient. A Queensland delegate, Hon N Harper, said 'it is nebulous to the extreme and opens up a Pandora's box of interpretational problems.' ACC Proc, Brisbane 1985, vol I, 294.
130 Report No 1 of the Joint Standing Committee on Electoral Matters, *One vote, one value* was published in April 1988, shortly after publication of this Chapter in the First Report of the Constitutional Commission.
131 Rights Report, 103.
132 ibid.
133 id, 81.

achieved in the democratic process by the operation of pressure groups representing particular interests ranging across a broad spectrum, which of course includes the vital role of the rural sector.'[134] The problems of distance should not be addressed by distorting the fundamental principles of democracy.

4.132 The Committee also considered the issue of States' rights in this context. In the Committee's view, the democratic process itself must entail equality of voting by all the electors in a State. 'Unless the system itself is democratic the claim that it should be "left to each State to determine its own system" has no validity.'[135]

Submissions

4.133 The issue of one vote one value attracted many submissions, reflecting a variety of views and perceptions on the processes of democracy. Many argued strongly for one vote one value, others were equally trenchant in opposing it. Three main arguments were canvassed against the principle of one vote one value:

(a) ***One vote one value ignores the unique geographic, demographic and economic factors in Australia and it will operate to the detriment of rural areas.*** A number of submissions raised the issues associated with the problems of distance, noting the special difficulties faced by those representing large country electoral divisions. One vote one value would, it was argued, only exacerbate those difficulties.[136] The Soroptomist International of Western Australia said a ± 10% tolerance would create enormous electorates and that no amount of communication aids would solve the problems of representation.[137] In one submission it was suggested that one vote one value would mean fewer capital works being inaugurated in the country,[138] while others said it would enable the city to impose its will on rural people.[139] Another point was that one vote one value takes no account of the fact that the vast majority of the country's income is derived from the less populated areas.[140] Essentially, the argument was that, while the imposition of strict mathematical quotas for electoral divisions may have certain theoretical attractions, it does nothing to address the aspirations of people in isolated areas of Australia.[141]

(b) ***The constitutional imposition of one vote one value in the States is an infringement on the authority of the States and is contrary to the spirit of Federation.*** The Queensland Government was adamant that this principle is reflected in section 106 of the Constitution ensuring the constitutional authority of the States, particularly with regard to matters as important as democratic rights.[142]

134 id, 81-2.
135 id, 83.
136 D Williams S2827, 29 October 1987; J Chambers S3212, 16 February 1987; H. Brownsdon S3079, 15 November 1987; PE Pechey S3104, 24 November 1987.
137 Soroptomist International of Western Australia S2899, 29 October 1987.
138 DJ Barker S3045, 11 November 1987.
139 A Richardson S2915, 29 October 1987; G Hardie S2699, 17 October 1987.
140 Dame R Roe S640, 2 December 1986; G Sivyer S3186, 26 January 1988.
141 The Queensland Government S3069, 25 November 1987; Country Women's Association of Australia S3090, 20 November 1987; The Government of the Northern Territory S2493, 12 September 1987.
142 Queensland Government S3069, 25 November 1987.

(c) ***One vote one value is not entrenched in the Constitution of any comparable democracy.*** Colin Fisher MLA (NSW) submitted that neither England, Canada, America nor Japan operate according to this view of fair representation.[143] The Queensland Government presented figures indicating wide disparities between electoral divisions in the United Kingdom.[144]

4.134 Two main arguments were canvassed on behalf of the principle of one vote one value:

(a) ***Political equality is the essence of democracy and one vote one value is a basic requirement of equal representation.*** The view was expressed in many submissions.[145] It was said that one vote one value is a precondition of legitimacy for any representative legislative body,[146] and that as nearly as practicable the vote cast by one citizen should have the same weight as a vote cast by another citizen.[147] It was submitted that the principle is an assertion of an individual right which should override the claims of States' rights;[148] that principle should be entrenched in the Constitution;[149] and that it should apply equally to federal, State and Territorial electoral divisions.[150]

(b) ***Electoral zoning systems are discriminatory and contrary to the spirit of democracy.*** A number of detailed submissions were received putting the case against electoral zoning systems, in particular as they operate in Queensland.[151] One submission which did not support the one vote one value concept conceded that zonal arrangements in Queensland cannot be justified on the basis of democracy.[152] Detailed criticism of the electoral zoning system in Western Australia was also received.[153]

4.135 Several submissions supporting the one vote one value concept expressed the view that a ± 10% tolerance would not of itself produce the desired result. They submitted that only an electoral system based on proportional representation would achieve the goal of equal suffrage.[154] The Australian Electoral Commission suggested that the Constitution should also incorporate mandatory procedures to ensure that electorates do not vary by more than 10%. The procedures would include regular redistributions, a tolerance of no more than 10% from the quota, roll maintenance and special provisions for the Tasmanian Legislative Council.[155] The Western Australian Government noted that section 106A as recommended by the Advisory Committee would not apply to the multi-member electorates in that State.[156]

143 C Fisher MLA S2396, 17 August 1987.
144 Queensland Government S3069, 25 November 1987.
145 HH Jackson S1399, 26 March 1987; Law Association for Asia and the Pacific (Lawasia) S956, 16 February 1987; Australian Federation of Business and Professional Women Inc S2057, 11 May 1987; D Kozaki S926, 16 February 1987; Queensland Council for Civil Liberties S784, 26 November 1986; New South Wales Council for Civil Liberties S400, 25 October 1986.
146 Associate Professor P Hanks S369, 10 October 1986.
147 Senator M Tate S712, 1 November 1986.
148 Bayside Citizens for Democracy S706, 8 December 1986.
149 R Tomasic S3486, 22 November 1986.
150 B Holderness-Roddam S476, 7 November 1986.
151 Citizens for Democracy S2944, 8 November 1987; Senator M Reynolds S788, 4 December 1986; Queensland Branch of the ALP S779, 2 December 1986; Mr LA Duhs S507, 2 December 1986.
152 RF Diamond S754, 10 December 1986.
153 JH Taplin S2401, 24 August 1987.
154 JK Luker S3314, 22 February 1988; Italian Federation of Migrant Workers and Families S1241, 7 March 1987; Mr J Wright, Proportional Representation Society S3643 25 October 1986; Conservation Council of South Australia S698, 18 October 1986; Dr RJ Brown MHA S296, 23 June 1987; D Davies S2948, 31 October 1987; Mr EW Haber S2462, 31 August 1987.
155 Australian Electoral Commission S1199, 29 August 1986.
156 Western Australian Government S3352, 26 February 1988.

Reasons for recommendations

4.136 In our view, one vote one value is a fundamental principle of democracy. There can be no valid classification of people or electors in a way that abridges the right of equal representation. Any attempt, however well-intentioned, to weight the vote in one electoral division against that in another, for reasons of economic or geographic interest, contradicts the ideals of democracy. It is an error, in our view, founded on a mistaken understanding of the nature and purpose of representative government.

4.137 We recognise that one vote one value is a controversial issue in Australia. As the evidence suggests, perceptions of the democratic process vary considerably. However, we believe one vote one value is right in principle. Further, we are concerned with what is appropriate for Australia. We appreciate the problems of distance experienced in isolated areas. But these are less significant now and can be overcome largely by such things as providing elected representatives with appropriate transport and communication facilities and electoral allowances. Besides, the same arguments could be used on behalf of those Australian citizens who suffer other disadvantages, such as poverty. The fundamental principle is that Parliamentary democracy is concerned with the representation of electors. As the United States Supreme Court observed in *Reynolds v Sims*[157]

> Legislators represent people, not trees or acres. Legislatures are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system . . . if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.

4.138 The principle of one vote one value is consistent with democratic theory. A ± 10% tolerance represents a reasonable application of that principle. A ± 10% tolerance already applies in elections for members of the House of Representatives. It is also established in a majority of the States for State electoral divisions. What we are recommending, therefore, is an extension of an established principle to all State and Territorial electoral divisions. In a federation the political rights of all citizens should be as nearly as practicable the same. We recommend, therefore, that the principle of one vote one value for federal, State and Territorial electoral divisions be entrenched in the Constitution.

4.139 We accept that the value of Tasmanian votes is inflated by the requirement in section 24 of the Constitution that Original States, irrespective of population, shall have a minimum of five representatives in the House of Representatives. In our view, this is an appropriate arrangement in a federal scheme. So, too, is the provision in section 7 which ensures equal representation in the Senate to all Original States. Both these arrangements should continue.

4.140 We acknowledge the arguments in those submissions which sought to include detailed provisions in the Constitution to ensure that electorates do not vary by more than ± 10%. We have also discussed the possibility of providing for a constitutional Electoral Officer to fix electoral boundaries for federal, State and Territorial electoral divisions in order to avoid gerrymanders. However, although we accept the importance of procedural matters, our considered opinion is that it is not appropriate at this time to include such matters of detail in the Constitution. It is better to leave these to the Parliaments concerned, at least for the time being.

157 377 US 533, 567 (1964).

4.141 We recommend that the Constitution require that electoral divisions be determined at such times as are necessary to ensure that the principle of one vote one value within ± 10% tolerance is maintained. The formulation we propose would not impose precise time limits on how often electorate sizes should be reviewed. Nevertheless, we do not believe it will give rise to any problem which cannot be resolved by the courts. We think that the High Court would take an approach similar to that adopted in *McKinlay's Case* (1975). The clear intent of the provision we recommend is that redistributions will occur at regular and appropriate intervals. The consequence of not complying with the ± 10% tolerance for federal, State or Territorial electoral divisions would be an election held with the whole State or Territory as one electorate.

4.142 We believe that, for reasons of practicality, any provision to entrench the principle of one vote one value in the Constitution should refer to the number of electors and not persons in an electorate. We also recommend that the word 'elector' be defined in the Constitution. For these purposes an elector shall mean an enrolled elector. In our view, the only reliable way of determining the number of persons entitled to vote in an electoral division is by reference to the electoral rolls.[158] We have proceeded on the assumption that compulsory enrolment will continue.

4.143 We acknowledge the problem raised by the Western Australian Government that section 106A, as recommended by the Advisory Committee, would not apply to multi-member electorates in that State.[159] Clearly, a ± 10% tolerance should also apply to those electoral divisions where more than one member of a legislature is chosen. We recommend an appropriate provision to achieve this.

4.144 We accept that a ± 10% tolerance will not of itself ensure the realisation of the principle of equal suffrage. It does not, for example, address the problem of gerrymanders. However, it will correct the gross discrepancies that exist now. Very importantly, the ± 10% tolerance is the best practical formulation of a general principle. It avoids the interpretational problems associated with the phrase 'as nearly as practicable, the same'. Perhaps absolute equality is not achievable. Our aim is to entrench a reasonable standard of political equality in the Constitution. Although some of us would prefer to set a ± 5% tolerance, we agree that the ± 10% tolerance is an acceptable guarantee at this time.

Summary of reasons for recommendations

4.145 We believe one vote one value is an essential principle of democracy. It is fundamental to a sense of meaningful participation in Australia's democratic polity. The principle of one vote one value should be entrenched in the Constitution for electoral divisions where members of the House of Representatives or the legislatures of a State or Territory are chosen.

Section 25

Recommendation

4.146 We *recommend* that section 25 of the Constitution should be repealed.

158 We note that this approach is consistent with 'interpretation' provisions in federal, State and Territorial electoral Acts.

159 We assume that the Advisory Committee intended to propose a ± 10% tolerance for State electoral divisions.

Current position

4.147 Section 24 of the Constitution provides that the number of members of the House of Representatives from each State is determined by reference to the number of people in that State.

4.148 Section 25 of the Constitution provides that, for the purposes of section 24:

> if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

The section is based on Section 2 of the Fourteenth Amendment of the United States Constitution. Its purpose was to encourage the States to enfranchise the emancipated negroes after the Civil War by reducing the federal representation of the States if they failed to do so.[160]

4.149 According to Quick and Garran, section 25 was designed for the same purpose. It causes races which are discriminated against in the State's franchise laws to be excluded from the section 24 calculations, thereby diminishing the number of seats in the House of Representatives to which the State concerned would otherwise be entitled under section 24.

4.150 The High Court has held that section 25 recognises that people might constitutionally be denied the franchise on the ground of race.[161]

Previous proposals for reform

4.151 ***Constitutional referendum.*** A proposal to repeal section 25 was included in the *Constitution Alteration (Democratic Elections)* Bill of 1974 which was approved by 47.23% of all the electors and by a majority of electors in New South Wales.

4.152 ***Australian Constitutional Convention.*** At the Melbourne (1975) and Hobart (1976) sessions, the Convention resolved that section 25 'with all its implications, ought to be repealed'.[162] Section 25 was considered to be an outmoded provision.

4.153 Section 25 was among the provisions included in the Bill, *Constitution Alteration (Removal of Outmoded and Expended Provisions),* agreed to by the Senate by an absolute majority without dissent on 13 October 1983 and by the House of Representatives by an absolute majority with 3 dissentients on 17 November 1983. The Bill was not submitted to the electors.

4.154 In 1985 and again in 1987 Senator Macklin (Australian Democrats) introduced the *Constitution Alteration (Democratic Elections)* Bill. Clause 2 of the Bill provides for the repeal of section 25. In his second reading speech Senator Macklin described the section as 'an archaic and objectionable provision.'[163]

Advisory Committee's recommendation

4.155 The Rights Committee recommended that section 25 should be repealed. The Committee regarded the section as 'odious and outdated' and considered that it would

160 Quick and Garran, 456.
161 *McKinlay's Case* (1975) 135 CLR 1, 44 (Gibbs J).
162 ACC Proc, Melbourne 1975, 174; Hobart 1976, 206.
163 *Hansard,* 23 September 1987, 531.

permit a State Parliament so minded to create 'whites only' or 'blacks only' electorates. In the Committee's view, section 25 presents a chilling analogy with the current electoral system in South Africa. It concluded:

> It is a leftover from the racial intolerance of the nineteenth century and is a standing temptation to a State to discriminate on the grounds of race. Although the provision is not being used by any State at the present time, it is unacceptable and dangerous to democracy to retain such a provision in the Australian Constitution.[164]

Submissions

4.156 Several submissions were received calling for the repeal of section 25.[165] Mr Jeremy Long, then the Commissioner for Community Relations said that, while the intention of the provision is no doubt benign, it would seem unnecessary and undesirable to have such an archaic provision retained in the Constitution.[166] Other submissions were more openly critical. For example, the Ethnic Affairs Commission of New South Wales said that section 25 'must be omitted from any future Constitution, because, inter alia, it confers the Commonwealth with a right to negatively discriminate on racial grounds'.[167]

4.157 On the other hand, Stephen Souter argued that section 25 is one of the three provisions in the Constitution which seeks to impose some form of constitutional guarantee of civil liberties on the States (the other two being sections 92 and 117). He disagreed with the Advisory Committee's view that section 25 would permit racially segregated electorates and concluded that the Committee misread both the intention of the provision and the way it works and jumped to the conclusion that section 25 is opening the floodgates to apartheid.[168]

Reasons for recommendation

4.158 We believe that section 25 is an outmoded provision of the Constitution. We acknowledge that the section may be considered objectionable. However, section 25 does not have the sinister implications suggested in the Report of the Advisory Committee. Section 25 should be repealed because it is no longer appropriate to include in the Constitution a provision which contemplates the disqualification of members of a race from voting.

4.159 We have recommended that the right to vote and the principle of one vote one value should be entrenched in the Constitution. Section 25 contradicts the spirit and substance of these provisions. It is archaic and we recommend that it should be repealed.

Direct elections

Recommendations

4.160 We *recommend* that the Constitution be altered to provide that:

(i) each House of a Parliament of a State shall be composed of members directly chosen by the people of the State;

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164 Rights Report, 74.

165 PH Bailey, Human Rights Commission S190, 22 November 1986; South Australian Ethnic Affairs Commission S2208, 20 May 1987; National Aboriginal and Islander Legal Services Secretariat S114, 10 July 1986; NSW ALP Immigration and Ethnic Affairs Policy Committee S1253, 17 March 1987; F Arena MLC (NSW) S895, 3 February 1987; The Queensland Government S3069, 25 November 1987.

166 J Long, Commissioner for Community Relations S694, 4 December 1986.

167 Ethnic Affairs Commission of NSW S3362, 8 January 1987; B Oliver, Ethnic Communities Council (NT) S868, 28 January 1987.

168 S Souter S2656, 7 October 1987.

(ii) the legislature of a Territory shall be composed of members directly chosen by the people of the Territory; and

(iii) this requirement shall not apply to the filling of casual vacancies.

4.161 The recommendations we have made in relation to election of senators and members of the House of Representatives preserve the present constitutional requirements that senators and members of the House of Representatives shall be directly elected.

Current position

4.162 The Constitution contains no provisions regarding the composition of the Houses of State Parliaments and no provisions regarding the manner in which members of those bodies are to be chosen. These matters are governed exclusively by State law. The Constitution does, however, require that senators for a State are to be directly chosen by the people of the State, and that 'The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth' (sections 7 and 24). The one exception to the general principle that members of the Federal Parliament shall be directly elected is contained in section 15, which provides for the filling of casual vacancies in the Senate by a joint resolution of the Houses of State Parliaments.

4.163 A requirement that members of a legislative body be chosen directly by the people means simply that the members are to be 'chosen directly by popular vote, and not by some indirect means, such as by the Parliament or Executive Government of a State, or by an electoral college.'[169]

4.164 Members of the State Parliaments are all elected, and, in every case, directly elected. Except in New South Wales, this has been the position for a long time. Until as late as 1933, the Legislative Council of New South Wales was a nominated chamber. Between 1933 and 1978 it was elected on a rotation basis by an electorate made up of members of the Legislative Assembly and the Legislative Council, including the retiring members of the Council. Since 1978 it has been directly elected by the electors of the State.

4.165 Casual vacancies in the State Parliaments are also, in most cases, filled by direct elections. Casual vacancies in the Legislative Council of South Australia are filled at joint sittings of both Houses, in much the same way as casual vacancies in the Senate are filled.[170] Casual vacancies in the Legislative Council of New South Wales may also be filled in this way, but only if it is not possible to fill the vacancy by a recount of votes cast at the previous election.[171] Where a casual vacancy arises in the Tasmanian House of Assembly, any person who was a candidate at the elections at which the former incumbent was elected may nominate as a candidate. There is then a recount of votes cast at the previous election. But if the vacancy cannot be filled because there are no candidates available who belong to the same party as the prior incumbent, the leader of the relevant party may request an election.[172]

4.166 Except in Western Australia, the principle of direct elections is not entrenched in any of the State Constitutions.[173]

169 *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 44 (Gibbs J).
170 *Constitution Act 1934* (SA), section 13.
171 *Constitution Act 1902* (NSW), sections 22C and 22D.
172 *Electoral Act 1985* (Tas), sections 231-3.
173 *Constitution Act 1889* (WA), section 73(2).

4.167 When, in exercise of its powers under section 122 of the Constitution, the Federal Parliament establishes a legislature for a Territory, it is not obliged to provide for direct election of members by the people of the Territory. It may provide for a legislature similar to the kind of legislature which was commonplace in the Australian colonies prior to the grant of self-government, that is to say, one in which some or all of the members are officials of the Executive Government or nominees of that Government. There have been Territorial legislatures so constituted, but today all of these legislatures are composed of members who are directly elected by the electors of the Territory.

Previous proposals for reform

4.168 ***Constitution Alteration (Democratic Election of State Parliaments) 1968.*** We have noted above[174] that in 1968 Senator Murphy introduced a Bill to alter the Constitution to provide that 'The Houses of Parliament of the States shall be composed of members directly chosen by the people of the States . . .'. The proposal was not voted upon.

4.169 ***Constitutional referendum.*** In the Bill for the *Constitution Alteration (Democratic Elections)* in 1974 there was a provision that 'Each House of the Parliament of a State or, where there is only one House of the Parliament of a State, that House, shall be composed of members directly chosen by the people of the State . . .'. As has already been mentioned, that Bill went to a referendum but was not approved by the requisite electoral majorities.[175]

4.170 ***Constitution Alteration (Democratic Elections).*** A similar provision was included in the *Constitution Alteration (Democratic Elections)* Bills introduced in 1985 and 1987 by Senator Macklin (Australian Democrats). The relevant provision in those Bills differed from the corresponding provision in the 1974 Bill in that it provided that legislatures of self-governing Territories also should be composed of members chosen directly by the people of the Territory. The term 'self-governing Territory' was defined.

4.171 ***Australian Constitutional Convention.*** Senator Macklin's proposals were supported in principle at the Brisbane (1985) session of the Australian Constitutional Convention.[176]

Issue

4.172 'Nothing could be more fundamental', Isaacs J once observed, 'than the directly elective character of the two Houses.'[177] But he was speaking only of the Houses of the Federal Parliament. The question is whether the Constitution should require that the Houses of State Parliaments and the legislatures of the Territories be directly elected.

Reasons for recommendations

4.173 In our view, it does not make a great deal of sense to introduce into the Constitution provisions to guarantee rights to vote in parliamentary elections, and to entrench provisions relating to the value of votes, without including at the same time a further provision to require that the members of the legislatures shall be chosen directly by the people. The three principles seem to us to go hand in hand; in accordance with our Terms of Reference, they are fundamental to ensuring and advancing the democratic rights of the Australian people as citizens.

174 para 4.36.
175 para 4.37-4.41.
176 ACC Proc, Brisbane 1985, vol I, 424.
177 *Vardon v O'Loghlin* (1907) 5 CLR 201, 213.

4.174 We are not, however, persuaded that State Parliaments and Territorial legislatures should be precluded from enacting legislation to provide for the filling of casual vacancies by methods other than the holding of by-elections. Since section 15 of the Constitution makes an express exception to the general requirement that senators and members of the House of Representatives shall be directly elected, the absence of an express proviso to a constitutional requirement that members of State Parliaments and Territorial legislatures are to be directly elected would probably be interpreted to mean that casual vacancies in those legislatures could only be filled at by-elections or, perhaps, by recount of votes cast at the prior election. If that were the case, present arrangements for the filling of casual vacancies in the Legislative Councils of New South Wales and South Australia would be unconstitutional.

4.175 We note that, in the United States, the various provisions in the Constitutions of the States which protect voting rights have been held not to preclude the enactment of legislation which provides for the filling of casual vacancies in a legislative chamber otherwise than by direct election,[178] for example, by appointment by a State Governor or by the political party with which the prior incumbent was affiliated. Such legislation, it has been said, involves 'no fundamental imperfection in the functioning of democracy.'[179] It 'serves the legitimate purpose of ensuring that vacancies are filled promptly, without the necessity of the expense and inconvenience of a special election'. Though it may have some effect on the right of citizens to elect the members of the legislature, that effect is minimal.[180]

4.176 We agree with these sentiments and accordingly recommend that the general rule that the members of State Parliaments and Territorial legislatures be directly elected by the people should not apply to the filling of casual vacancies in those legislatures.

Citizenship

Recommendation

4.177 We *recommend* that section 51 of the Constitution be altered to give the Federal Parliament an express power to make laws with respect to nationality and citizenship. We recommend that this alteration be by the addition of the words 'nationality, citizenship' to section 51(xix.) so that this paragraph would read:

> (xix.) Nationality, citizenship, naturalization, and aliens:.

We do *not recommend,* however, insertion in the Constitution of a section, as recommended by the Rights Committee, to define who are Australian citizens and to protect Australian citizens against deprivation of citizenship.

Current position

4.178 The Constitution does not expressly grant to the Federal Parliament a power to make laws with respect to nationality or citizenship. Section 51(xix.) provides that the Federal Parliament has power to make laws with respect to: 'Naturalization and aliens'. Nowhere in the Constitution is there any reference to Australian citizens or Australian citizenship. Reference is, however, made to subjects of the Queen.[181]

178 *Rodriguez v Popular Democratic Party,* 457 US 1 (1982).
179 *Valenti v Rockefeller,* 292 F Supp 851, at 867 (SDNY 1986).
180 *Rodriguez v Popular Democratic Party,* 457 US 1, 12 (1982).
181 See sections 34 and 117.

4.179 While the Federal Parliament has not been granted an express power to make laws with respect to nationality and citizenship, it has been assumed that the Parliament does have such a power. The power is either implied in section 51(xix.) or is one of the implied national powers. Its exercise by the Federal Parliament, by enactment of the *Australian Citizenship Act 1948* (originally entitled the *Nationality and Citizenship Act 1948),* has certainly not been called into question in any case before the High Court of Australia.

4.180 The reasons why the Federal Parliament was not given an express power to make laws with respect to nationality and citizenship are purely historical. At the time of Federation and for many years after, Australia was regarded merely as a colony of the United Kingdom. The concepts of Australian nationality and citizenship were unknown. For constitutional purposes persons were either subjects of the Queen or aliens. Whether a person had the status of a subject of the Queen – a British subject – was determined mainly by the common law. The primary rule of the common law was stated by Sir William Blackstone in his *Commentaries on the Laws of England* as follows:[182]

> Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance or, as it is generally called, the allegiance of the king; and aliens, such as are born out of it.

4.181 The common law and statutory modifications of it permitted aliens to become British subjects by naturalization – a process which required some governmental act. Section 51(xix.) of the Constitution granted to the Federal Parliament a plenary power to make laws on that subject.

4.182 The establishment of the status of being a British subject as something separate and distinct from that of being a citizen of Australia came about as a result of the enactment of the *British Nationality Act 1948* (UK) and the *Nationality and Citizenship Act 1948* (Cth). 'The principles to which this legislation gave effect were that the peoples of each of the countries of the Commonwealth [of Nations] should have separate citizenship, but that all citizens of Commonwealth countries should have the common status of British subjects.'[183] Subsequent Australian and United Kingdom legislation has accentuated the difference between the two concepts and has also introduced further refinements. For example, a person who has the status of a British subject under Australian law is not necessarily a British subject under United Kingdom law and *vice versa.* A person who is, under Australian law, a subject of the Queen in right of Australia may not, under United Kingdom law, be a subject of the Queen in right of the United Kingdom.

Advisory Committee's recommendations

4.183 The Rights Committee recommended that section 51(xix.) of the Constitution be altered to include a reference to citizenship. It also recommended the addition of a section to define who are Australian citizens and to provide that citizenship could not be taken away except in accordance with a procedure which complied with the principles of fairness and natural justice.[184]

Submissions

4.184 The submissions we received generally agreed with the proposal to extend the power in section 51 (xix.) to nationality and citizenship. They also generally agreed with

182 18th edn, vol I, 366.
183 *Pochi v Macphee* (1982) 151 CLR 101, 108 (Gibbs CJ).
184 Rights Report, 86.

the Advisory Committee's proposed section 126A.[185] The Queensland Government, however, argued not that the proposals were wrong in principle, but that they were not absolutely necessary and hence, should not be pursued.[186]

4.185 Many submissions pointed out that the concept of citizenship is of major importance to democratic rights – both the right to vote and the right to stand for Parliament. For this reason, it was submitted, the Constitution should define and guarantee 'the concept of what is an Australian'.[187]

4.186 Some also suggested[188] that all references to 'British subjects' should be omitted from the Constitution, and be replaced by the expression 'Australian citizens'.

4.187 There were, however, other submissions[189] which opposed the Rights Committee's proposed definition of who are Australian citizens on the ground that it does not recognise a particular existing class of Australian citizens: that is, British subjects who had been resident in Australia for at least five years prior to the commencement of the *Australian Citizenship Act 1948.* If the new section had the effect of depriving such people of their citizenship, it was argued, this would be in violation of their human rights.[190]

4.188 Some submissions objected to section 126A, in the form proposed by the Rights Committee, on the ground that it would provide for deprivation of citizenship. People were especially concerned about deprivation of citizenship in times of war.[191] Others argued for a guarantee against deprivation of citizenship in any circumstances.[192] The Public Interest Advocacy Centre argued that the provision would be open to abuse, and did not accept 'that the deprivation of citizenship is a necessary or desirable power in the Commonwealth'.

Reasons for recommendation

4.189 Although we are in no doubt that the Federal Parliament already has power to make laws with respect to nationality and citizenship, we think it desirable that the power should be expressly conferred rather than left to implication.

4.190 We agree with the Rights Committee that the notion of 'a subject of the Queen' is no longer appropriate for constitutional purposes[193] and other of our recommendations involve omission of the expression in the sections in which it occurs.[194] Those suggested alterations do not, however, mean that the Federal Parliament would be deprived of power to make laws under which a person's rights and privileges depend on the person having the status of a British subject or a subject of the Queen.

185 eg K Crombie S2946, 4 November 1987; RJ Ross S2719, 20 October 1987.
186 The Queensland Government S3069, 25 November 1987.
187 Ethnic Communities Council of NSW S926, February 1987; see also P Thomas S3434, 8 November 1986; S Souter S1177, 8 March 1987; CM Pennings S35, 18 February 1986.
188 F Arena MLC S2505, 15 December 1986; see also B Oliver S868, 28 January 1987.
189 HS Spence S3262, 12 February 1988 and JRS Kelly S3277, 16 February 1988.
190 We accept that that was certainly not its intent.
191 NSW ALP Immigration and Ethnic Affairs Policy Committee S1253, 17 March 1987; F Arena S2505, 15 December 1986; D Kozaki S926, 14 February 1987.
192 Public Interest Advocacy Centre S3098, 24 November 1987; Republican Party of Australia S3382, 25 October 1985.
193 Rights Report, 86.
194 In Chapter 2 under the heading 'Discrimination against out of State residents', para 2.91.

4.191 The alterations of the Constitution we recommend in relation to qualifications of electors[195] and of senators and members of the House of Representatives[196] would, if adopted, introduce into the Constitution for the first time the concept of Australian citizenship. There is, we recognise, force in the argument that where a constitution guarantees certain rights to citizens, those rights are more amply protected if citizenship is also guaranteed to defined classes of persons. But for reasons which we explain below,[197] we are not persuaded that it is necessary to provide a constitutional definition of who are Australian citizens. We do not, therefore, endorse the Rights Committee's recommendation that the Constitution be altered by addition of a provision in the following terms:

> All persons who are:
>
> (i) born in Australia;
>
> (ii) natural-born or adopted children of an Australian citizen;
>
> (iii) naturalised as Australians
>
> are citizens of Australia and shall not be deprived of citizenship except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice.[198]

4.192 The effect of this provision would be that any person within the specified categories would automatically be an Australian citizen. A person could not, however, become a naturalised Australian except in accordance with laws made by the Parliament. The Parliament could also make laws specifying circumstances in which a person could be deprived of citizenship. Those laws would, however, have to provide for a procedure which complied with the principles of fairness and justice.

4.193 The intention of the Rights Committee was, we understand, that an Australian citizen should not be deprived of citizenship except by an official act, pursuant to legislation, after a procedure which accords with the principles of natural justice. So a person could not be validly deprived of citizenship by a statute which stated that citizenship was automatically lost on the happening of a certain event, for example, service in enemy armed forces, or voluntary acquisition of the citizenship of a foreign country. On the other hand, the Committee seemed to envisage that the Parliament could legislate to make it possible for an Australian citizen to renounce Australian citizenship.

4.194 In considering the section proposed by the Rights Committee we have had regard to how that section would or might affect the present laws about citizenship as enacted in the *Australian Citizenship Act 1948*. We thought it desirable to do so because if we were to endorse the Committee's recommendation, or to propose another provision to guarantee citizenship, we should be in a position to indicate precisely how existing law would be affected by the proposed alteration of the Constitution. We would also need to justify whatever changes in existing law that alteration would involve. Our detailed analysis of the existing legislation and of how it would or might be affected by the constitutional provision recommended by the Rights Committee is set out in *Appendix I*.

4.195 Our reasons for not endorsing the Committee's proposed alteration of the Constitution are:

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195 para 4.16.
196 para 4.735.
197 para 4.195-4.198.
198 Rights Report, 86.

(a) The proposed alteration would, if adopted, effect substantial changes in Australian citizenship law and would do so mainly by enlargement of the classes of persons who acquire citizenship by birth, descent and adoption. But no case has been shown why Australian citizenship should be extended in the manner the Committee has proposed.

(b) Enlargement of the classes of persons who acquire Australian citizenship by birth, descent and adoption, as proposed by the Committee, would inevitably increase the number of cases in which persons would acquire dual nationality and be confronted with the many real problems which that concept raises. Many more persons, lacking any real connection with Australia, would be endowed with a citizenship neither wanted nor valued, and which, until formally renounced, could prove embarrassing.

(c) The proposed alteration of the Constitution could be read as an exhaustive statement of how Australian citizenship may be acquired and of who can now be recognised as an Australian citizen. Unlike the legislation which has been enacted in the past to amend the law relating to acquisition of Australian citizenship, the proposed alteration to the Constitution does not include any express provisions to safeguard the status of persons whose citizenship has been determined by prior law: for example, that of persons born in Australia, but who did not, according to the law in force when they were born, acquire Australian citizenship. Nor does it safeguard the position of the classes of British subjects accorded Australian citizenship under Part IV of the *Australian Citizenship Act 1948.*

(d) Although we do not dissent from the broad proposition that an Australian citizen should not be deprived of citizenship except by due process and on grounds specified by Act of Parliament, we do not think it advisable to deprive the Parliament of power to enact laws which provide for automatic loss of citizenship on the occurrence of specified events. In our view there should not be an inflexible constitutional requirement that involuntary expatriation cannot occur unless:

(i) an official determination has been made that a statutory ground exists for terminating citizenship; or

(ii) the determination has been made after compliance with a procedure satisfying principles of fairness and natural justice.

Many of the causes which are accepted as legitimate causes for deprivation of citizenship[199] are not ones which can be administered by a process involving notice to the individual that an expatriating cause has arisen and inviting that individual to 'defend' himself or herself against a proposed decision to terminate citizenship. Most of the statutory causes for deprivation of citizenship are rather ones the existence of which would be controverted only if an individual asserted a right or privilege limited to citizens (for example, the right to enrol and vote as an elector), or resisted performance of a duty imposed on citizens (for example, compulsory military service). In such cases, the question of whether the individual was, or was not, at the relevant time an Australian citizen could be decided by a court of law and so decided by 'due process'.

(e) At present, deprivation of Australian citizenship by official act can occur only by a Ministerial order pursuant to section 21 of the *Australian Citizenship Act 1948.* The High Court has an entrenched jurisdiction to

199 eg voluntary acquisition of the citizenship of another country or renunciation of citizenship by service in its armed forces at a time when that country is at war with Australia.

review any such Ministerial order. Although such review is not a review on the merits, the grounds for review could include such matters as that account had been taken of irrelevant considerations, or that a breach of the requirements of natural justice had occurred.[200]

4.196 While we accept that citizenship is an important matter, we do not think it is something that is suitably conferred and protected by one relatively short constitutional provision of the kind which has been proposed by the Rights Committee.

4.197 It is true that the United States Constitution contains a very short provision guaranteeing citizenship. Section 1 of the Fourteenth Amendment provides, *inter alia,* that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

But there are several important differences between this provision and that which the Rights Committee has proposed. They are:

(a) The classes of persons who are guaranteed citizenship by the United States provision are not as wide as the classes of persons who would be accorded citizenship under the section proposed by the Committee. They do not include persons born in the United States of parents who enjoy diplomatic immunity because those persons are regarded as not being within the jurisdiction of the United States. They do not include persons born outside the United States of parents who are United States citizens, or persons adopted by United States citizens. And the citizenship of naturalised citizens of the United States is constitutionally protected only if they were naturalised in the United States.

(b) The provision means that all people born or naturalised in the United States etc cannot have their citizenship taken away involuntarily. In contrast, the Rights Committee's proposal would not prevent citizenship being taken away, but it would impose procedural safeguards in relation to doing so.

4.198 We have had regard to a number of more modern constitutions in which citizenship has been defined and protected. Those which are most relevant to Australia's circumstances contain very lengthy and detailed provisions on citizenship. Examination of them has reinforced our view that constitutional definition and protection of Australian citizenship cannot be satisfactorily dealt with in the way proposed by the Rights Committee.

Enforcement of democratic rights

Recommendation

4.199 We *recommend* that the Constitution be altered by the inclusion of the following provision:

> 127A. Any person who claims that his rights have been infringed by a breach of, or a failure to comply with, section eight, thirty, one hundred and seven B or one hundred and twenty-two D of this Constitution may apply to a court of competent jurisdiction for an appropriate remedy.

The object of this proposed section is to make it clear that persons who claim that their rights under the proposed sections on qualifications of electors have been infringed have standing to sue for whatever legal remedy is appropriate.

200 Our later recommendations in Chapter 6 would ensure that some court would always have jurisdiction in the matter.

Current position

4.200 At present, there are several ways in which persons who claim to be qualified to vote in parliamentary elections may seek the aid of the courts to enforce what they claim to be their rights or to obtain remedy for denial of their rights.

4.201 Since the landmark English case of *Ashby v White* in 1703,[201] it has been recognised that if an electoral officer wrongly denies the right to vote to a qualified elector, the officer is liable to pay damages, but only if it is proved that the denial of the right was malicious.[202] This common law remedy is, as Isaacs J pointed out in *Kean v Kerby,*[203] 'practically worthless'. Malice can rarely be proved and the remedy 'gives no real or effective protection to the elector's right politically: it gives no security that his political opinions will not be disregarded.'[204]

4.202 Where a person's complaint is of wrongful refusal of enrolment as an elector, remedy may be sought by a suit for a declaration of right or by an application for a writ of mandamus or like order to compel enrolment.[205] There are also statutory remedies.[206]

4.203 Where it can be shown that denial of a right to be enrolled or to vote has affected the result of an election, then by statute the election may be declared void by a court of disputed returns.[207] Recourse to such a tribunal, it has been said, affords 'real and effective protection to electors in maintaining their right of franchise.'[208]

4.204 Questions concerning electoral distributions may be raised for judicial decision by suits for declarations and injunctions, but as there has been some doubt whether individual electors have the requisite standing to sue in such cases, it has been customary, at least in federal cases, for the electors who wish to sue to bring what are called relator actions, that is, actions formally brought in the name of an Attorney-General, at the relation of a private person.[209] Such an action cannot, however, be brought unless the relevant Attorney-General consents to the action being brought in his or her name. Discretion to grant or refuse that consent is, legally, unfettered.

4.205 In *McKinlay's Case* in 1975,[210] Barwick CJ doubted whether an elector would have standing to sue for declarations in respect of an alleged breach of section 24 of the Constitution, but Murphy J, the only other Justice who expressed an opinion on the

201 2 Raym 938.

202 *Drewe v Coulton* (1787) 1 East 563: 102 ER 17; *Cullen v Morris* (1819) 2 Stark 577; 171 ER 741; *Tozer v Child* (1857) 7 E & B 377; 119 ER 1286.

203 (1920) 27 CLR 449, 460.

204 ibid.

205 As in *The Queen v Pearson; Ex Parte Sipka* (1983) 152 CLR 254.

206 See eg *Commonwealth Electoral Act 1918,* section 120.

207 See *Commonwealth Electoral Act 1918,* sections 353, 360; *Parliamentary Electorates and Elections Act 1912* (NSW), sections 155, 164(3); *Elections Act 1983* (Qld), sections 135, 151; *Electoral Act 1985* (SA), sections 102, 107; *Electoral Act 1985* (Tas), sections 214, 222; *Constitution Act Amendment Act 1958* (Vic), sections 279, 287(3); *Electoral Act 1907* (WA), sections 157, 164(3).

208 *Kean v Kerby* (1920) 27 CLR 449, 460 (Isaacs J).

209 See *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *Attorney-General (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527; cf the following State cases where electors were recognised to have standing: *McDonald v Cain* [1953] VLR 411, 420, 427, 438-9 and *Tonkin v Brand* [1962] WAR 2, 15, 19, 21.

210 (1975) 135 CLR 1.

matter, took a contrary view.[211] It may be that under the liberalised tests of standing to sue which the High Court has developed in later cases,[212] the view of Murphy J would now be preferred.

Previous proposals for reform

4.206 The *Constitution Alteration (Democratic Elections)* Bill put to referendum in 1974, and the *Constitution Alteration (Democratic Elections)* Bills introduced by Senator Macklin in 1985 and 1987, contained a clause designed to give the High Court original jurisdiction in matters arising under, or involving the interpretation of, sections 7, 8, 9, 24, 29 (as amended) or 30 (as amended) of the Constitution. The Court's original jurisdiction would also extend to matters arising under, or involving the interpretation of, several new sections on voting rights and on election of members of State Parliaments and the legislatures of self-governing Territories. The clause also provided that the new, entrenched original jurisdiction could be invoked by an elector or by a person to whose right to be an elector the matter related.

4.207 The primary purpose of the clause was to make it clear that electors and persons claiming the right to be electors could bring proceedings in the High Court in a range of matters affecting voting rights.

4.208 The law on standing to sue in constitutional cases and in other cases where public rights and duties are sought to be enforced was reviewed by the Australian Law Reform Commission in its 1985 report on *Standing in Public Interest Litigation.*[213] The Commission recommended enactment by the *Federal Parliament of a Standing (Federal and Territory Jurisdication) Act*[214] which would make it possible for anyone to sue for enforcement of public rights and duties under the Constitution or under federal or Territorial laws, subject to certain restrictions to prevent vexatious litigation. Were the proposed Act to be enacted, the standing of private individuals to sue for enforcement of the constitutional provisions to guarantee democratic rights which we recommend would be placed beyond doubt.

Canadian experience

4.209 As has already been mentioned,[215] under section 3 of the *Canadian Charter of Rights and Freedoms,* the right to vote in parliamentary elections is guaranteed. Section 24(1) of the *Charter* provides that anyone whose rights or freedoms, as guaranteed by the *Charter,* 'have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.'

4.210 This remedies section provides a firm constitutional basis for judicial enforcement of protected voting rights. In one case, it was relied upon by the court to justify grant of a remedy which would not have been available under the common law. In that case, the court enforced a prisoner's right to vote in Quebec elections by granting a writ of mandamus against officers of the Crown which required them to allow the chief electoral officer of the province to prepare, within the prison, a list of inmates having the necessary

211 id, 26 (Barwick CJ), 76 (Murphy J).
212 See *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *Davis v Commonwealth* (1986) 68 ALR 18.
213 PP 406/1985.
214 A draft Bill for the Act was set out in Appendix A of the report.
215 para 4.67-4.71.

qualifications to vote and to establish a polling booth inside the prison. At common law, the writ sought would not have been available because the defendants were acting as Crown officers. But, according to the court, section 24 of the *Charter,* was overriding.[216]

Reasons for recommendation

4.211 In Chapter 6 we recommend that section 75 of the Constitution be altered to invest in the High Court original jurisdiction in any matter arising under the Constitution, or involving its interpretation.[217] If this recommendation is adopted, the High Court would have an entrenched jurisdiction in any matter arising under, or involving the interpretation of, all the provisions in the Constitution to do with elections and voting rights.

4.212 In Chapter 9 we recommend the inclusion in the Constitution of a series of provisions to guarantee certain rights and freedoms which are not, at present, given constitutional protection. These provisions would include a section similar to section 24(1) of the *Canadian Charter of Rights and Freedoms.*[218]

4.213 We consider that the provisions of the Constitution which are meant to protect individual rights to vote in parliamentary elections are of such great importance that the Constitution should also assure that persons who claim that their rights in that regard have been infringed have standing to seek an appropriate judicial remedy. What remedy will be appropriate will depend on the nature of the alleged violation of the individual's rights or of the alleged failure to comply with the relevant constitutional guarantee.

Meetings of Parliament

Recommendations

4.214 We *recommend* that section 5 of the Constitution be omitted and the following section be substituted:

> 5.(1) The Governor-General in Council may appoint such times for holding the sessions of the Parliament as the Governor-General in Council thinks fit.
>
> (2) The Governor-General in Council may, from time to time, by Proclamation or otherwise, prorogue the Parliament.
>
> (3) The Governor-General in Council may, subject to this Constitution, in like manner dissolve the House of Representatives.
>
> (4) After a general election of the House of Representatives, the Parliament shall be summoned to meet not later than seventy-five days after the day fixed for polling at the election.

4.215 The alterations to the Constitution which would be effected were this proposal to be adopted would be as follows:

(a) The power of the Governor-General to appoint times for holding sessions of the Parliament, to prorogue Parliament and to dissolve the House of Representatives would be vested instead in the Governor-General in Council. The power to dissolve the House would, however, be subject to proposed section 28. This section would allow the Governor-General to dissolve the House within the first 3 years of its term, but only if the House

216 *Levesque v Attorney-General of Canada* (1985) 25 DLR (4th) 184, 192 (FCTD); cf *Badger v Attorney-General of Manitoba* (1986) 30 DLR (4th) 108, a similar case where a mandatory remedy was denied on discretionary grounds.

217 para 6.46.

218 para 9.234.

had resolved that the Government did not have its confidence and the Governor-General was satisfied that it was not possible for a Government having the confidence of the House to be formed.[219]

(b) The present provision on the first meeting of the Parliament after the establishment of the Commonwealth would be omitted.

(c) The time within which the Parliament would be required to be summoned after a general election would not be, as at present, 30 days after the day appointed for return of writs, but 75 days after polling day.

4.216 We further *recommend* that the following sections be added to the Constitution:

110A. After a general election of the more numerous House of the Parliament of a State (or, if there is only one House of the Parliament of a particular State, after a general election of that House), the Parliament of the State shall be summoned to meet not later than seventy-five days after the day fixed for polling at the election.

122B. After a general election of the legislature of a Territory, the legislature shall be summoned to meet not later than seventy-five days after the date fixed for polling at the election.

Current position — Federal Parliament

4.217 Section 5 of the Constitution provides:

The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.

After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs.

The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth.

Section 6 provides:

There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

4.218 The powers exercisable by the Governor-General under section 5 are powers which, in the United Kingdom, are exercisable by the Queen. In the United Kingdom they are prerogative powers, that is to say, powers conferred by the common law rather than by statute. In both Australia and the United Kingdom they are, by convention, exercised on Ministerial advice.

4.219 During the life of any one Parliament there may be more than one session during which the Houses sit to transact their business. The Governor-General, acting on the advice of the Prime Minister, decides when those sessions should be held, but after a general election the Parliament must be summoned to meet not later than 30 days after the date appointed for return of the writs. The Constitution does not limit the time which may be appointed for return of writs. This is a matter which is left to be prescribed by the Parliament and the Parliament is free to prescribe whatever limits it thinks fit.

4.220 Prorogation brings a parliamentary session to an end and has the effect of quashing incompleted proceedings, for example Bills not finally passed. It is different from an adjournment by one of the Houses. An adjournment merely suspends sittings. Until 1928 it was usual, following United Kingdom practice, to prorogue Parliament before the

219 para 4.343; Bill No. 4, Appendix K.

House of Representatives was dissolved. Nowadays it is most unusual for the Federal Parliament to be prorogued. Instead the Houses merely adjourn. Therefore, in practice, there is only one session in the life of any one Parliament. This practice might seem to be inconsistent with section 6, but the general view is that this section does not require a separate parliamentary session each year; merely that no more than 12 months must elapse between one sitting and the next.[220]

4.221 A dissolution of the House of Representatives brings the life of a Parliament to an end, and members of that House thereupon cease to be members.[221] The Senate, however, remains in being and, on one view, can continue to transact business.[222]

4.222 Neither a dissolution of the House of Representatives nor a double dissolution pursuant to section 57 of the Constitution affects the tenure of those members of the Parliament who were, at the time of the dissolution, Ministers of State for the Commonwealth. They remain Ministers until they resign their Ministerial offices, are formally dismissed by the Governor-General, or cease to hold office by operation of the provision in section 64 of the Constitution that 'no Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or member of the House of Representatives.'

4.223 The Constitution thus tolerates a state of affairs under which, for up to a period of 90 days, there need be no Federal Parliament although there is a Ministry which 'holds over' without renewal of its authority by formal commission of the Governor-General.

4.224 While the second paragraph of section 5 of the Constitution might appear to ensure that a Parliament will, and must, be summoned to meet very soon after the results of a general election are known, in fact it does not have this effect.

4.225 To understand how this can come about it is necessary to have regard to the various constitutional and legislative provisions which govern the parliamentary electoral process.

4.226 Where a general election is to be held, that process is formally begun by issue of writs for elections. In the case of elections of senators the writs are issued by State Governors, and in cases in which the Senate has been dissolved pursuant to section 57, the writs must be issued within 10 days from the proclamation of the dissolution (section 12). In the case of general elections for the House of Representatives, the writs are, under section 32 of the Constitution, caused to be issued by the Governor-General in Council and must be issued within 10 days from the expiry of the House or from the proclamation of its dissolution. The subsequent steps in the electoral process are governed by the *Commonwealth Electoral Act 1918.*

4.227 Under the Act, the final date for nomination of candidates for election may be 11 to 28 days after the date of the issue of the writ (section 156). The date for polling may be fixed as a day not less than 22 days and not more than 30 days after the final date for nomination of candidates (section 157). The day appointed for return of the writs must be not more than 100 days after their issue (section 159). Until 1987 it was 90 days. In result, polling day must be between 33 and 58 days after the issue of the writ, and the maximum time for return of writs after the appointed polling day is 67 days. The maximum period

220 JR Odgers, *Australian Senate Practice* (5th edn, 1976) 619-20.

221 Those who renominate continue to receive their parliamentary allowances up to and including the day prior to the day fixed for the election – *Parliamentary Allowances Act 1952,* section 5(5).

222 Odgers, op cit, 621.

which can elapse between the issue of writs and the first meeting of a new Parliament is now 140 days, though in practice it is more likely to be 130 since writs are normally issued immediately after a dissolution of the House.

4.228 The statutory period for return of writs was increased in 1987 from 90 days to 100 days following presentation, in December 1986, of the Second Report of the Joint Select Committee on Electoral Reform. In its report the Committee quoted from a letter from the Prime Minister, Hon RJL Hawke, in which he had drawn attention to the effect of amendments to the *Commonwealth Electoral Act* in 1983 to increase the minimum period between the issue of writs and polling day from about 23 days to 33 days. The Prime Minister pointed out that, as a new Parliament had to meet no later than 120 days after issue of the writs, the amendments had meant that the maximum time between polling day and the first meeting of the Parliament had been reduced. He suggested that if the Act were amended to extend the time for return of writs from 90 days to 100 days, it would be possible to hold an election in mid to late November, without the need for Parliament to meet in early February.[223]

4.229 In recommending that the time for return of writs be extended in the way suggested by the Prime Minister, the Joint Select Committee noted that 'the manner in which Senate scrutiny is now conducted can mean, where there is a large number of candidates, a long delay before all Senate vacancies are filled.'[224]

4.230 Table 4.1 sets out the number of days which elapsed between:

(a) the dissolution of the House of Representatives (or a double dissolution) and the ensuing polling day;

(b) polling day and the first meeting of the new Parliament; and

(c) the dissolution and the first meeting of the new Parliament, over the years 1969 to 1987.

4.231 Table 4.1 shows that, since 1969, the periods of time which have elapsed between the dissolution of a Parliament and the first meeting of the next Parliament have ranged between 57 days in 1969 and 118 days in 1984. The time which has elapsed between the end of one Parliament and the first meeting of the next Parliament does not appear to have had any necessary connection either with the state of the political parties after elections, or with the scope of the elections, that is, whether they were for the House of Representatives alone, for the House and the entire Senate, or for the House and half the Senate. A change of Governments occurred only after the general elections of 1972, 1975 and 1983. In those years, the time which elapsed between the dissolution of Parliament and the first meeting of the new Parliament varied considerably – 117 days in 1972-3, 98 days in 1975-6, and 77 days in 1983. Double dissolutions occurred in 1974, 1975, 1983 and 1987. In those years the country was without a Federal Parliament for 89, 98, 77 and 101 days respectively.

4.232 One factor which has clearly affected the timing of the first meeting of a new Parliament has been the date fixed for polling in the preceding elections. When elections have been held in early to mid December of one year, the first meeting of the new Parliament has not, since 1969, occurred before mid to late February of the following year.

223 Report, PP 1/1987 para 5.9.
224 ibid.

TABLE 4.1

MEETINGS OF FEDERAL PARLIAMENT

DATE OF DISSOLUTION		POLLING DAY		1ST MEETING	DAYS FROM DISSOLUTION TO 1ST MEETING
1969 29 September	[26 days]	25 Oct (Reps only)	[31 days]	25 Nov	57
1972 2 November	[30 days]	2 Dec (Reps only)	[87 days]	27 Feb 1973	117
1974 11 April	[38 days]	18 May (DD)	[51 days]	9 July	89
1975 11 November	[32 days]	13 Dec (DD)	[66 days]	17 Feb 1976	98
1977 10 November	[30 days]	10 Dec (Reps, 1/2 Sen)	[73 days]	21 Feb 1978	103
1980 19 September	[29 days]	18 Oct (Reps, 1/2 Sen)	[38 days]	25 Nov	67
1983 4 February	[30 days]	5 March (DD)	[47 days]	21 April	77
1984 26 October	[36 days]	1 Dec (Reps, 1/2 Sen)	[82 days]	21 Feb 1985	118
1987 5 June	[36 days]	11 July (DD)	[65 days]	14 Sept	101

['DD' indicates dissolution of both Houses of the Federal Parliament; 'Reps only' refers to elections for the House of Representatives; 'Reps, 1/2 Sen' refers to elections for the House of Representatives and half the Senate respectively.]

Current position — State Parliaments

4.233 The constitutions of the Australian States contain provisions similar to sections 5 and 6 of the Federal Constitution. Most do not, however, include a provision like that in the second paragraph of section 5 which requires the Parliament to be summoned to meet within a specified time after the return of writs for a general election.[225] The only States in which there is a statutory provision comparable with the second paragraph of section 5 are New South Wales and Tasmania.

4.234 In New South Wales, the Legislative Assembly must be summoned to meet not later than 7 days after the date appointed for return of writs. Writs must be issued within 4 days of the dissolution or expiry of the Assembly, and the day appointed for return of writs must be not later than 60 days after the issue of the writs or such later date as is fixed by a proclamation of the Governor published in the *Gazette.*

4.235 In Tasmania, writs must be issued within 10 days of the dissolution or expiry of the House of Assembly. The day for return of writs must be 60 days after the issue of the writs, but, as in New South Wales, there is power to extend this time. The Assembly must be summoned to meet no later than 90 days after the dissolution or expiry of the Assembly, though the Governor is empowered to extend the time, by proclamation, for a period of no more than 30 days.

4.236 In recent years, the period of time which has elapsed between polling day for State general elections and the first meeting of the new State Parliament has generally been shorter than that which has elapsed between polling day for federal general elections and the first meeting of the next Federal Parliament. The intervals of time between polling day and the first meeting of the new State Parliament, in the last two general elections prior to 1988, are shown in Table 4.2.

225 *Constitution Act 1902* (NSW), sections 10, 11; *Constitution Act 1867* (Qld), sections 3, 12; *Constitution Act 1934* (SA), sections 6, 7; *Constitution Act 1934* (Tas), sections 11, 12; *Constitution Act 1975* (Vic), sections 20, 38, 41; *Constitution Act 1889* (WA), sections 3, 4.

TABLE 4.2

MEETINGS OF STATE PARLIAMENTS

State	Polling Date	Date of first sitting	Interval (Days)
NSW	19 Sept 1981	28 Oct 1981	39
	24 March 1984	1 May 1984	38
Qld	22 Oct 1983	22 Nov 1983	31
	1 Nov 1986	12 Feb 1987	103
SA	6 Nov 1982	8 Dec 1982	31
	7 Dec 1985	11 Nov 1986	66
Tas	15 May 1982	15 June 1982	31
	8 Feb 1986	12 March 1986	32
Vic	3 April 1982	27 April 1982	24
	2 March 1985	3 April 1985	32
WA	19 Feb 1983	22 March 1983 *	31
	8 Feb 1986	10 June 1986	122

* The Assembly sat for only 3 days and adjourned until 26 July 1983

Practice in other countries

4.237 The Australian Constitution is based on parliamentary practice in the United Kingdom and on the Constitution of the United States. In Britain the Parliament is periodically dissolved and thereupon a new Parliament elected. In the United States the new Congress continues in existence for some weeks after the election date and is succeeded by the new Congress on the same day or soon afterwards.

4.238 We are indebted to the Australian High Commissioner in Britain for the following letter which the Clerk of the House of Commons sent him on 28 October 1987:

> The average interval between Parliaments in the United Kingdom since 1918 has been 38 days, and since 1945 the average has been 32 days. It is our custom for the proclamation which dissolves the old Parliament to appoint a day for the meeting of the new one, so everyone knows the position at the time of the General Election . . . We vote on a Thursday, and this year's experience of meeting on the following Wednesday was not untypical. Of course, our 'first past the post' electoral system allows us to know all the results by about mid-day on the Friday.
>
> A minimum interval of 20 days between Parliaments is prescribed, and in fact we need a little more than that for all the election formalities to be completed. There is no maximum interval laid down, but you will see that our practice is pretty uniform.
>
> There is power to defer the planned date for the first meeting of Parliament if circumstances should require it. This is effected by a further proclamation (on the advice of Ministers) under the Prorogation Act 1867. The power has only been used twice in this century: in 1900 and 1919.

4.239 We are indebted to the Australian Ambassador to the United States for the following information from the Clerk of the House of Representatives. The United States Constitution gave Congress the power to set the time for election of Senators and Representatives (Article I, Section 4, Clause 1.1). In 1872 Congress selected as the date for elections the Tuesday next after the first Monday in November in every even numbered year. Pursuant to Section 1 of the Twentieth Amendment, ratified in 1933, the terms of Senators and Representatives shall end at noon on 3 January following the election day. Pursuant to Section 2 of the Amendment, the first meeting of the new Congress shall begin at the same time 'unless they shall by law appoint a different day'. Congress has, as often as not, appointed a different day, the latest being 21 January 1971 and 15 January 1979.

4.240 Table 4.3 sets out the intervals of time between polling day and the first sitting of the Parliament of New Zealand and of the Lower House of the Canadian Parliament.

TABLE 4.3
PERIOD BETWEEN HOLDING OF ELECTIONS AND FIRST SITTING DAY OF LOWER HOUSE OF PARLIAMENT

NEW ZEALAND

POLLING DATE	FIRST SITTING DAY	PERIOD (DAYS)
26 Nov 1966	26 Apr 1967	103
29 Nov 1969	12 Mar 1970	82
25 Nov 1972	23 Jul 1973	237
29 Nov 1975	17 May 1979	173
28 Nov 1981	07 Apr 1982	130
14 Jul 1984	15 Aug 1984	30
15 Aug 1987	17 Sep 1987	

CANADA

POLLING DATE	FIRST SITTING DAY	PERIOD (DAYS)
08 Nov 1965	18 Jan 1966	72
25 Jun 1968	12 Sep 1968	79
30 Oct 1972	04 Jan 1973	67
08 Jul 1974	30 Sep 1974	84
22 May 1979	09 Oct 1979	140
18 Feb 1980	14 Apr 1980	56
04 Sep 1984	05 Nov 1984	62

Issues

4.241 The basic issues are:

(a) Should the Constitution be altered to reflect the well established convention that the powers vested in the Governor-General by section 5 are exercised only on Ministerial advice?

(b) Should the Constitution be altered to limit the power of the Parliament to enact laws the effect of which make it possible for a meeting of Parliament not to be held for some considerable time after the expiry or dissolution of the House of Representatives? If so, how should the Constitution be altered?

(c) Should the Constitution be altered to include any provision whereby States and Territorial legislatures are similarly controlled in relation to meetings of their Parliaments and their legislatures?

Reasons for recommendations

4.242 We recommend that section 5 of the Constitution be reformulated for several reasons. First, the last paragraph relating to the meeting of the first Parliament after the establishment of the Commonwealth is clearly expended. Secondly, we consider that the powers which the section vests in the Governor-General are more appropriately vested in the Governor-General in Council. These are powers which are exercised on Ministerial advice and the Constitution should reflect this. The final change involved in the proposed new section 5 is the most important. It concerns the meeting of Parliament after a general election.

4.243 While we acknowledge that it should be left to the Parliament to legislate on matters such as the minimum and maximum time which must elapse between the issue of writs and polling day, and the time within which returns to writs must be made, it is, in our view, desirable that the Constitution should ensure that after a general election, the Parliament is summoned to meet as soon as possible after polling day.

4.244 Sections 5 and 32 of the Australian Constitution were designed to limit the period that the nation would be without a Parliament. That intention has seriously miscarried because the Constitution leaves it to the Parliament to ordain the number of days to be specified in the writs for the elections for the return of those writs. Parliament can set and alter the number of days when and how it wishes by amending the *Commonwealth Electoral Act 1918*. This means that in the Federal Parliament, as in the State Parliaments, months can elapse between the last meeting of an old Parliament and the first meeting of a new Parliament.

4.245 In the meantime members of the new Parliament will not have been officially installed. Moreover, (a) the Government which had a majority in the former House of Representatives may not have a majority in the new House and it may or may not have resigned and accordingly a new Government may or may not have been installed, or (b) the Government which had a majority in the old House may still have a majority in the new House but may have new Ministers or Ministers who have changed portfolios. In all such cases the processes of representative government will have been suspended.

4.246 This particular aspect of our recommendation is closely linked with further recommendations in Chapter 5 relating to the terms of office of Ministers.[226] Adoption of those recommendations would mean that the Governor-General could not terminate the appointment of a Prime Minister unless the House of Representatives had passed a resolution that the Government no longer had the confidence of the House, and the Governor-General could not terminate the appointment of other Ministers except on the advice of the Prime Minister.

4.247 In considering what is a reasonable maximum period of time allowable between polling day and the first meeting of Parliament after a general election, we have had regard to the operation of the existing law and the time which has elapsed between polling day and the first meeting of Parliament following the general elections held from 1969 to date.[227] On only two occasions (in 1972-73, and 1984-85) did the period exceed the 75 day period we have recommended. In both cases the elections had been held in early December.

4.248 Were our proposal to be adopted then, assuming the relevant provisions of the *Commonwealth Electoral Act 1918* were to remain as they are, the maximum period which could elapse between the expiry or dissolution of the House of Representatives and the first meeting of Parliament after the election would be 143 days. The corresponding period under the Act and the Constitution, as they now stand, is 140 days.[228]

4.249 The reasons for limiting the period of time which may elapse between the day of polling in general elections and the first meeting of a new Parliament apply equally to State Parliaments and Territorial legislatures. We therefore *recommend* that the rule which applies to the Federal Parliament should also apply to these legislatures.

226 para 5.58-5.72.

227 Table 4.1.

228 Issue of writs – no later than 10 days after the expiry or dissolution of the House; return of writs – no later than 100 days after issue of writs; first meeting of Parliament – no later than 30 days after the day appointed for return of the writs.

COMPOSITION OF THE FEDERAL PARLIAMENT

Recommendations

4.250 We *recommend:*

(i) The nexus between the size of the House of Representatives and the Senate should be broken, subject to the inclusion in the Constitution of provisions expressly limiting the size of both Houses of Parliament.

(ii) The number of senators for each Original State should be fixed at 12.

(iii) The power of the Parliament to determine the number of members of the House of Representatives should be qualified by providing that the number of people represented by a member of the House of Representatives shall be not fewer than 100,000, subject to the present guarantee that, 'five members at least shall be chosen in each Original State' (section 24) and to our recommendations on the representation of Territories and new States.

(iv) The entitlement of Territories and new States to representation in the House of Representatives and the Senate should be prescribed in the Constitution.

(v) The Australian Capital Territory and Jervis Bay Territory should be treated as one Territory for the purposes of representation.

(vi) A Territory should be entitled to its own representative in the House of Representatives when its population is in excess of 50,000.

(vii) The number of members of the House of Representatives chosen in each new State and in each Territory which is entitled to be represented should be in proportion to the population of the new State or Territory, provided that at least two members of the House of Representatives should be chosen in the Australian Capital Territory and at least one member in a new State and in the Northern Territory.

(viii) Residents (being persons qualified to be enrolled as electors) of a Territory that is not entitled to be represented in the Parliament should be entitled to vote at an election of senators or members of the House of Representatives for or in a Territory on the mainland of Australia, as the Parliament provides.

(ix) Each new State and Territory should be entitled to representation in the Senate on the basis that it returns one senator for every two members whom it is entitled to return to the House of Representatives, subject to the following:

- a new State, the Australian Capital Territory and the Northern Territory should each be entitled to representation in the Senate by at least two senators;
- no new State or Territory should be entitled to be represented in the Senate by more than twelve senators.

This formula would produce the following results:

(a) *New States, Australian Capital Territory, Northern Territory*

Number of members of House of Representatives	Number of senators
1, 2, 3, 4 or 5	2
6 or 7	3
8 or 9	4
10 or 11	5
12 or 13	6
14 or 15	7
16 or 17	8
18 or 19	9
20 or 21	10
22 or 23	11
24 or more	12

(b) *Representation in the Senate of Territories other than the Australian Capital Territory and the Northern Territory* would be the same as in the above table except as set out below:

Number of members	Number of senators
1	0
2 or 3	1

(x) Section 26 should be repealed.

Current position

4.251 ***The Senate.*** The composition of the Senate (with the exception of representation of Territories) is dealt with in section 7 of the Constitution which provides as follows:

> The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.
>
> But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.
>
> Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.
>
> The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

4.252 There were six senators for each State until 1949 when the number was increased to ten. The *Representation Act 1983* (Cth) provided for a further increase to twelve. In addition, the Northern Territory and the Australian Capital Territory each return two senators, pursuant to the *Senate (Representation of Territories) Act 1973* (Cth), making a total of 76 senators.

4.253 The size of the Senate and the House of Representatives is linked by the requirements of section 24, discussed below. This link is referred to as 'the nexus'.

4.254 ***House of Representatives.*** The composition of the House of Representatives (with the exception of the representation of Territories) is governed, for the most part, by section 24 of the Constitution which provides as follows:

> The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.
>
> The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:-
>
> (i.) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:
>
> (ii.) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.
>
> But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

Section 27 is also relevant. It provides:

> Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives.

4.255 This means that the Parliament may make laws changing the size of the House of Representatives, provided that:

(a) the nexus between the size of the two Houses requiring, as nearly as practicable, a 2:1 ratio between the number of members of the House of Representatives and the number of senators, is maintained;

(b) the members of the House of Representatives are directly chosen by the people of the Commonwealth;

(c) the number of members chosen in each State is in proportion to the population of the State; and that

(d) at least five members are chosen in each Original State.

The above provisos do not apply to members chosen in the Territories.

4.256 The first House of Representatives had 75 members which meant that there was, on average, one member for about every 50,000 people in Australia. By 1948, the population of Australia had doubled in size. The *Representation Act 1948* (Cth) enabled the House of Representatives to be enlarged in 1949 to 121 members from the States. In compliance with the nexus requirement the number of senators was increased to 60. In 1983, the House of Representatives was enlarged to its present size of 148 members, an average of one member for approximately every 107,000 people. Again, this was accompanied by a proportionate increase in the number of senators from the States.

4.257 The number of members returned by each State is as follows:

New South Wales	51
Victoria	39
Queensland	24
Western Australia	13
South Australia	13
Tasmania	5

In addition, the Australian Capital Territory returns two members and the Northern Territory, one member.

4.258 ***Representation of Territories.*** The power of the Parliament to make laws with respect to Territories is set out in section 122 of the Constitution. It provides:

> The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

The High Court has held that this section confers on the Federal Parliament a virtually unqualified power to make laws for the Territories. The power to provide for the representation of Territories 'in either House of the Parliament to the extent and on the terms which it thinks fit' is unfettered by the requirements of section 7[229] or section 24.[230] This means, amongst other things, that:

(a) the nexus requirement does not apply to Territory senators and members;

(b) Territory senators and members need not be directly chosen by the people of the Territory; and that

(c) the number of members chosen in a Territory need not be in proportion to its population.

4.259 The Northern Territory has been entitled to return one member of the House of Representatives since the *Northern Territory Representation Act 1922* but full voting rights were not conferred until the Act was amended in 1968. The Australian Capital Territory was granted representation in the House of Representatives by one member under the *Australian Capital Territory Representation Act 1948* (Cth). The member had only limited voting rights until 1966 when full rights were conferred. Representation was extended to two members in 1973.[231]

4.260 The Australian Capital Territory and the Northern Territory were granted representation in the Senate (two senators each) by the *Senate (Representation of Territories) Act 1973* (Cth). That Act was one of the Bills passed by the historic joint sitting of 1974 in accordance with section 57. The first senators for the Territories were elected on 13 December 1975. Legislation relating to Territorial representation was consolidated under the *Commonwealth Electoral Act 1918* (Cth) in 1983.

4.261 The people of the Territories of Jervis Bay, the Cocos (Keeling) Islands and Christmas Island are included within the federal electoral divisions of the Australian Capital Territory or the Northern Territory. Of the remaining Territories – Ashmore and Cartier Islands, Australian Antarctic Territory, Coral Sea Islands Territory, Heard and McDonald Islands and Norfolk Island – only Norfolk Island has a permanent population. It has no federal parliamentary representation.

4.262 ***Representation of new States.*** Section 121 deals with the admission or establishment of new States. It provides:

> The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

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229 *Western Australia v Commonwealth (First Territories Representation Case)* (1975) 134 CLR 201; *Queensland v Commonwealth (Second Territories Representation Case)* (1977) 139 CLR 585.

230 *Attorney-General (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527.

231 *Australian Capital Territory (House of Representatives) Act 1973* (Cth).

The Parliament is thereby empowered to determine the extent of representation of a new State in both Houses of Parliament and is not bound by the terms of sections 7 and 24 in so doing. The power to admit new States to the Commonwealth or to establish new States has not been used to date.

Previous proposals for reform

4.263 ***Joint Committee on Constitutional Review.*** In summary, the Committee recommended that the Constitution should be altered to provide that:

(a) The nexus between the size of the two Houses should be broken.

(b) The Parliament should have power to determine the number of senators, provided that the Original States:

- are equally represented, and
- have at least six and no more than ten senators.

(c) The power of the Parliament to determine the number of members of the House of Representatives should be subject to the qualification that there should be on average not fewer than 80,000 people for every member.

(d) The power of the Parliament to determine the number of members should be subject to the present proviso that each Original State should have at least five members.[232]

The Joint Committee made no recommendations on the representation of Territories or new States.[233]

4.264 ***Constitutional referendum.*** A proposal along the lines recommended by the Joint Committee was put to a referendum in 1967 by the Coalition Government with the support of the Opposition. It was approved by 40.25% of all electors and by a majority in New South Wales alone.

4.265 ***Australian Constitutional Convention.*** The Melbourne (1975) and Hobart (1976) sessions of the Australian Constitutional Convention adopted resolutions which proposed the breaking of the nexus between the size of the House of Representatives and the Senate.[234] They recommended that, subject to the provision that each Original State should return at least five members, the power of Parliament to determine the size of the House of Representatives should be qualified by a requirement that, on average, each member would represent at least 85,000 people.

4.266 They also recommended that each State should have no fewer than ten senators. Unlike the Joint Committee, they did not recommend an upper limit on the number of senators for each State.

4.267 The representation of Territories and new States was debated at the Perth (1978) session of the Australian Constitutional Convention, but the question was referred to its Standing Committee for consideration and report.[235] The issues were eventually the subject of recommendations made by the Convention's Structure of Government Sub-Committee in the context of its report on breaking the nexus (see below), but the Convention did not make any substantive recommendations relating to them.

232 1959 Report, 6.
233 ibid.
234 ACC Proc, Melbourne 1975, 173; ACC Proc, Hobart 1976, 204.
235 ACC Proc, Perth 1978, 192.

4.268 In 1983 Senator Macklin (Australian Democrats) introduced the *Constitution Alteration (Parliament)* Bill 1983. It reflected the Convention resolution except that it proposed a quota of no fewer than 100,000, rather than 85,000, in calculating the number of members of the House of Representatives to be returned in each State. It passed the Senate but was not debated by the House of Representatives. A Bill to the same effect was introduced by Senator Macklin on 23 September 1987 but has not proceeded beyond his second reading speech.

4.269 In its report to the Brisbane (1985) session, the Structure of Government Sub-Committee of the Australian Constitutional Convention recommended that the Constitution be altered to break the nexus subject to the following conditions:

(a) that the present weight of a senator's vote in relation to that of a member of the House of Representatives at joint sittings of the two Houses be preserved despite the breaking of the nexus, that is, it should remain in the ratio of one to two;

(b) that the number of people represented by a member of the House of Representatives would not be less than 100,000;

(c) that there be not less than the existing number of senators and not more than 100 senators; and

(d) that certain rules should apply to the maximum and minimum representation of Territories and new States in the Parliament.

The Brisbane session resolved:

> That the Report of the Structure of Government Sub-Committee on Breaking the Nexus between the sizes of the Houses of Parliament be noted.[236]

4.270 ***Joint Select Committee on Electoral Reform.*** In November 1985, the Committee issued its *Report No. 1, Determining the Entitlement of Federal Territories and New States to Representation in the Commonwealth Parliament.*[237] The Committee recommended that the entitlement to representation of Territories and new States should be prescribed in the Constitution. It recommended, however, that, initially, formulas for determining the entitlement of Territories should be enacted as provisions of the *Commonwealth Electoral Act 1918.* Broadly, the Committee proposed that:

(a) Territories should be entitled to representation in the House of Representatives in accordance with their population on similar principles to those applicable to the States, and

(b) entitlement in the Senate should be on the basis of one senator for every two members of the House chosen in the Territory, with a guarantee that the Australian Capital Territory and the Northern Territory retain at least their existing entitlement of two senators each.

4.271 Further, the Committee recommended that no new State should be admitted to the federation on terms and conditions as to its representation more favourable than those the Committee recommended for Territories.

236 ACC Proc, Brisbane 1985, vol I, 423.
237 PP 1/1986.

Submissions

4.272 ***Nexus.*** Only a small minority of submissions received favoured the retention of the nexus. One submission argued that it was essential in order to preserve the voting strength of the Senate.[238] Another said that 'it is vital to the Parliamentary process and the protection of the smaller States that the influence of the Senate be maintained.'[239]

4.273 Other submissions gave qualified support to the abolition of the nexus. NJ Murray submitted that the weight ratio given to the votes of the members of the respective Houses in joint sittings should remain unchanged, that members of the lower House should never represent fewer than 100,000 people and that there should be no reduction in the number of senators.[240] With these safeguards in place, the breaking of the nexus would pose no problem for democracy. Mr S Souter agreed that, if the nexus is to be removed, some other safeguard should be substituted to discourage changes in the size of either House for the purpose of political gain. He was particularly concerned about the effect of breaking the nexus on the power of the Senate to influence the outcome of a joint sitting under section 57.[241] On the other hand, I Smith expressed concern that the Senate might grow at a faster rate than the House of Representatives.[242] Otherwise, he supported the breaking of the nexus.

4.274 The submissions which favoured the breaking of the nexus can be divided into two categories: those which saw a problem with the nexus itself and those which proposed an alternative method of establishing the size of the Houses. NJ Parkes, JA Pettifer and DM Blake, former Clerks of the House of Representatives, expressed strong support for the recommendation of the Australian Constitutional Convention that the nexus be broken. They considered it 'quite unacceptable that future population growth justifiably calling for increased membership of the House of Representatives should necessitate a further increase in the number of senators.'[243] Mr Chris Miles MP submitted that twelve Senators for each State provided sufficient representation and that any higher number would involve unjustifiable expense.[244] M Smith argued along similar lines.[245] R Price MP gave unqualified support to the abolition of the nexus.[246]

4.275 Some submissions saw the problem not as the nexus itself, but that Australia is overgoverned.[247] They supported its abolition on the basis that it could lead to a reduction in the size of both Houses and smaller government.

4.276 Other submissions advanced a variety of suggestions for better ways of fixing the numbers of the Houses. BA Trivett suggested that it would be more realistic, given the historical context, to have a Senate of a fixed size, chosen by the House of Representatives for an indefinite term.[248] P Canet argued that the size of the Houses should be set on independent criteria: electorate size (that is, population) for the House of Representatives and a minimum and maximum number of senators.[249]

238 J Moodie S3221, 16 February 1987.
239 AB Kelly S707, 4 December 1986.
240 S729, 7 December 1986.
241 S2013, 27 April 1987.
242 S3226, 16 February 1987.
243 S60, 27 June 1986.
244 S197, 1 August 1986.
245 S84, 16 May 1986.
246 S179, 25 July 1986.
247 HE Carruthers S110, 16 June 1986; DW Hood S123, 20 June 1986.
248 S2012, 23 April 1987.
249 S610, 21 November 1986.

4.277 ***Representation.*** We received only a few submissions relating to the representation of Territories and new States in the Parliament.

4.278 The Northern Territory Government submitted that new States should have complete equality of representation with Original States.[250] It said that it would only accept Statehood on equal terms, including representation in the Senate equal to that of the Original States. Similarly, the Law Society of the Northern Territory submitted that:

> Northern Territory statehood without general equality as to powers, duties and representation with the other states would seriously disadvantage residents of the new state. The federal nature of the Australian Constitution should not be departed from in the case of the new state of the Northern Territory.[251]

4.279 We also received a number of submissions on the question of separate representation for Aborigines. The National Aboriginal and Islander Legal Services Secretariat argued that, because the interests of the component parts of the Commonwealth are safeguarded by the Senate, the Aborigines should be represented there, as an electorate, as if they were a State.[252] The Public Interest Advocacy Centre endorsed this view, arguing that this would be an important step towards redressing the inequalities which the Aborigines have faced for the last 200 years.[253] The Aboriginal Development Commission submitted that if a certain number of seats in the Senate were designated for Aboriginal representatives, Parliament would have ready access to expert opinion on laws affecting the Aborigines.[254]

Reasons for recommendations

4.280 ***Nexus between the size of the House of Representatives and the Senate.*** In reaching our decision to recommend the breaking of the nexus between the size of the two Houses of Parliament notwithstanding the failure of the 1967 referendum on this question, we had regard to the resolutions in favour of the proposal passed by the Melbourne (1975) and Hobart (1976) sessions of the Australian Constitutional Convention, as well as the earlier recommendations of the Joint Parliamentary Committee.[255]

4.281 We also had the benefit of the Structure of Government Sub-Committee's 1985 Report which included a closely argued paper by Mr GJ Lindell setting out the issues involved in breaking the nexus and the arguments in favour and against such a proposal.[256]

4.282 We consider that there is no necessary relationship between the size of the House of Representatives and the size of the Senate.

4.283 The role and function of the two Houses are different. The House of Representatives determines the Government, provides most of the Ministry and initiates the bulk of legislation. Its members, elected on the basis of population, are required to perform constituency work in their own electorates. Clearly, as the population increases, the size of electorates increases and the workload of individual members becomes heavier. An increase in the size of the House may therefore be considered desirable on the

250 S3693, 6 November 1986.
251 S3669, 6 November 1986.
252 S114, 10 July 1986.
253 S3098, 24 November 1987.
254 S565, 21 November 1986.
255 ACC Proc, Melbourne 1975, 173; ACC Proc, Hobart 1976, 204.
256 Report, Appendix C, ACC Proc, Brisbane 1985, vol II.

basis of population growth to enable members to represent their electorates adequately. In other words, a significant increase in population is a factor which may justify an increase in the size of the House of Representatives.

4.284 Another factor which may justify an increase in the House is an increase in the size of the Ministry. If the Ministry is enlarged in order to cope with the growing complexity of Government business, the number of members of the Government party who, as members of the Executive, are pledged to support Cabinet decisions, might outweigh the number of members on the back bench, thereby reducing the role of Parliament. It may be considered desirable, therefore, to balance any significant enlargement of the Ministry with an increase in the size of the back bench.

4.285 The Senate is elected on the basis of equal representation of States rather than on the basis of population. Unlike members of the House, senators do not represent particular electorates but are drawn from the State as a whole.

4.286 Although the Senate does provide a number of Ministers from its ranks, the majority are drawn from the House of Representatives. In the present Parliament, eight out of thirty Ministers are senators – slightly more than 25% of the total Ministry. As a result, the Senate does not initiate as much legislation as the House of Representatives. It does, however, play a significant role, particularly through its committee system, not only in the legislative process but as a check on the Executive. Activities of its committees include the scrutiny of Bills, the examination of a broad range of policy issues, the review of regulations and by-laws made by the Executive and examination of the Government's estimates of expenditure. In our opinion, any increase in the size of the Senate should depend upon whether its numbers are adequate to perform its role effectively and whether Territories and, potentially, new States, are fairly represented, rather than following automatically from an increase in the size of the House or Representatives.

4.287 The fear has been expressed[257] that if the nexus is broken, there would be no safeguard against arbitrary or unnecessary increases in the number of members of Parliament. This view is presumably based on the assumption that Governments are loathe to increase the size of the Senate and therefore, so long as increases in the size of the House automatically involve a proportionate increase in the number of senators, Governments will only act with very good reason.

4.288 On the other hand, it has also been argued that the nexus requirement fosters unwarranted increases because necessary or desirable increases in the House must be accompanied by increases in the Senate, whether or not additional numbers are needed in the Senate.[258] On each of the two occasions (1949, 1983) on which the total number of members of the Parliament has been increased in accordance with sections 7 and 24 of the Constitution, the impetus has been a desire to increase the size of the House of Representatives rather than any wish to enlarge the Senate.

4.289 We believe it *is* important to provide some check on Parliament's capacity to increase its own size. We do not consider, however, that the nexus is the most effective safeguard against unnecessary increases. The most effective means of curtailing the size of the Parliament is to provide an express limitation in the Constitution which, at present, contains no such express limits on the size of either House.

257 For example, in *Constitution Alteration (Parliament) 1967: Argument against the proposed law: The Case for NO* in the 1967 referendum; see Structure of Government Sub-Committee Report, 9, ACC Proc, Brisbane 1985, vol II.

258 *Constitution Alteration (Parliament) 1967: Argument in favour of the proposed law: The Case for YES;* see id, 5-8.

4.290 Another argument frequently raised against breaking the nexus is that it would inevitably lead to a reduction in the power and prestige of the Senate because Governments could increase the size of the House of Representatives but not the Senate. Proponents of this view argue that the Senate would eventually be dwarfed in size – and therefore importance – by the House.

4.291 We do not believe that the power and prestige of the Senate is dependent upon it always remaining half the size of the House of Representatives. The power of the Senate depends upon the powers given to it by the Constitution. Except in relation to certain categories of money Bills, the power of the Senate with respect to proposed legislation is equal to the power of the House of Representatives and is unaffected by its size. The United States Senate is a good example of an Upper House the power of which is undiminished by its small size vis-a-vis the Lower House. It has 100 senators, two from each of the 50 States, as compared with a House of Representatives of 435 members. While it is true that the United States Senate has powers which our own Senate does not possess, for example, its power of trying cases of impeachment and its duty to advise and consent on foreign affairs, the legislative power of the two Houses is much the same.

4.292 Any proposed legislation to increase the size of the Australian House of Representatives would be subject to amendment by the Senate and could not be passed without its approval.[259]

4.293 It has also been argued that, assuming the breaking of the nexus eventually leads to an increase in the size of the House of Representatives in relation to the size of the Senate, the position of the less populous States would be weakened 'in Party rooms (where much of the real power is exercised), in Cabinet and on Parliamentary committees.'[260] Although electors in the less populous States would continue to return the same number of senators as the larger States, the proportion of their representatives in the Parliament as a whole would be reduced if the House, in which representation is based on population, were increased in size relative to the Senate.

4.294 Concern has also been expressed that if the size of the House of Representatives increases to more than twice the size of the Senate, any chance of the Senate influencing the outcome of a joint sitting will be removed.[261] Specifically, it has been argued that the position of the less populous States would be weakened if their views differed from the more populous States in a joint sitting, because their representation is stronger in the Senate than the House.[262]

4.295 Provision is made for a joint sitting as the final step in the procedure set out by section 57 of the Constitution for resolving deadlocks between the two Houses over proposed legislation. Broadly, a Bill must be twice passed by the House of Representatives and twice rejected by the Senate. The second rejection by the Senate must then be followed by the dissolution of both Houses, a third passage by the House and a third rejection by the Senate before a joint sitting can be held to vote on the disputed Bill. If it is passed by an absolute majority of the total number of members of the Senate and the House voting together, it is taken to have passed both Houses and, upon assent, becomes law.

259 This is subject to one exception, that is, that a deadlocked Bill may be passed at a joint sitting of the House and the Senate. See below under the heading 'Disagreement between the Houses'.

260 *Constitution Alteration (Parliament) 1967: Argument against the proposed law: The Case for NO;* see id, 11.

261 See for example the dissenting report of Senator Wright in 1959 Report, Appendix B.

262 See also *Constitution Alteration (Parliament) 1967: Argument against the proposed law: The Case for NO;* see Structure of Government Report, February 1985, 11, ACC Proc, Brisbane 1985, Vol II.

4.296 We do not think that the argument about joint sittings is sufficiently strong to justify the maintenance of the status quo. First, there has only ever been one joint sitting – 1974 – and it is unlikely that there will be frequent joint sittings in the future. Secondly, in our view the outcome of a joint sitting would seldom depend upon the ratio of the sizes of the two Houses. The political party system operates in the Senate, just as it does in the House of Representatives. Assuming that proportional representation is retained for the election of senators, representation of the two major parties in the Senate will continue to be fairly evenly divided. Therefore, the outcome of joint sittings under the present system would, in most cases, depend only on the size of a Government's majority in the House of Representatives. As long as a Government had a significant majority in the House, whether or not it controlled the Senate, it would always be able to ensure the passage of a Bill at a joint sitting even if the nexus was retained and the Bill was opposed by all non-Government members and senators. Conversely, if a Government had only a narrow majority in the House and no majority in the Senate, a Bill opposed by non-Government members and senators would usually be defeated even if the House had been increased to more than twice the size of the Senate.

4.297 Accordingly, we have decided not to adopt the proposal of the Structure of Government Sub-Committee of the Australian Constitutional Convention that the nexus be broken subject to the condition that the present weight of a senator's vote in relation to that of a member of the House of Representatives be preserved.

4.298 We do, however, recommend that the joint sitting provision be altered to require a special majority which directly takes the interests of the States into account. This is dealt with below in the context of our proposals to alter the deadlock procedure.[263]

4.299 We recommend that the nexus between the size of the House of Representatives and the Senate be broken, subject to the inclusion in the Constitution of provisions expressly limiting the size of both Houses of Parliament.

4.300 ***Number of senators.*** We were initially attracted to the recommendation of the Structure of Government Sub-Committee in its report to the Brisbane (1985) session of the Australian Constitutional Convention that the power of the Parliament to alter the size of the Senate be restricted so that the number of senators could not be diminished, nor increased to more than 100 senators. However, we decided that to place an absolute limit on the size of the Senate was not compatible with our decision to recommend that the representation of new States and Territories in the Senate be in accordance with a formula linking it to the number of members a new State or Territory is entitled to return.

4.301 Under the Sub-Committee's proposal, the Senate could be increased by a maximum of 24 more Senate places. Under our recommended formula, Senate representation of Territories and new States could, in theory, extend beyond that figure. We think it important to retain some flexibility in relation to the size of the Senate, particularly as we cannot foresee future developments on Territories and new States.

4.302 We do not, however, see any need to allow for an increase in the number of senators for the Original States. Twelve each has been entirely adequate for the Senate to perform its role effectively. We recommend that the number of senators for each Original State be fixed at that figure.

4.303 ***Number of members of the House of Representatives.*** There have been a number of proposals to limit the size of the House of Representatives by providing that the number of people represented by one member shall not be fewer than a specified number. In 1959

263 para 4.613, 4.677-4.680.

the Joint Committee recommended an average of no fewer than 80,000 people; in 1975 and 1976 the Melbourne and Hobart sessions of the Australian Constitutional Convention recommended 85,000, and in 1985 the Convention's Structure of Government Sub-Committee recommended that no fewer than 100,000 people be represented by one member.

4.304 In our view, it is better to limit the size of the House by fixing a minimum number of persons for an electorate than by placing an absolute limit on the number of members. The former approach allows reasonable increases in line with population growth while prohibiting excessive increases. We consider the figure proposed by the Structure of Government Sub-Committee to be appropriate. Accordingly, we recommend that the number of people represented by a member of the House of Representatives shall be not fewer than 100,000, subject to the present guarantee in section 24 that, five members at least shall be chosen in each Original State and to our recommendations relating to the representation of Territories and new States.

4.305 ***Representation of Territories.*** As noted above,[264] the Parliament of the Commonwealth has full power to determine the number of senators and members of the Territories. Further it has full power to determine the method of their election or appointment and their voting rights in the Parliament. By contrast, the entitlement to representation of the Original States is controlled by the nexus and is subject to other qualifications, for example, that representation in the Senate shall be equal and that representation in the House shall be in proportion to population, subject to a minimum representation of five members.

4.306 We have recommended that the nexus be broken but in its place we have proposed a fixed number of senators to represent each of the Original States and a limit on the power of the Parliament to increase the size of the House of Representatives. We do not think it is logical to prescribe the entitlement to representation of the Original States in the Constitution but to leave the entitlement of Territories completely open-ended.

4.307 Further, the unqualified nature of the Parliament's power under section 122 has given rise to the fear that it could be abused. Indeed, the possibility that a Government could swamp the Senate with senators from the Territories, thereby giving them a disproportionate or dominant voice in the 'States' House' was used by the plaintiffs in the *Territories Representation Cases*[265] as an argument against a broad construction of section 122. This argument was accepted by some judges in the first *Territories Representation Case* but not by the majority. Justice Mason, for example, dismissed the argument as an

> exercise in imagination [which] assumes the willing participation of the senators representing the States in such an enterprise, notwithstanding that it would hasten their journey into political oblivion. It disregards the assumption which the framers of the Constitution made, and which we should now make, that Parliament will act responsibly in the exercise of its powers.[266]

4.308 The Joint Select Committee on Electoral Reform, however, in its report on the representation entitlement of Territories and new States considered it 'imprudent to dismiss the possibility so lightly.'[267] The Committee said:

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264 para 4.258.

265 *Western Australia v Commonwealth* (1975) 134 CLR 201; *Queensland v Commonwealth* (1977) 139 CLR 585.

266 134 CLR 201, 271.

267 PP 1/1986, 19.

> The Party balance in the Senate could easily be upset by a small manipulation in favour of one or other of the Parties to ensure control of that Chamber. The situation is exacerbated by the possibility of multiple voting and selection by means other than direct election by the people.
>
> 4.11 Similarly, the control of either Chamber, in a tight numbers situation, could be affected by legislative change affecting the existing entitlement of the Territories, as for instance to remove voting rights of Territory representatives . . . Nor does historical experience support the assumption that a Parliament can always be relied on to act responsibly.[268]

4.309 Although we favour the view that the political process and the nature of our institutions are sufficient in themselves to prevent such manipulation, we acknowledge that concern about possible abuse is widely held and will continue to exist so long as the terms and extent of the entitlement of Territories to representation is open-ended. For this reason and for reasons of consistency, certainty and democratic principle we recommend that the entitlement of Territories to representation in the Senate and the House of Representatives be prescribed in the Constitution.

4.310 We do not think that the extent of the representation of Territories in the House of Representatives is problematic because we see no reason why the people of the Territories should not be represented in proportion to their population in the same manner as the people of the States are represented. All Australians who are qualified to be enrolled as electors should be entitled to be represented in the House of Representatives, 'the people's House', on the same basis. There is no reasonable justification for doing otherwise.

4.311 The only qualification we would make to that relates to the question of minimum representation. Section 24 provides, *inter alia,* that, 'five members at least shall be chosen in each Original State.' This provision has an effective operation only in relation to Tasmania, the population of which is not large enough to sustain five members. At Federation, Western Australia was in the same position. Quick and Garran note that, without the guaranteed minimum, Tasmania and Western Australia would have been entitled to only 2 or 3 members each in the House of Representatives. They said:

> This was considered such an insignificant representation that provision was made that there should be a minimum number of five members in each State.[269]

It is unlikely that the two least populous colonies would have agreed to join the federation without the inclusion of such a provision.

4.312 Clearly, such an argument does not apply to the position of Territories today. At present two members are chosen in the Australian Capital Territory (including Jervis Bay) and one in the Northern Territory. The people of the other Federal Territories do not have separate representation. We think that the Australian Capital Territory and the Northern Territory should be guaranteed a continuing representation in the House of Representatives and should maintain at least their present entitlement.

4.313 Accordingly, we recommend that the number of members of the House of Representatives chosen in each Territory which is entitled to be represented should be in proportion to the population of the Territory, provided that at least two members are chosen in the Australian Capital Territory and one member in the Northern Territory. We also recommend that, as at present, the Australian Capital Territory and Jervis Bay Territory should be treated as one Territory for the purposes of representation. We recommend that the residents (being persons qualified to be enrolled as electors) of a Territory which is not entitled to its own representative in the Parliament should be

268 id, 50-1.
269 Quick and Garran, 455.

entitled to vote at an election of members of the House of Representatives in a Territory on the mainland of Australia, as the Parliament provides. Further, we recommend that a Territory should be entitled to its own representative in the House of Representatives when its population exceeds 50,000.

4.314 The appropriate entitlement of Federal Territories to representation in the Senate is more difficult to determine. We noted above[270] that the Joint Select Committee on Electoral Reform recommended that the *Commonwealth Electoral Act 1918* should be amended to provide that entitlement of a Territory to representation in the Senate should be on the basis of one senator for every two members of the House chosen in the Territory, subject to a guarantee that the Australian Capital Territory and the Northern Territory retain at least their existing representation of two senators each.

4.315 The formula adopted by the Committee was based on a resolution sponsored by Hon IBC Wilson MP at the Perth (1978) session of the Australian Constitutional Convention[271] and a subsequent submission by him to the Committee. The rationale for the Wilson proposal is that the representation entitlement of Territories (and new States) would be more or less consistent with maintaining the nexus in size between the Senate and the House of Representatives. Even though the chain of causation would be reversed, that is, the number of senators for a Territory would be in proportion to the number of members, the final result would be that the total number of members of the House would be, 'as nearly as practicable, twice the number of senators'.

4.316 We have recommended that the nexus between the size of the Houses should be broken. Nevertheless, we think that the Joint Select Committee's proposal for the representation of Territories in the Senate should be adopted. It is both practical and equitable.

4.317 We have decided, therefore, to recommend that a formula based on membership of the House (which, in turn, is based on population) be prescribed to determine Territorial entitlement rather than recommend a fixed number of senators. We think it unlikely that, in the foreseeable future, the breaking of the nexus would result in the size of the House increasing to much more than twice the size of the Senate. If our recommendation to break the nexus is not accepted, membership of the House will remain, as nearly as practicable, twice the size of that of the Senate. In either event, we think that the fairest and most practical solution at the present time is to provide a formula for the entitlement of all Federal Territories on the basis of one senator for every two members, thereby taking population growth into account. This should be subject to a maximum representation of 12 senators and to the Australian Capital Territory and the Northern Territory maintaining their present entitlement of two senators each.

4.318 In effect, this will mean that the Australian Capital Territory and the Northern Territory will be entitled to a third senator when they have six members in the House of Representatives (that is, populations in excess of 600,000 if our recommendations are adopted). Other Territories will be entitled to one senator on reaching a population large enough to return two members to the House of Representatives (that is, at least 200,000 people). We recommend, however, that residents (who are qualified to be enrolled as electors) of a less populous Federal Territory which is not entitled to its own representation in the Senate, should be entitled to vote at an election of senators for a mainland Territory (in practice, the Australian Capital Territory or the Northern Territory), as the Parliament provides.

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270 para 4.270.

271 This matter remained on the agenda of the Convention and was the subject of debate at the most recent session – see ACC Proc, Brisbane 1985, vol I, Agenda Item B8.

4.319 ***Representation of new States.*** A majority of the Joint Select Committee on Electoral Reform recommended, 'that no new State should be admitted to the Federation on terms and conditions as to representation in the Parliament, more favourable then those prescribed for representation of Territories in the Electoral Act.'[272]

4.320 A dissenting report was submitted by one member, Senator Macklin. He argued that, if implemented, the proposal put forward by the majority report would condemn the Northern Territory (the only Territory presently pressing for Statehood) to the status of a second class State. In relation to the Senate, the Northern Territory and any other new States would be 'denied the equality of representation as a State which is the constitutional principle upon which the Senate is founded.'[273]

4.321 In response to the latter argument, we note that the Framers of the Constitution *expressly* confined the principle of equal representation in the Senate to 'Original States' (section 7). It was an essential ingredient for the union of the colonies into the federation. Further, they empowered the Federal Parliament to determine the extent of a new State's representation in both Houses of the Parliament 'as it thinks fit' (section 121). Clearly, it was envisaged that the representation entitlement of a new State might not be the same as that of the Original States, therefore, there is no constitutional reason for insisting on a principle of equality of Statehood, at least in relation to representation in the Federal Parliament.

4.322 We do not think that the representation entitlement of new States should be left to the Federal Parliament. It should be prescribed in the Constitution for the same reasons as those we have given above in recommending that Territorial entitlement should be so prescribed, namely, consistency, certainty and democratic principle.

4.323 We see no reason to provide that a new State should have an equivalent guaranteed minimum representation in the House of Representatives as the Original States have, nor equal representation in the Senate. As we have observed above,[274] there were sound historical reasons for such provisions in relation to the Original States. None of these apply to new States. We think that, as for Territories, population size is the most rational basis for determining representation entitlement of new States in both Houses, subject to a guaranteed minimum representation of one member in the House of Representatives and two senators, and a maximum of 12 senators. The guaranteed minimum will ensure that a new State will be at least as well represented as the Northern Territory in the House, and at least as well represented as that Territory and the Australian Capital Territory in the Senate. The upper limit on the number of senators will ensure that representation of a new State in the Senate cannot exceed that which we have recommended for the Original States.

4.324 Therefore, we recommend that:

(i) The number of members of the House of Representatives chosen in a new State should be in proportion to its population, subject to a guaranteed minimum representation of one member.

(ii) A new State should be entitled to representation in the Senate on the basis that it returns one senator for every two members whom it is entitled to return to the House of Representatives, subject to a guaranteed minimum representation of two senators and a maximum representation of twelve senators.

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272 *Report No. 1, Determining the Entitlement of Federal Territories and New States to Representation in the Commonwealth Parliament*, 45.

273 id, 56.

274 para 4.311, 4.321.

4.325 ***Section 26.*** Section 26 says:

> 26. Notwithstanding anything in section twenty-four, the number of members to be chosen in each State at the first election shall be as follows:-
>
> | | |
> |---|---|
> | New South Wales | twenty-three; |
> | Victoria | twenty; |
> | Queensland | eight; |
> | South Australia | six; |
> | Tasmania | five; |
>
> Provided that if Western Australia is an Original State, the numbers shall be as follows:-
>
> | | |
> |---|---|
> | New South Wales | twenty-six; |
> | Victoria | twenty-three; |
> | Queensland | nine; |
> | South Australia | seven; |
> | Western Australia | five; |
> | Tasmania | five. |

Section 26 is now outmoded and should be repealed.

CASUAL VACANCIES IN THE SENATE

Recommendations

4.326 We *recommend* no change to the procedure set out in section 15 of the Constitution for filling casual vacancies in the Senate except that special provision should be made in terms similar to section 15 for Territorial senators.

4.327 We *recommend* that the last four paragraphs of section 15, being transitional provisions, now be repealed as expended.

Current Position

4.328 The machinery for filling casual vacancies in the Senate is set out in section 15 of the Constitution which provides:

> 15. If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together, or, if there is only one House of that Parliament, that House, shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens.
>
> Where a vacancy has at any time occurred in the place of a senator chosen by the people of a State and, at the time when he was so chosen, he was publicly recognised by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, a person chosen or appointed under this section in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, shall, unless there is no member of that party available to be chosen or appointed, be a member of that party.
>
> Where –
>
> (a) in accordance with the last preceding paragraph, a member of a particular political party is chosen or appointed to hold the place of a senator whose place had become vacant; and
>
> (b) before taking his seat he ceases to be a member of that party (otherwise than by reason of the party having ceased to exist),

he shall be deemed not to have been so chosen or appointed and the vacancy shall be again notified in accordance with section twenty-one of this Constitution.

The name of any senator chosen or appointed under this section shall be certified by the Governor of the State to the Governor-General.

Transitional provisions follow.

Background

4.329 The first vacancy in the Senate after the introduction of proportional voting in 1949 occurred in December 1951. The Prime Minister and the Premiers, of whom three were Labor and three Liberal, agreed that, whenever a casual vacancy occurred in the Senate, the replacement should come from the same party as the former senator. In its 1958 and 1959 reports the Joint Committee on Constitutional Review expressed the unanimous view that the:

> principle should continue to be observed without exception so that the matter may become the subject of a constitutional convention or understanding which political parties will always observe.[275]

4.330 On 10 February 1975 a Government senator resigned. Three days later the Senate passed a unanimous resolution:

> The Senate commends to the Parliaments of all the States the practice which has prevailed since 1949 whereby the States, when casual vacancies have occurred, have chosen a Senator from the same political party as the Senator who died or resigned.[276]

Nevertheless the places of the senator who had resigned and of another Government senator who died in June were filled by the Parliaments of their States by senators who did not belong to the Government party. Thus a change was brought about in the political complexion of the Senate elected in May 1974.

4.331 Section 15 was altered to its present form by the referendum on *Constitution Alteration (Senate Casual Vacancies)* in May 1977. The proposal was approved by 73.3% of all electors and by majorities in all States. It should be noted, however, that the Constitution still does not ordain procedures and principles for filling casual vacancies in the places of Territorial senators. It is a statutory procedure – *Commonwealth Electoral Act 1918* (Cth), section 44 – which governs the filling of Senate casual vacancies in the Territories.

4.332 In 13 cases subsequent to the 1977 referendum casual vacancies were filled by State Parliaments by persons nominated by the parties of the former senators. Several of the new senators belonged to parties which did not have a majority in the Parliament of the State concerned. On 2 April 1987, however, when there was a policy conflict between the Federal Labor Government and the Tasmanian Liberal Government, Senator Grimes, a Minister, resigned and the Tasmanian Government declined to appoint a replacement who would support the policy of the Federal Government and oppose the policy of the State Government. On 8 May the Leader of the Federal Opposition, Hon John Howard, MP, stated:

> I believe that the person appointed to fill casual vacancies of this kind ought to be the person nominated by the retiring Senator's political party.

275 1959 Report, 43.
276 *Hansard* 146, 147, 173.

> Until the current impasse is resolved the Opposition will continue to grant the Labor Party a pair in the Senate in relation to Senator Grimes' vacancy. This means that the voting strength of Labor in the Senate will not be diminished in any way.[277]

Issues

4.333 The issue thus arises as to whether it is necessary to alter section 15 or whether, on the contrary, parliamentary conventions sufficiently address its problems.

4.334 A second issue independently arises as to whether the Constitution should provide for the filling of vacancies in the case of Territorial senators. If the answer is yes, the issue arises as to what should be the precise terms of that procedure.

Submissions

4.335 On 23 June 1987 we wrote to the leaders of all major political parties in the Federal and State Parliaments and the Northern Territory Legislative Assembly seeking their views as to the adequacy of section 15 of the Constitution and any changes to it that seem appropriate.

4.336 We received seven letters in reply. Three supported changing section 15 of the Constitution.[278] Three submissions opposed change.[279] One submission noted problems with section 15 but did not specifically recommend that section 15 be altered.[280]

4.337 The following specific arguments were put in favour of retaining section 15 in its current form:

(a) Section 15 is an adequate limitation on State Parliaments. Any alteration could only lead to a minimal increase in certainty, and could never be foolproof.[281]

(b) Section 15 correctly reflects the convention applicable to filling casual Senate vacancies by requiring the Parliament of the former senator's State to choose the nominee of the former senator's party. To so alter section 15 would reduce the role of State Parliaments to 'rubber stamp' decisions taken outside of Parliament.[282]

(c) Despite problems with section 15 as it is, no possible changes amount to improvements without their own problems. Therefore no change is justified.[283]

4.338 The following specific arguments were put in favour of changing section 15:

(a) It is essential in our political system that the political balance of the Senate, determined by the electorate, is not disturbed by the unilateral decision of a State Government. The potential for this to occur still exists under the altered section 15 of the Constitution, as was recently demonstrated in the

277 Press release, 8 May 1987.
278 Senator J Haines (Leader, Australian Democrats) S2419, 27 August 1987; Hon E Kirkby, MLC (Australian Democrat, NSW) S2616, 1 September 1987; Hon J Cain (Premier of Victoria, ALP) S2623, 23 September 1987.
279 Hon S Hatton (Chief Minister, NT, Country-Liberal) S2772, 29 August 1987; Hon R Gray (Premier of Tasmania, Liberal) S3825, 24 August 1987; Hon B Burke (Premier of WA, ALP) S3826, 20 August 1987.
280 Hon RJL Hawke (Prime Minister, ALP) S3827, 2 November 1987.
281 Hon B Burke.
282 Hon R Gray.
283 Hon S Hatton.

case of the casual vacancy in Tasmania. It is the view of the Victorian Government that the potential for such an incident to re-occur is unacceptable.[284]

(b) Ambiguities in the wording of the current section 15 can be and should be corrected. The only solution lies with a further alteration to section 15 to make it clear that the State Parliament's right to choose a successor is confined to the relevant party's nominee.[285]

4.339 The Commission also received some submissions from the general public, all implying by their suggestions that section 15 in its present form is inadequate.[286]

Reasons for recommendation

4.340 ***Substance of Section 15.*** The convention governing Senate vacancies is well understood and has been generally observed. It is quite unpersuasive to argue that a State Government should not have to appoint a candidate selected by internal party processes when, without widespread disapproval, the party candidates for general elections are selected in much the same way. Quite to the contrary, we regard the convention as meritorious given that it guards the democratic representation of parties in the Senate against disturbance by a Senate casual vacancy.

4.341 Despite the view that the terms of section 15 allow for its spirit to be frustrated we do not recommend that the section be altered other than by the repeal of the transitional paragraphs. We can see no change that will produce an impeccable and impregnable constitutional provision. Yet we are satisfied that its defects can be ameliorated by sensible, practical actions such as those taken by Mr Howard. We trust that his example will be taken as setting a proper principle and precedent.

4.342 ***Territories.*** A necessary corollary to our recommendation that the Constitution be altered to provide for representation of Territories in the Senate is that the Constitution be altered to expressly provide for a mechanism in substance similar to section 15 governing casual Senate vacancies in the case of Territorial senators.

4.343 Where the senator is elected to represent a Territory without an elected legislature, a joint sitting of the House of Representatives and the Senate should be convened to choose the person to fill the vacancy until the expiry of the Senate term. Where the senator is elected by a Territory with a single legislative House (such as the Northern Territory) that House should be convened to choose the person to fill the vacancy. Where the senator is elected by a Territory with two elected legislative Houses, a joint sitting of those Houses should be convened to choose the person to fill the vacancy. Like the current section 15, the casual vacancy provisions for Territorial senators should provide that a vacancy be filled by a person of the same party as the previous incumbent senator's party. Such alterations ensure, as far as possible, that casual vacancies be filled following the same principles, whether the vacancy involves a State or Territorial senator.

4.344 ***Expended Provisions.*** The last four paragraphs of section 15 are transitional provisions which are now expended. Therefore we recommend they be repealed.

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284 Hon J Cain.

285 Senator J Haines and Hon E Kirkby.

286 AG Hordern S877, 28 January 1987; SS Gilchrist S2641, 30 September 1987; WJ Riley S2811, 23 October 1987; AR Pitt S3065, 23 December 1987; DJ Bull S36, 25 February 1986.

TERMS OF THE FEDERAL PARLIAMENT

Recommendations

4.345 We *recommend* that the Constitution be altered to provide that:

(i) The maximum term of the House of Representatives shall be four years.

(ii) The House of Representatives shall not be dissolved within three years of its first meeting after a general election unless the House has passed a resolution expressing a lack of confidence in the Government and no Government can be formed from the existing House.

(iii) Senators chosen in the States shall hold their places for two terms of the House of Representatives except in the event of a double dissolution.

(iv) Senators chosen in the Territories shall hold their places for one term of the House of Representatives.

(v) The polling day for an election of senators shall be the same day as the polling day for the election of members of the House of Representatives.

(vi) If, after the election of senators following a dissolution of the Senate but before the division of senators into two classes takes place, a senator dies, resigns or becomes disqualified, the division is to be made as if the place had not become vacant.

Introduction

4.346 The Constitution contemplates that there should be an election every three years for the whole of the House of Representatives and for half the Senate. In the first fifty years of Federation there was only one separate House of Representatives election and one double dissolution. There was no separate Senate election. The triennial system developed serious distortions after World War I and has broken down since World War II. These failures of the Constitution have become critical when the former Opposition has taken office without a majority in the Senate, as in 1929, 1941, 1949, 1972 and 1983.

4.347 Between the first double dissolution in September 1914 and the second in April 1951 the terms of service of senators were taken to begin on 1 July 1914 and every third year thereafter: section 13. Elections to replace or re-elect senators could be made within one year before their terms were to expire. Elections for the places to be filled on 1 July in the years from 1935 to 1947 inclusive were held on the same day as the elections for the House of Representatives in the preceding August, September or October. Thus it came about that senators were elected as much as ten months before their terms were due to begin.

4.348 Another defect in the choosing of senators became apparent when a Government senator died in April 1946, over 14 months before the expiry of his term. The Parliament of his State chose an adherent of the Opposition to take his place.

4.349 For long periods between 1919 and 1949 the Government, for some periods, and the Opposition, for others, held all but one, two or three of the places in the Senate. This defect was overcome at the 1949 elections, when the proportional system of voting was substituted for the preferential system. Since that time, numbers of senators who support the Government and numbers who support the Opposition have been much more even.

4.350 Since the 1949 elections there have been constant departures from the triennial system. Indeed, there have been more federal elections in Australia than there have been in the United States which has a fixed biennial system. After the 1951 election there was

for the first time an election for the Senate alone in May 1953. For only the second time, there was an election for the House of Representatives alone in May 1954. Elections were then held for both Houses in December 1955 and, at the intended three year intervals, in November 1958 and December 1961. In November 1963, however, the elections for the two Houses were again put out of kilter by holding an election for the House of Representatives alone. Thereafter elections for the Senate and the House of Representatives alternated at the end of 1964, 1966, 1967, 1969, 1970 and 1972.

4.351 The increase which was made in 1949 in the number of senators from six to ten for each State came to have the hitherto unforeseen consequence of making it easier for places to be won by independents and by members of parties not represented in the House of Representatives. The Chifley Government (July 1945-December 1949) was the last to enjoy a majority in the Senate throughout its term. The Menzies Governments which succeeded it did not secure a majority until the whole Senate was elected by proportional voting after the double dissolution in 1951 and did not retain a majority in the Senate after June 1962. The Holt, Gorton, McMahon and Whitlam Governments never had a majority in the Senate. The Fraser Government, elected in December 1975, did not have a majority after June 1981. The Hawke Government has never had a majority.

4.352 Following the election for the House of Representatives in December 1972 the new Government had to work with a Senate in which half the members had been elected in November 1967 with terms expiring at the end of June 1974. The other half had been elected in November 1970 with terms expiring at the end of June 1977. In April 1974 it was announced that the Opposition senators, including those whose terms were to expire on 30 June, would vote against the supply Bills which were to cover government services for the five months after 30 June.

4.353 In the Parliament elected after the double dissolution in April 1974 there was a recurrence of the defect exposed on the death of the Government senator who died in April 1946. We have described above[287] the breaches of the convention with respect to the filling of casual vacancies which had operated after the introduction of proportional voting for the Senate.

4.354 Disputes between the Houses of the Federal Parliament made it possible for both to be dissolved in November 1975, February 1983 and June 1987. Meantime the number of senators for each State was increased from ten to twelve at the elections held in December 1984.

4.355 The position has thus been reached in Australia where no member of the Federal Parliament knows when he or she will next have to face the electors. Every senator and every candidate for the Senate knows that the six-year term which the Constitution provides for senators has become an illusion. The last senators who served six-year terms were those who were elected on 5 December 1964 and who took their places on 1 July 1965. One may contrast the position in the United States where all members of both Houses of Congress know the precise date on which their next elections will be held. Since 1945 Australians have gone to the polls 22 times (See Table 4.4 below).

287 para 4.329-4.332.

4.356 It is clear that legislative means, such as increasing the size of both Houses or changing the electoral system for the Senate, or administrative means, such as double dissolutions, have not sufficed to overcome the shortcomings we have described in the operation of Australia's bicameral Federal Parliament. Only one defect – the filling of casual vacancies – has been substantially overcome by altering the Constitution itself.[288]

4.357 Under the Constitution as it stands, a Prime Minister can virtually secure an election of the House of Representatives whenever he or she desires. Under the Constitution as it would have been altered by the *Constitution Alteration (Simultaneous Elections)* Bills of 1974, 1977 and 1984, a Prime Minister could virtually have secured an election for the House of Representatives and half the Senate whenever he or she desired. Under the Constitution as it stands, a Prime Minister can virtually secure an election for the House of Representatives and the whole Senate at any time after the Senate has produced a section 57 situation by twice rejecting a Bill or Bills.

4.358 On the other hand, under the Constitution as it stands, whenever a Government does not have a majority in the Senate – as has been the case from mid-1962 to late 1975 and since mid-1981 – the Senate can virtually force the House of Representatives to face an election without itself facing one.

4.359 The alterations of the Constitution which we recommend are designed to extend the maximum duration of the Federal Parliament to four years from the first meeting of the House. This would accord with the terms for all State Parliaments except the Parliament of Queensland. The alterations which we recommend are also designed to preclude the dissolution of the House or the Parliament within three years after the first meeting. This would bring about a situation similar in principle to that which now applies in Victoria and South Australia. The Government could not procure an election for the House, with or without a full or half Senate election, within the first three years and the Senate could not procure an election for the House within the first three years.

4.360 In our proposals the sole exception to a minimum term of three years for the two Houses is where 'the House has passed a resolution that the Government does not have the confidence of the House and the Governor-General is satisfied that it is not possible for a Government having the confidence of the House to be formed'. This is an exceedingly unlikely circumstance; 3 October 1941 was the last occasion on which defeat on the floor of the House obliged a Government to resign and on that occasion a new Government was formed from the existing House.

4.361 Our recommendations on the terms of the Federal Parliament form only part of a scheme which we are proposing for the alteration of those sections in the Constitution affecting the Parliament. The other parts of the scheme concern the powers of the Senate with respect to proposed financial legislation and the procedure for resolving disputes between the two Houses over other proposed legislation. In essence, we recommend that:

(a) the Senate should not have power to reject or block a Government's money Bills (as defined) during the first three years of the term of the House of Representatives, and that

(b) the procedure for resolving deadlocks should be altered so that a double dissolution can only take place in the fourth year of the term of the House of Representatives.

288 para 4.331.

These recommendations are corollaries of Recommendation (ii) above[289] for a minimum term of three years. We have found it convenient, however, to deal with the detail of the proposals in separate sections.[290]

4.362 We believe that the scheme which we propose will substantially overcome the difficulties we have discussed above.

Current position

4.363 Section 28 of the Constitution provides that the House of Representatives is to have a maximum term of three years but may be dissolved sooner by the Governor-General.

4.364 Sections 7 and 13 of the Constitution provide that senators are elected for a term of six years, with half the number of Senate places becoming vacant every three years. (Neither of these sections applies to the senators chosen in the Australian Capital Territory or the Northern Territory who, pursuant to section 42 of the *Commonwealth Electoral Act 1918,* serve the equivalent of one term of the House of Representatives.)

4.365 The Senate can be dissolved only in special circumstances and then only if the House of Representatives is dissolved at the same time. The special circumstances arise when the two Houses cannot reach agreement over a proposed law passed by the House of Representatives: section 57.

4.366 Following the election of the whole Senate after a double dissolution, half of the newly elected senators must retire or seek re-election after serving only three years to enable the three year rotation system to continue. Section 13 leaves it to the Senate to divide the senators chosen for each State into two classes, one consisting of short term, the other of long term senators.

4.367 Section 13 also provides that Senate elections may be held at any time within one year before Senate places actually become vacant. (Elections for Territorial senators are held on the same day as general elections for the House of Representatives.[291]).

Previous proposals for reform

4.368 ***Royal Commission on the Constitution.*** The Royal Commission in 1929 recommended that the maximum term of the House of Representatives be extended from three years to four years. It did not recommend any change to the terms of senators.[292]

4.369 ***Joint Committee on Constitutional Review.*** The Committee recommended in 1959 that instead of serving six year terms:

> . . . senators should hold their places until the expiry or dissolution of the second House of Representatives after their election, unless the Senate should be earlier dissolved under the provisions of section 57 of the Constitution.[293]

The Committee did not recommend any change to the length of the term of the House of Representatives.

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289 para 4.345.
290 para 4.475-4.477; 4.613.
291 *Commonwealth Electoral Act 1918,* section 43.
292 1929 Report, 268.
293 1959 Report, 34.

4.370 ***Australian Constitutional Convention.*** The Hobart (1976) session of the Australian Constitutional Convention adopted a resolution which proposed that the Constitution be altered to ensure that Senate elections are always held at the same time as elections for the House of Representatives.[294]

4.371 The Adelaide (1983) session also supported simultaneous elections of the House and the Senate. Further, it recommended that the term of the House be extended to four years and that the term of senators be extended to twice the term of the House of Representatives.[295]

4.372 The Adelaide session of the Convention rejected a proposal put forward by Federal Government delegates for a three year fixed term for the House of Representatives. A number of those opposing the proposal, however, favoured a four year fixed term.

4.373 ***Constitutional referendums.*** Proposals to introduce simultaneous elections for the House of Representatives and the Senate have been put to referendum and rejected on three occasions. The results were as follows:

Year	Federal Government	National vote in favour	States with majorities	Opposition attitude
1974	ALP	48.3	NSW	Oppose
1977	Liberal	62.3	NSW Vic SA	Support
1984	ALP	50.6	NSW Vic	Oppose

4.374 A Bill, *Constitution Alteration (Fixed Term Parliaments)* was introduced by the Opposition in the Senate on 11 November 1981 and was passed by an absolute majority on 17 November 1982. The Bill provided for elections of the House of Representatives to be held on a fixed date every three years. An early dissolution was allowed if the House passed a vote of no confidence in the Government (and no alternative Government could be formed), or in the event of a double dissolution pursuant to section 57 to resolve a deadlock over proposed legislation. In either case, however, the incoming Government would merely serve out the term of its predecessor, thus ensuring the restoration of the three year cycle.

4.375 The 1982 Opposition having become the Government, the new Attorney-General introduced a similar Bill in the Senate on 12 May 1983 but had it withdrawn from the notice paper on 21 September 1983.

4.376 A Bill to give effect to the resolution of the Adelaide session of the Convention that terms of the House of Representatives be extended to four years and senators' terms be extended to twice the term of the House *(Constitution Alteration (Parliamentary Terms) 1983* was passed by the Parliament but was not submitted to referendum.

4.377 In September 1987 Senator Macklin (Australian Democrats) introduced a Bill, *Constitution Alteration (Fixed Term Parliaments) 1987,* which, *inter alia,* provides for a qualified fixed term of four years for both the House of Representatives and the Senate. The Bill has not yet received a second reading.

294 ACC Proc, Hobart 1976, 204.
295 ACC Proc, Adelaide 1983, vol I, 322.

Submissions

4.378 A wide range of submissions were received, the majority of them favouring some change to the status quo. Most submissions dealt only, or principally, with the term of the House of Representatives.

4.379 A significant number of submissions favoured extending the term of the House to four years. The main argument put forward in favour of lengthening the term was that it would improve the quality of Government. In the words of Mr C Miles, MP (who favoured a five year term), it would 'produce more effective, long-term government and would enable Parliamentarians to concentrate on decision-making unaffected by possible electoral backlash.'[296]

4.380 Similarly, Mr E Mayer, Chairman of the Business Council of Australia (BCA), considered that, '. . . the primary benefit to be gained from a longer term is the inducement it gives to more responsible government decision-making.'[297] The BCA has, in fact, been actively campaigning for the introduction of a four year maximum term for the House because, in its view, the frequency of elections has had an adverse impact on Government economic policy-making which has, in turn, had an adverse effect on private sector planning and business confidence. Mr Mayer drew our attention to a survey conducted by the Roy Morgan Research Centre for the BCA in May 1987 which found that a majority of Australians in five of the six States would have voted in favour of extending the term from three to four years at that time.

4.381 Similar views to those of Mr Mayer were put forward by Dr NR Norman who wrote that:

> No provision of the Constitution seems to be more limiting or inimical to the development of appropriate economic policies than the provisions . . . limiting the parliamentary term to three years, or possibly much less . . . . This short and uncertain term militates against the development of bold but unpopular initiatives, most expecially in the areas of tax and industrial relations.[298]

4.382 An opposing view was put by Mr PG Harvey, who favoured a shorter term than the present one. He submitted that:

> If the desire is for more responsible decision making, then that aim is more likely to be achieved by more frequent elections rather than less frequent ones. Lacking the security of three, four or five years in office, knowing they will have to face the electorate at frequent intervals, Governments will be far less likely to go off on extreme frolics of their own designed to satisfy their own supporters without regard to the wishes or the best interests of the people as a whole. The swing from one extreme to the other will necessarily be avoided: incremental change will become the name of the game.[299]

4.383 The major argument raised against extending the maximum term of the House of Representatives was that, given that it rarely runs its present maximum term now, any extension is unjustified. Mr S Souter, for example, argued that 'If governments are foolish enough to give in to crass political opportunism, we are all the poorer, but the onus is surely on the government to change its ways, not for the leash to be lengthened because it can't – or won't.'[300]

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296 S197, 1 August 1986.
297 S902, received 9 February 1987.
298 S3688, 2 December 1986.
299 S1359, 24 March 1987.
300 S2014, 27 April 1987; others who shared similar views included: JJ Conway S0275, 15 June 1986; H Smallwood S0151, 4 July 1986; CM Murray S2371, 12 August 1987.

4.384 Another argument put by a number of people was that extending the period between elections would not serve the interests of democracy. JR Lawrence[301] considered that it 'would represent a reduction in the power of the Australian people to remove a bad government from office.' Further, he considered that the view that Governments need longer terms in order to carry out unpopular policies is 'twisted logic' – 'the government is elected to administer and lead the nation in accordance with the wishes of the people, not in defiance of those wishes.'

4.385 A significant number of submissions favoured fixing the term of the House of Representatives and, of these, a majority were also in favour of extending the term to four years.[302] Some, however, wanted the three year term to be fixed[303] or partially fixed.[304] S Hancock[305] favoured a fixed three year term for members of the House of Representatives but proposed that they should be elected in a series of rolling by-elections. In her view, 'a healthy democracy needs to be worked and tested continually.' At least one person favoured a fixed term of less than three years.[306]

4.386 Mr S Souter suggested that the real problem is the instability of government under the Westminster system. He observed that, 'Adding one more year to the maximum period between elections is not likely to generate any great or lasting effect as long as the government is still in a position to defeat the intention by being able to call an early election or of being forced to one, or where its majority in Parliament is such that it is spending more time trying to preserve it than running the country.' In his view, 'The ultimate solution would be a total separation of executive and legislature,' but a 'next-best solution' would be 'a comprehensive package ... attacking the various aspects of the problem, such as early elections, length of term, and so on.'[307]

4.387 Of those advocating a fixed term, some specified that one or more exceptions should be made, for example, in the event of a loss of confidence and/or a deadlock and/or failure of the Senate to pass supply.[308] Mr H Paas considered that, in the event of an early dissolution over, for example, a deadlock, the new Parliament should only serve out the remainder of the previous term. This would be a strong disincentive against going to an early election 'just because a Government felt it would do better under the circumstances prevailing at the time.'[309]

4.388 A number of submissions favoured a fixed minimum term of three years and a maximum term of four years.[310] JHL Beament submitted that such a scheme, with different rules applying to each segment of the term would be too complicated. He proposed a system under which an election could not be held before the end of a term unless supported by a two thirds majority of the House.[311]

301 S2741, 25 October 1987.
302 For example, NJ Parkes, JA Pettifer and DM Blake, former Clerks of the House of Representatives, S0060, 27 June 1986; Dr IA Furzer S0134, 23 June 1986; HR Byron S232, 19 August 1986; MD Reynolds S0136, 23 June 1986.
303 For example, AJ Marr S2951, 1 November 1987; AB Kelly S709, 4 December 1986.
304 L Foley S2887, 28 October 1987.
305 S2222, 9 June 1987.
306 PG Harvey S1359, 24 March 1987.
307 S Souter S2014, 27 April 1987.
308 For example, AJ Marr S2951, 1 November 1987; H Paas S1925, 22 April 1987; AB Kelly S709, 4 December 1986; NJ Parkes, JAPettifer and DM Blake S0060, 27 June 1986.
309 S1925, 22 April 1987.
310 I Robertson S2720, 19 October 1987; Senator J Watson S2074, 6 May 1987; Fairfield City Council (subject to qualifications) S2076, 12 May 1987.
311 S2472, 5 September 1987.

4.389 Comparatively few submissions were received on Senate terms or on whether elections for the two Houses should be simultaneous. Mr E Mayer of the BCA submitted that senators should serve for two terms of the House of Representatives, otherwise, if the House had a four year maximum term, it would be difficult for elections to be held at the same time. This would result in more rather than fewer elections.[312]

4.390 Others, including three former Clerks of the House of Representatives,[313] proposed that the Senate term should be the same as that of the House of Representatives. Mr P Taft considered that this would 'guarantee the Senate's accountability and ensure that it better represents the electors' wishes.' In his view it is unjust that under the present system, because of the larger quota of votes needed, it is 'possible for a party with over ten percent popular support (over a million votes) to miss winning a seat altogether.'[314] Mr M Mackerras strongly favoured simultaneous elections of the whole House and the whole Senate. He considered the present system of rotation of senators an 'unfair farce' and set out a statistical analysis in support of his view.[315]

4.391 A few submissions opposed the introduction of simultaneous elections – Mr S Souter, for example, considered that, as the proposal had been rejected three times at referendum, the electorate's verdict should be accepted as final for at least the foreseeable future.[316] Mr C Miles, MP, submitted that the Senate is the States' House and 'should not be subject to tampering or manipulation by the Government of the day.' In his view, the threat of an election could influence decisions by senators.[317]

Term of the House of Representatives

Extension of the maximum term

4.392 As we have pointed out above,[318] federal elections are held much more frequently than the Constitution requires. In the 42 years since the end of World War II, Australia has had 22 federal elections of one kind or another – eight combined House of Representatives and half Senate elections, five House of Representatives elections, four separate half Senate elections and five double dissolutions. The elections are listed in Table 4.4.

312 S902, received 9 February 1987; others favouring a Senate term equal to two terms of the House included Senator J Watson S2074, 6 May 1987 and Fairfield City Council (which also proposed that the Senate be dissolved as well as the House, if it blocked supply) S2076, 12 May 1987.
313 NJ Parkes, JA Pettifer and DM Blake S0060, 27 June 1986.
314 S2651, 5 October 1987; JR Lawrence expressed a similar view, S2741, 25 October 1987.
315 S821, 19 November 1987.
316 S2016, 27 April 1987.
317 S197, 1 August 1986.
318 para 4.346-4.355.

TABLE 4.4

FEDERAL PARLIAMENTARY ELECTIONS: 1946-1987

1946	28 September	House of Representatives and half Senate
1949	10 December	House of Representatives and half Senate
1951	28 April	double dissolution
1953	9 May	half Senate
1954	29 May	House of Representatives
1955	10 December	House of Representatives and half Senate
1958	22 November	House of Representatives and half Senate
1961	9 December	House of Representatives and half Senate
1963	30 November	House of Representatives
1964	5 December	half Senate
1966	26 November	House of Representatives
1967	25 November	half Senate
1969	25 October	House of Representatives
1970	21 November	half Senate
1972	2 December	House of Representative
1974	18 May	double dissolution
1975	13 December	double dissolution
1977	10 December	House of Representatives and half Senate
1980	18 October	House of Representatives and half Senate
1983	5 March	double dissolution
1984	1 December	House of Representatives and half Senate
1987	11 July	double dissolution.

4.393 This means that Australians have gone to the polls for federal elections approximately once every two years since 1945. If State elections are taken into account, the frequency of elections is even greater.

4.394 Frequent elections mean short parliamentary terms. The average length of the term of the House of Representatives in the post World War II period has been just over two years. In our opinion that is too short a cycle to encourage good government in the form of long-term planning and proper implementation and assessment of programs. A short electoral cycle tends to place pressure on Governments to adopt expedient short-term measures for the purpose of electoral success. Governments which fear electoral repercussions in the near future are notoriously reluctant to make hard decisions, however necessary or desirable they may be for the long-term benefit of the country.

4.395 A system which fails to provide an environment favourable to responsible long-term Government planning is likely to have an adverse effect on the private, as well as the public sector. The Business Council of Australia, which is advocating the introduction of a four year maximum term, argues that:

> A three-year electoral term usually generates a pattern whereby governments, if they stay three years, tend to spend their first year settling in; begin taking tough and far-sighted decisions in the second year; and then effectively shut up shop in the third year because it is getting too close to the next election. Such a 'stop-start'approach to economic management is very destructive to business planning and confidence.[319]

4.396 Elections are, of course, at the heart of a democratic system; but one of their purposes is to give authority to a Government to carry out its policies. Repeated elections after short periods defeat this object.

4.397 Frequent elections are also expensive. The Australian Electoral Commission estimates that the poll held in July 1987 cost taxpayers approximately $47 million. If short electoral cycles were in the best interests of the country the expense of holding the elections would not be too high a price to pay, but we believe the reverse to be true.

319 Business Council of Australia, *Towards a Longer Term for Federal Parliament* (1987) 10 (pamphlet).

4.398 One of the original reasons for the provision of a maximum three year term for the House of Representatives was that the lower Houses of the colonial legislatures sat for three years. In 1897, Sir George Turner, in arguing that an amendment to the draft *Commonwealth of Australia Bill* which changed the term of the House of Representatives from three years to four should be changed back again, said:

> .... our people – the people of Australia – have got used to the period of three years, the period for which their own members are elected; and they would hardly understand why we should increase the term to four years for members of the House of Representatives.[320]

4.399 This rationale for a three year term no longer exists. All State legislatures except Queensland have changed to a four year system and it is the Federal Parliament which is now out of step. Tasmania extended the term of its lower House to a maximum of four years in 1973, New South Wales in 1981, Victoria in 1984, South Australia in 1985 and Western Australia in 1987.[321] In each case, State parliamentarians have seen four years as the optimum maximum period for the life of a Parliament. In New South Wales, where the amendment had to be approved by referendum, the proposal was supported by the electors with a 66% vote in favour. At the Adelaide session of the Constitutional Convention (1983) the vast majority of delegates, representing all major political parties, supported an extension of the maximum term.[322]

4.400 One of the most common arguments cited in support of the maintenance of the three year term is that it provides greater parliamentary accountability to the public. It is said that the longer the parliamentary term the greater the risk that Governments will become complacent and unrepresentative of current opinion.

4.401 We do not agree that increasing the parliamentary term by one year would decrease parliamentary accountability. Accountability is dependant upon many factors besides frequent elections, including openness of government, debate and questioning in the Parliament and freedom of the media. In any event we consider that, on balance, any perceived disadvantages of this sort are outweighed by the advantages of increased stability and the likelihood of better government.

4.402 Further, the vast majority of countries with a democratic system of government have four or five year terms. Of the 143 Parliaments listed as at 30 June 1985 with the Inter-Parliamentary Union in Geneva, only 12 have terms of three years while another three have shorter terms, leaving the remaining 128 with terms of four or more years.[323]

4.403 For the reasons outlined above, we adopt the recommendation of the Adelaide session of the Australian Constitutional Convention and recommend that the maximum term of the House of Representatives should be extended from three years to four years.

Three year minimum term

4.404 The extension of the maximum term to four years, without more, will not bring about stable government in Australia.

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320 Conv Deb, Adelaide, 1897, 1031.

321 The *Acts Amendment (Electoral Reform) Act 1987* (WA) provides for four year terms for both Houses commencing with the 1989 elections.

322 ACC Proc, Adelaide 1983, vol I, 145-179.

323 *Parliaments of the World: A Comparative Reference Compendium.* I-P.U., 2d ed, 1986, Vol 1, 3-10. The countries with terms shorter than three year are Suriname (2.25 years), the United States (two years, coinciding with elections for State legislatures) and the United Arab Emirates (two years). With respect to the United States, although the lower House is elected for a two year term, the Executive Government, which is not a parliamentary Executive as in Australia, is elected for four years. Apart from Australia, those countries with three year term Parliaments are Angola, Bhutan, El Salvador, Mali, Mexico, Nauru, New Zealand, Samoa, Sweden, Tonga and Yemen. Among the 41 listed with 4 year terms are Belgium, Denmark, Finland, Federal Republic of Germany, Greece, Israel, Japan, Netherlands, Norway, Portugal, Spain and Switzerland. The 83 countries listed with five year terms include Canada, France, India, Ireland, Italy, Malaysia, Papua New Guinea, Singapore and the United Kingdom.

4.405 One feature of our political system which is detrimental to stable government is the Senate's power to deny funds to a Government which enjoys the confidence of the House of Representatives. In effect, this means that the Opposition can force a Government to resign before the end of its term whenever it can muster a majority in the Senate. This is incompatible with another feature of our political system – responsible government.

4.406 Prior to 1974 this problem was not regarded as particularly significant. For 73 years all major appropriation and supply Bills introduced by the Government of the day were passed by the Senate. That situation changed when the Opposition in the Senate threatened to refuse supply in 1974 and deferred a vote on the Budget Bills in 1975.

4.407 Another feature of our system of government which detracts from stability and predictability is that the House of Representatives may be dissolved before its maximum term by the Governor-General, acting on the advice of the Prime Minister. In other words, a Government has the power to determine when an election will be held. It may choose to run its full term or it may choose to call an early election. The last three House of Representatives first met on 25 November 1980, 21 April 1983 and 21 February 1985 and could have continued for three years from those dates. The Houses were dissolved on 4 February 1983, 26 October 1984 and 5 June 1987. The dates of Australian federal elections have been more frequent and less predictable than those of the countries with which Australia has closest relations, namely, Japan, the United Kingdom and the Federal Republic of Germany.

4.408 The possibility of an election before the end of a Government's maximum term often leads to a long period of speculation and rumour. The uncertainty generated by this can have harmful consequences for public administration, business and the community generally. Further, it distracts the Government and the Parliament from giving proper attention to carrying out their respective functions. Dealings with State Governments, overseas Governments and overseas corporations are also disrupted.

4.409 The power of the Government to determine when an election will be held gives it an electoral advantage over the Opposition because it can choose the time which it considers to be most favourable to its own chances of re-election.

4.410 A third element in the present system which is detrimental to stable government is that, in the event of a dispute between the two Houses over a Bill originating in the House of Representatives, the Prime Minister may, providing that certain conditions have been satisfied, advise the Governor-General to dissolve both Houses. By so doing, the terms of all senators are cut short, as is the term of the House of Representatives, and elections must be held. We discuss this in more detail below.[324] For present purposes it is sufficient to point out that this feature of the procedure for dealing with legislative deadlocks provides yet another opportunity for the manipulation of parliamentary terms to serve party political interests rather than the interests of the nation.

4.411 One solution to these problems would be to introduce a qualified fixed term system under which elections could not be held before the expiry of the House of Representatives term unless a Government lost the confidence of the House of Representatives and no new Government could be formed from the existing House. Under such a system, so long as a Government retained the confidence of the House of Representatives, it could not call an early election and the Senate could not force it to hold one. The potential for opportunism in the timing of elections would be removed.

4.412 Although we think that such a scheme has considerable merit, we do not think that it would meet with sufficient acceptance to make it a practical proposition at this time. There are those who would see it as an emasculation of the Senate, others who would consider it an unwarranted interference with an important power of Government. Moreover, it lacks the flexibility of the present system.

324 para 4.613 and following.

4.413 We have therefore decided to recommend a scheme which combines the present maximum term system with a qualified minimum term. The House of Representatives should have a maximum term of four years but should not be dissolved within the first three years unless it passes a vote of 'no confidence' in the Government and no other Government can be formed from the existing House. This would guarantee a Government at least three years in which to concentrate on governing the country. In the fourth year the Government would still be able to call an election when it chooses. In that year the Senate, should it consider that circumstances warrant it, could exercise its power to veto the Government's money Bills in order to force an early election. In other words, neither the power of the Government to call an early election nor the power of the Senate to force one should be completely abolished but should be held in check for most of the Parliament's term so as to ensure a significant period of stable government. The power of the Government to dissolve both Houses in the event of a deadlock should also be restricted to the fourth year.

4.414 We believe that our proposal achieves a sensible balance between competing interests. If implemented, it would ensure longer terms and more stability and predictability than the present system, while allowing for more flexibility than under a fixed four year term.

4.415 In reaching this decision, we were influenced by the fact that both Victoria and South Australia have, in recent years, adopted a three year qualified minimum term with a four year maximum for the lower House. The Victorian *Constitution Act 1975* was amended in 1984. It provided the following exceptions to a three year minimum term for the Legislative Assembly:

(a) rejection of supply by the Legislative Council;

(b) development of a deadlock over a Bill of special importance; and

(c) a vote of no confidence by the Assembly.

These exceptions permit but do not *require* an early dissolution.

4.416 The South Australian *Constitution Act 1934* was amended along similar lines to Victoria's in 1985. The exceptions to the three year minimum term are:

(a) a vote of no confidence by the Assembly;

(b) defeat of a motion of confidence by the Assembly;

(c) rejection of a Bill of special importance by the Legislative Council; and

(d) a double dissolution in accordance with section 41 (which provides for the settlement of deadlocks).

As in Victoria these exceptions permit but do not require an early election.

4.417 The scheme which we recommend goes further than its State counterparts by providing for an exception to the three year minimum term only in the event of a loss of confidence in the Government. We believe that to allow for further exceptions would defeat the main purpose of the proposal, that is, to ensure stable government and fewer elections.

4.418 One possible consequence of our proposals should be noted. What some regard as the decline of the real power of Parliament in relation to the Executive was discussed earlier in Chapter 2.[325] One powerful weapon the Executive has over Parliament is the threat to advise a dissolution. If our recommendations are approved, therefore, one important factor operating against parliamentary control over the Executive will have been removed for three years of each four year term.

325 para 2.233-2.239.

4.419 Accordingly we recommend that the Constitution be altered to provide that the House of Representatives shall not be dissolved within three years of its first meeting after a general election unless the House has passed a resolution expressing a lack of confidence in the Government and no Government can be formed from the existing House.

Terms of senators

Terms of senators from States

4.420 We have reached our decision to recommend that Senate elections be held at the same time as elections for the House of Representatives and that State senators serve the equivalent of two terms of the House (except in the event of a double dissolution) notwithstanding that this proposal has been put to referendum three times in recent years and has failed to attract the requisite majority on each occasion.[326] We do so because the reasons for putting the proposal to referendum were sound ones and, so far as we are concerned, remain convincing. Further, we believe that the defeat of the proposal, particularly on the most recent occasion, had very little, if anything, to do with its merits or lack of them. This is sufficiently illustrated by the fact that the party which put the proposal to the people in 1977 campaigned against its acceptance in 1984 although it had been endorsed again in 1983 by the Adelaide session of the Constitutional Convention. In 1977, with the support of all federal political parties, the proposal gained the support of 62% of the electors and achieved majorities in three States, leaving it one State short of the special majority required for alteration of the Constitution.

4.421 As set out above[327] State senators serve six year terms with half the number of Senate seats becoming vacant every three years. Although the intention was to hold elections for half the Senate with elections for the House of Representatives at three yearly intervals, there is no *requirement* that the elections be held on the same date. If the House of Representatives is dissolved early or, in some cases, in the event of a double dissolution, elections for the two Houses can easily fall out of kilter. This happened as a result of the early House election in November 1963 – it was followed by three separate half Senate elections (1964, 1967, 1970) and three separate House of Representatives elections (1966, 1969, 1972).

4.422 The disadvantages of the present system have been thoroughly canvassed in the past. They are that separate half Senate elections simply add to the frequency of elections with consequent disruption to government and expense to the taxpayer. The Australian Electoral Commission estimates that the cost of a separate half Senate election would be approximately $40.5 million and a separate House election approximately $43.5 million. By comparison, a combined House and half Senate election would cost about $47 million.[328]

4.423 Further, a separate half Senate election cannot change a Government but it can increase the chances of conflict between the two Houses. On 17 February 1977, in his second reading speech on the *Constitution Alteration (Simultaneous Elections)* Bill, Senator Durack, Attorney-General in the Fraser Government, remarked that simultaneous elections would provide a more satisfactory electoral basis upon which the

326 The results of the referendums are listed at para 4.373.
327 para 4.364.
328 These estimates are based on the cost of the 1987 election for the House of Representatives and the Senate, and include public funding.

Government of the country could proceed.[329] The same point was made by Senator Evans, Attorney-General in the Hawke Government, in his second reading speech on the *Constitution Alteration (Simultaneous Elections) 1984* Bill.[330]

4.424 Another unsatisfactory feature of the present system is that the membership of the Senate at a given time may not be an accurate reflection of the expressed wishes of the people. This is because, under section 13 of the Constitution, elections for half the Senate may be held up to one year before the Senate places actually become vacant.

4.425 An argument which has been raised in the past against simultaneous elections is that they will detract from the power and independence of the Senate. The Prime Minister, so the argument goes, would be given a power over the Senate which he does not now have and senators might be less likely to exercise their power to reject, defer or amend Government legislation if their action could be used to trigger an early election involving half the Senate as well as the House.

4.426 First, we think that acceptance of an argument of this sort presupposes a rather cynical attitude towards senators. We would expect them to deal with proposed legislation on its merits.

4.427 Secondly, if our recommendations are adopted, including the proposal for a qualified fixed term for the House of Representatives, the Government would not be *able* to call an early election for the first three years of its term, even if its legislative program were being frustrated by the Senate. In other words, senators' terms would still be at least as long as the present six years and may be up to two years longer. The only exception to that would be in the event of a double dissolution, but under the present system also senators terms may be cut short in that way. Indeed, under our scheme (as discussed below)[331] restrictions will be introduced on the timing of double dissolutions which will have the effect of giving both members and senators greater security of tenure.

4.428 Senate elections could, of course, be held at the same time as general elections for the House of Representatives without altering the terms of senators for the States in the way we have proposed. For example, the terms of those senators could be reduced to the equivalent of one term of the House of Representatives. We have not considered this option because it is unnecessary to achieve our principal object, that is, to avoid the effect of too frequent elections on the stability of government.

4.429 We recommend that the Constitution be altered to provide that:

(i) senators chosen in the States shall hold their places for two terms of the House of Representatives except in the event of a double dissolution, and

(ii) the polling day for an election of senators shall be the same day as the polling day for the election of members of the House of Representatives.

Terms of senators from Territories

4.430 As discussed above[332] representation of Territories in the Parliament is treated quite differently in the Constitution from the representation of States. Under section 122 of the Constitution, the Parliament is empowered to provide for Territorial representation 'in either House of the Parliament to the extent and on the terms which it thinks fit.' We have noted above[333] that, pursuant to legislation passed in reliance on that section, senators chosen in the Australian Capital Territory and the Northern Territory serve the equivalent of one term of the House of Representatives.

329 *Hansard*, 195.
330 *Hansard*, 13 June 1984, 2882.
331 para 4.645-4.659.
332 para 4.258-4.261.
333 para 4.364.

4.431 For reasons of certainty in the interpretation of the Constitution and consistency with the position of the States we have recommended that the Constitution should prescribe the entitlement of the Territories to representation in the Parliament. For the same reasons we recommend that the Constitution should prescribe the terms of senators for the Territories.

4.432 We have considered whether to recommend that the terms of Territorial senators be altered to bring them into line with State senators. The Australian Capital Territory and the Northern Territory each return two senators, and are likely to continue to return that number for the foreseeable future. This means that if their terms were the same as those of State senators and the rotation system also applied to them, there would only be one position to be filled in each Territory at a half Senate election. In that situation the party which retained a majority, however small, in a Territory would hold both places; the electors of that Territory would be denied proportional representation. If that distortion were avoided by having both places filled at alternate elections, the electors of that Territory would be denied rotation. Given these problems, we have concluded that the term of Territorial senators should not be changed.

4.433 Accordingly, we recommend that the Constitution should be altered to provide that senators chosen in the Territories shall hold their places for one term of the House of Representatives.

The rotation of State senators

4.434 Section 13 of the Constitution provides, *inter alia,* for the rotation of Senate places following dissolution of the Senate and a subsequent election:

> [A]fter each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first class shall become vacant at the expiration of three years, and the places of those of the second class at the expiration of six years, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service.

Under our proposed scheme, following dissolution of the Senate, senators of the first class would serve two terms of the House of Representatives and senators of the second class would serve one term.

4.435 As can be seen, section 13 provides that the Senate itself determines which senators serve the longer term, which serve the shorter term. Although this system is open to abuse, it had never caused any dispute until recently. The Senate has been dissolved six times since it was first elected in 1901. Following the full Senate election on each occasion, the Senate has divided senators into classes by placing the names of those elected in each State on a list in the order in which they were elected and giving those placed in the top half of the list the longer term and the other half the shorter term. This method was obviously fair under the 'first past the post' voting system, but with the introduction of proportional representation in 1948 it was less appropriate.

4.436 In 1983, the Joint Select Committee on Electoral Reform recommended that the practice be changed. It recommended that, 'following a double dissolution election, the Australian Electoral Commission conduct a second count of Senate votes, using the half Senate quota in order to establish the order of election to the Senate, and therefore the terms of election'.[334] The Committee considered that this method would be a fairer reflection of the priority and preferences indicated by votes than the old method. As a

334 First Report, September 1983, para 3.39.

result of the Committee's recommendation, the *Commonwealth Electoral Act 1918* (Cth) was amended to require the Australian Electoral Officer for each State to conduct a recount using the half Senate quota.[335]

4.437 Following the 1987 double dissolution there was a dispute in the Senate over whether or not to use the new system. By a majority of 36 votes to 32, the Senate voted to divide into long and short term classes by using the old method.[336]

4.438 We have considered whether the matter should be settled and future conflict avoided by recommending that the method for dividing senators into classes should be prescribed in the Constitution. We have concluded that it should not.

4.439 In our view, it would be extremely difficult, if not impossible, to prescribe an appropriate formula without referring to the 'Australian Electoral Commission' and concepts such as 'proportional representation' in the Constitution. As a matter of principle, we consider this to be undesirable. A Constitution should set out broad principles and structures – it is not the place for detailed procedural matters. By referring in the Constitution to specific bodies which are not an integral part of our system of government or to methods of voting, an unnecessary rigidity would be introduced into the system. On the other hand, if we recommended that the Constitution should be altered to ensure that senators are divided into classes on the basis of 'relative success' at the election, the problem would not be resolved. The recent Senate dispute was over which method for determining 'relative success' should be used.

4.440 Therefore, we have decided that the best option is for the matter to be left to the Senate, as it is under the present section 13 of the Constitution.

4.441 There is, however, another aspect of section 13 which needs to be mentioned. Under section 15 of the Constitution (which deals with casual vacancies in the Senate) if a senator's place becomes vacant 'before the expiration of his term of service', the Parliament of the State for which he was chosen 'shall choose a person to hold the place until the expiration of the term.' No specific provision is made in the Constitution for the situation where, following the election of senators after a dissolution of the Senate but before the division of senators into long and short term classes, the place of a newly elected senator becomes vacant, for example, by death, resignation or disqualification.

4.442 The 1959 Joint Committee on Constitutional Review recommended that this should be rectified by providing that the division of senators into classes should be made as if the senator's place had not become vacant. A provision to this effect was included in the 1974, 1977 and 1984 Constitution Alteration Bills providing for simultaneous elections of the House of Representatives and the Senate. Clause 4 of *Constitution Alteration (Term of Senators) 1984* provided for a new section 13(8), as follows:

> (8) Where, since the election of senators for a State following a dissolution of the Senate but before the division of the senators for the State into classes in pursuance of this section, the place of a senator chosen at the election has become vacant, the division of senators shall be made as if the place of the senator had not so become vacant and, for the purposes of section 15 of this Constitution, the term of service of the senator shall be deemed to be, and to have been, the period for which he would have held his place, in accordance with this section, if his place had not so become vacant.

4.443 We agree that a provision in those terms is desirable and therefore recommend that if, after the election of senators following dissolution of the Senate but before the division of senators into classes, the place of a senator becomes vacant, the division is to be made as if the place had not become vacant.

335 *Commonwealth Electoral Legislation Amendment Act 1983*, section 109; *Commonwealth Electoral Legislation Amendment Act 1984*, Schedule 1, Part 1.
336 *Hansard*, 17 September 1987, 212.

ELECTORAL LAWS AND WRITS FOR ELECTIONS

Recommendations

4.444 We *recommend* that sections 9, 10, 11, 12 and 31 of the Constitution be repealed and that the following sections be substituted:

> 9.(1) The Parliament may make laws, subject to this Constitution, with respect to the election of senators but so that the method of choosing senators shall be the same for all the States and for the Territories that are entitled to be represented in the Senate.
>
> (2) The polling day for an election of senators shall be the same day as the polling day for the election of members of the House of Representatives.[337]
>
> 10.(1) The Governor-General in Council shall cause writs to be issued for the election of senators whenever the terms of service of senators are about to expire or have expired.
>
> (2) The writs shall be issued within ten days of the expiry of those terms of service.
>
> 31. The Parliament may make laws, subject to this Constitution, with respect to the election of members of the House of Representatives but so that the method of choosing members shall be the same for all the States and for the Territories that are entitled to be represented in the House of Representatives.

Current position

4.445 The sections in the Constitution which the new sections set out above would replace are as follows:

> 9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.
>
> The Parliament of a State may make laws for determining the times and places of elections of senators for the State.
>
> 10. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State.
>
> 11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.
>
> 12. The Governor of any State may cause writs to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution.
>
> 31. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives.

A related provision, which appears in the last paragraph of section 7, provides that the 'names of the senators chosen for each State shall be certified by the Governor to the Governor General'.

4.446 The main effects of these provisions are:

(a) The Federal Parliament has power to make laws relating to elections of senators and members of the House of Representatives, but, in the absence of federal laws, the laws in force in each State relating to elections for the more numerous House of the relevant State Parliament apply, as nearly as

337 The recommendation reflected in this sub-section is dealt with under the heading 'Terms of senators' above.

practicable. (State laws were declared to govern federal parliamentary elections, in the absence of federal laws on the subject, because, for the first elections for the Federal Parliament, there would have been no applicable federal laws.)

(b) Both the Federal Parliament and the Parliaments of the States have power to make laws prescribing the method of choosing senators, but, if the Federal Parliament legislates on this subject, its legislation overrides State legislation on the same subject. The method of choosing senators prescribed by federal laws must be uniform for all the States.

(c) The power to cause issue of writs for elections of senators for a State is vested exclusively in the Governor of the State. The Governor certifies the names of the senators chosen for the State to the Governor-General. In contrast, the power to cause writs for general elections of members of the House of Representatives is vested in the Governor-General in Council.[338]

4.447 The reason why the States were given the powers they presently have in relation to the election of senators is that, when the Constitution was being prepared in the 1890s, it was agreed that the Senate should be a House representative of States. In that House the federating colonies wanted to be equally represented. Initially the idea was that senators would not be chosen directly by the electors of a State but rather would be chosen by the Houses of the State they were to represent.[339]

4.448 Even though it was later decided that senators should be directly elected, it was accepted that States should be assured certain controls over the elections of their senators, namely, exclusive power to legislate on the times and places of elections of senators for the State, a concurrent power with the Federal Parliament to legislate on the method of choosing those senators, and exclusive powers in relation to the issue of writs for Senate elections.

4.449 The occasions for the issue of writs by State Governors pursuant to section 12 are:

(a) the expiration of the terms of senators as determined by the last paragraph of section 7 (providing for six year terms) and by section 13 (providing for the rotation of senators);

(b) the dissolution of the Senate pursuant to section 57; and

(c) a determination that an election of a senator is null and void.[340]

4.450 The Constitution places limitations on the time within which writs for elections may be issued. When the Senate has been dissolved, writs must be issued within ten days of the proclamation of such dissolution (section 12). When vacancies arising by expiration of the terms of senators are to be filled, the writs must be issued within one year before the places are to become vacant. This limitation is implicit in section 13. The High Court has, however, accepted that an exception should be made where an election of a senator has been declared void and where a State proposes to hold another election. In that case the time limitation prescribed in section 13 does not apply.[341]

4.451 Even when circumstances have arisen which entitle a Governor to cause writs for Senate elections to be issued, it does not follow that the Governor is obliged to cause writs to be issued or can be compelled by judicial process to do so.[342] The power in this case is expressed in permissive terms.[343]

338 Section 32.
339 Conv Deb, Sydney 1891, 599.
340 See *Vardon v O'Loghlin* (1907) 5 CLR 201.
341 *Vardon v O'Loghlin* (1907) 5 CLR 201, 209-10, 214-5.
342 *The King v Governor of the State of South Australia* (1907) 4 CLR 1497.
343 In contrast, the duty of Governors to notify the Governor General of the names of senators chosen for a State is expressed in imperative words (sections 7 and 15).

4.452 Further, it is relevant to note that section 11 takes into account the possibility of a State failing to provide for its representation in the Senate by providing that the Senate may proceed to the despatch of business, notwithstanding such failure.

4.453 Current State law governing Senate elections is not uniform but contains some common elements.[344] Its general effect is 'to invest the State Governor with power to fix the dates for nomination, polling and the declaration of the poll; to provide that polling shall take place at places appointed under the relevant law of the Commonwealth; to endorse the requirement already existing under the Commonwealth Electoral Act section 64[345] that polls must be held on a Saturday; and to prescribe identical times for such matters as the hours of the poll and nomination'.[346]

4.454 Under the Constitution it is possible for writs for the same set of Senate elections to be issued on different days in different States. It is also possible for the dates for polling in those elections to vary from State to State. There is certainly no guarantee that polling days in Senate and House of Representatives elections will coincide. Federal-State cooperation, however, has ensured that writs for Senate elections have been issued on the same day, or within about a week of one another, and always in time for polling days to be uniform.[347]

4.455 Odgers described the practice in relation to the issue of writs for Senate elections as follows:

> [T]he Prime Minister informs the Governor-General of the requirements of section 12 of the Constitution ... states that it would be desirable that the States should adopt the polling date proposed by the Commonwealth and requests the Governor-General to invite the State Governors to adopt the suggested date.[348]

Federal-State cooperation has also ensured that the polling days for general elections for the House of Representatives and for the Senate have been the same when the elections for the two Houses are concurrent.

Issues

4.456 The particular issues we have considered are these:

(a) Should the power to cause writs for Senate elections to be issued remain with the State Governors?

(b) Should it be made clear that, when an occasion arises for the filling of State places in the Senate, writs must be issued so that electors have an opportunity to choose the maximum number of senators for the State?

(c) If the Constitution were to be altered to require that writs for elections of senators shall be issued within a specified time, should section 11 be retained?

(d) Should provision continue to be made in the Constitution whereby State electoral laws are to apply to federal parliamentary elections in the absence of applicable federal laws?

(e) Should the Parliaments of the States retain any of their present powers to legislate on matters concerning election of senators for the State?

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344 See *Senators' Elections Act 1903 (NSW); Senators' Elections (Amendment) Act 1912 (NSW); Senate Elections Act 1960 (Qld); Election of Senators Act 1903 (SA); The Election of Senators Act Amendment Act 1978 (SA); Senate Elections Act 1935 (Tas); Senate Elections (Times and Places) Act 1903 (Vic); Senate Elections (Times and Places) Act 1912 (Vic) Elections of Senators Act 1903* (WA).

345 Renumbered section 158.

346 C Saunders and E Smith, Appendix G in Standing Committee D's *Fourth Report to Executive Committee*, 21, ACC Proc, Adelaide 1983, vol II.

347 id, citing *Commonwealth Election and Referendum Statistics 1901-1975* (1976) 9.

348 JR Odgers, *Australian Senate Practice* (5th ed, 1976) 92.

Previous proposals for reform

4.457 ***Australian Constitutional Convention.*** At the Adelaide (1983) session of the Australian Constitutional Convention, it was agreed that the following practice should be observed as a convention:

> (33) State legislation and executive action for determining the times and places of Senate elections pursuant to section 9 of the Constitution is co-ordinated with the comparable legislation and executive action of other States and with the electoral laws of the Commonwealth. The dates (being the same for all States) for receipt of nominations and polling in Senate elections are settled between the Governor-General and the State Governor, acting on the advice of their respective Governments. Suitable dates are first proposed by the Commonwealth and are adopted in formal advice to State Governors unless they are unacceptable in one or more States. A State Government does not refuse to accept the suggested dates except on the basis of a sound practical objection to the convenience of the dates. The Governors issue writs for Senate elections pursuant to section 12 of the Constitution in time for the elections to be held on the agreed date.[349]

4.458 ***Bills for alteration of the Constitution.*** Proposals for simultaneous elections have been designed to ensure that the terms of senators expire upon the expiry or dissolution of the House of Representatives. All these proposals have left the power to cause writs for election of State senators with State Governors, but they have sought to make it mandatory for writs to be issued within a specified time from the date on which the places in the Senate to be filled by popular election become vacant. The Bills for *Constitution Alteration (Simultaneous Elections)* 1974, 1977 and 1984 also proposed that the second paragraph of section 9 be deleted or altered so as to remove the exclusive power of the Parliaments of the States to make laws on these subjects.

Reasons for recommendations

4.459 Our recommendation that section 12 of the Constitution be repealed and replaced by a section empowering the Governor General to cause writs for Senate elections to be issued, and our further recommendation that the exclusive power of the Parliaments to make laws for determining the times and places of elections of senators for the State, are integral to the recommendations we have already[350] made in relation to the terms of senators and of members of the House of Representatives. Were those recommendations to be adopted, changes to sections 9, 11 and 12 along the lines we propose would, in our view, be largely consequential.

4.460 The section which we recommend should replace section 12[351] not only vests the power to cause writs to be issued for election of senators in the Governor-General in Council. It also makes it obligatory for the writs to be issued whenever the terms of service of senators are about to expire or have expired. The writs must be issued within ten days of the expiry of those terms of service. This is to make it clear that States and Territories which, under the Constitution, are entitled to be represented in the Senate cannot be denied that representation by actions of the Federal Government. The duty to cause writs for election of senators to be issued would, we believe, be enforceable in the courts.[352]

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349 ACC Proc, Adelaide 1983, Vol I, 321.

350 para 4.345.

351 Section 10.

352 The reasoning in *The King v Governor of the State of South Australia* (1907) 4 CLR 1497, which led the High Court to deny an application for a writ of mandamus to compel a State Governor to issue writs under section 12, would probably not apply were legal action taken to enforce the duty imposed by the provision we propose.

4.461 Our recommendations here are not, however, contingent on adoption of the earlier recommendations referred to. It seems to us that there are no compelling reasons for distinguishing between the issue of writs for Senate elections and the issue of writs for elections of members of the House of Representatives, such that the power to issue the writs is vested, in the one case, in State Governors as advised by State Ministers, and, in the other, in the Governor-General in Council. Indeed the Australian Constitutional Convention's endorsement of what is tantamount to *de facto* unification of the powers indicates that the Constitution does not reflect what is generally accepted as a desirable state of affairs. What the Convention resolved in 1983 recognises that, although the Constitution permits States to determine the dates on which writs for Senate elections shall be issued, and likewise the dates of the polls, the primary responsibility for deciding these matters resides, and should reside, with the Federal Government.

4.462 Were section 12 of the Constitution to be altered in the way we recommend, there would be no point in retaining section 11. Section 11 presupposes that States may choose not to exercise their constitutional right to be represented in the Senate, or that, at a certain time, the processes for election of senators for a State may be incomplete. Under our proposals, States would have no choice in the matter except in relation to the filling of casual vacancies in the Senate.

4.463 We have also concluded that, irrespective of whether our previous recommendations under the heading 'Terms of Parliament'[353] are adopted, the exclusive legislative power granted to the Parliaments of the State by the second paragraph of section 9 should be withdrawn. The scope of the exclusive power to make law determining times and places of Senate elections is not altogether clear, but, more important, its existence is no longer of much practical significance. The same applies to the concurrent power granted by the first paragraph of section 9 to make laws prescribing the method of choosing senators for the State. Whatever the scope of this power may be, federal legislative powers under sections 9 and 10 are sufficiently wide to enable to Federal Parliament to legislate on all matters relating to the election of senators for States, except those within the exclusive domain of the States. The federal powers have been exercised to the full and will, we are confident, continue to be so exercised.

4.464 We recommend the removal from the Constitution of the provisions in section 10 and 31, which make State laws applicable to federal elections, as nearly as practicable, in the absence of federal laws. These provisions are no longer necessary and ceased to have any practical significances as soon as the Federal Parliament enacted its own legislation.

4.465 The legislative powers which would be conferred on the Federal Parliament by proposed sections 9 and 31 are largely powers the Parliament already has. The sections would, in a sense, be no more than re-enactments of present provisions, minus outmoded and unnecessary elements. The powers they confer are, it should be noted, expressed to be subject to the Constitution. This means that laws made in exercise of them must conform with other relevant provisions of the Constitution, for example, provisions to guarantee democratic rights. The proposed sections 9 and 31 also require that the methods prescribed for choosing senators and members of the House of Representatives must also be uniform. There could not, for example, be one set of laws for States and another set for Territories.

SIMULTANEOUS FEDERAL AND STATE ELECTIONS

Recommendation

4.466 We *recommend* that section 394(1) of the *Commonwealth Electoral Act 1918* (Cth) should be repealed.

353 para 4.344.

Current position

4.467 Since 1922 the *Commonwealth Electoral Act 1918* has precluded State and Federal elections being held on the same day by providing:

> 394. (1) On the day appointed as polling day for an election of the Senate or a general election of the House of Representatives, no election or referendum or vote of the electors of a State or part of a State shall, without the authority of the Governor-General, be held or taken under a law of the State.

4.468 No general election for a State Parliament has been held on the polling day for an election of the Senate or a general election of the House of Representatives. In the case of State by-elections, authority has sometimes been refused and sometimes granted.

4.469 There are no *constitutional* inhibitions against holding general elections for several or all State Parliaments on a federal polling day. The following table demonstrates, however, that since World War II the only cases of simultaneous State elections occurred in New South Wales and Queensland in 1947, in New South Wales and South Australia in both 1956 and 1962, in Victoria and South Australia in 1970 and in Western Australia and Tasmania in 1986.

TABLE 4.5
ELECTION DATES SINCE WORLD WAR II

(Elections for the Tasmanian Legislative Council take place every May. Where separate elections are held for other Legislative Councils and the Senate the dates are given in brackets. 'DD' indicates dissolution of both Houses of the Federal Parliament.)

Year	*NSW*	*VIC*	*QLD*	*WA*	*SA*	*TAS*	*AUS*
1945		10 Nov					
1946		(15 June)		(4 May)		23 Nov	28 Sept
1947	3 May	8 Nov	3 May	15 Mar	8 Mar		
1948				(8 May)		21 Aug	
1949		(18 June)					10 Dec
1950	17 Jun	13 May	29 Apr	25 Mar	4 Mar	6 May	
1951				(6 May)			28 Apr DD
1952		(21 June)		(3 May)			
		6 Dec					
1953	14 Feb		7 Mar	14 Feb	7 Mar		(9 May)
1954				(8 May)			29 May
1955		28 May				19 Feb	10 Dec
		(18 June)					
1956	3 Mar		19 May	7 Apr	3 Mar	13 Oct	
1957			3 Aug				
1958		31 May					22 Nov
		(21 June)		(10 May)			
1959	21 Mar			21 Mar	7 Mar	2 May	
1960			28 May	(30 Apr)			
1961		15 July					9 Dec
1962	3 Mar			31 Mar	3 Mar		
				(12 May)			
1963			1 June				30 Nov
1964		27 June				2 May	(5 Dec)
1965	1 May			20 Feb	6 Mar		
1966			28 May				26 Nov
1967		29 Apr					(25 Nov)
1968	24 Feb			23 Mar	2 Mar		
1969			17 May			10 May	25 Oct
1970		30 May			30 May		(21 Nov)
1971	13 Feb			20 Feb			
1972			27 May			22 Apr	2 Dec
1973	17 Nov	19 May			10 Mar		
1974			7 Dec	30 Mar			18 May DD
1975					12 July		13 Dec DD
1976	1 May	20 Mar				11 Dec	
1977			12 Nov	19 Feb	17 Sep		10 Dec
1978	7 Oct						
1979		5 May			15 Sep	28 July	
1980			29 Nov	23 Feb			18 Oct
1981	19 Sep						
1982		3 Apr			6 Nov	15 May	
1983			22 Oct	19 Feb			5 Mar DD
1984	24 Mar						1 Dec
1985		2 Mar			7 Dec		
1986			1 Nov	8 Feb		8 Feb	
1987							11 Jul DD
1988	19 Mar						

4.470 There would seem to be great administrative advantages in arranging State elections on the same polling day, at least in contiguous States. Such States have many common tasks and problems which uncoordinated election dates leave their governments too few opportunities to discuss.

Practice in United States of America

4.471 The frequency and unpredictability of federal and State election dates in Australia strikingly contrasts with the practice in the oldest federation, the United States of America. There, elections are held on firm dates in alternate years (the Tuesday after the first Monday in November in even-numbered years) for all political positions which are due to be filled in the federal sphere and in 45 of the 50 States. The President and most State Governors are elected for four-year terms, senators for six years and members of the House of Representatives and most State legislators for two years.

4.472 The joint election date is not laid down by the United States Constitution but has evolved in a cooperative process. Whatever criticisms are made of the workings of other aspects of the American federal system, all Americans seem content with having a predictable election date. This appears not only to have reduced the incidence of disagreements between the two Houses in Washington but in all the State capitals. It seems also to have reduced in the United States the federal-State 'buck-passing' which is encountered in all State and most federal election campaigns in Australia.

Reasons for recommendation

4.473 In Australia, State elections are often conducted as if they were federal by-elections. In the United States the parties have to conduct their federal and State election campaigns at the same time. They have to put forward coordinated federal and State policies. They have every incentive to promote cooperation rather than confrontation between the Federal Congress and the State legislatures. It is difficult to conceive of political or administrative reasons which would make it improper or difficult to conduct federal and State general elections on the same day in Australia when for many generations they have been held on the same day in the United States.

4.474 Therefore, we recommend the repeal of section 394(1) of the *Commonwealth Electoral Act 1918.*

RELATIONSHIP BETWEEN THE SENATE AND THE HOUSE OF REPRESENTATIVES

Powers of the Houses with respect to money Bills

Recommendations

4.475 We *recommend* that the Constitution be altered by omitting sections 53 and 54 and substituting sections incorporating the following principles:

(i) A proposed law imposing taxation or appropriating revenue or moneys may not originate in or be amended by the Senate.

(ii) The Senate may not amend any proposed law that:

- imposes taxation or deals only with the imposition, assessment or collection of taxation; or
- appropriates revenue or moneys:
  - for the ordinary annual services of the Government;

– for the construction of public works or buildings;

– for the acquisition of land; or

– for the acquisition of plant or equipment

or for two or more of those purposes.

(iii) The Senate shall, however, have power to amend an appropriation Bill mentioned in (ii) above so far as it appropriates revenue or moneys for a new purpose, that is a purpose:

- in respect of which revenue or moneys were not appropriated for expenditure in the previous financial year; or
- the accomplishment of which is not specifically authorised by law or is dependent upon the enactment of a proposed law.

(iv) A Bill shall not be taken to be one within any of the classes mentioned in (i) and (ii) above by reason only that it contains provisions for:

- the imposition or appropriation of fines or other pecuniary penalties; or
- the demand, payment or appropriation of fees for licences or for services under the proposed law.

(v) The Senate may not amend a proposed law so as to increase a proposed charge or burden on the people.

(vi) The Senate may request amendment of Bills it may not amend.

(vii) If a Bill which the Senate cannot amend becomes a law, a provision in it that deals with a matter which could have been the subject of amendment by the Senate is of no effect.

(viii) The first paragraph of section 55 should be omitted.

(ix) Subject to the foregoing, the Senate shall have equal power with the House of Representatives with respect to all Bills.

4.476 We further *recommend* that the Constitution be altered by the inclusion of sections to limit the power of the Senate to reject, or refuse to pass, Bills it cannot amend. In particular we recommend that the Constitution be altered to provide that:

(i) If at any time during the first three years of a Parliament the Senate rejects, or fails to pass, within 30 days of its transmission, a Bill it cannot amend, the Bill shall be presented for the Royal assent.

(ii) If, in the fourth year of a Parliament, the Senate rejects, or fails to pass, within 30 days of its transmission, a Bill it cannot amend, the Senate and the House of Representatives may be dissolved simultaneously by the Governor-General in Council.

(iii) If a Bill which cannot be amended by the Senate has not been rejected or passed by the Senate at the time the House of Representatives is dissolved, or the Parliament is prorogued, the above provisions shall not apply.

4.477 The recommendations are an integral part of the series of recommendations we make in relation to the terms of the House of Representatives, the terms of senators, termination of the appointment of a Prime Minister and the power to dissolve the Houses of the Parliament.

Current position

4.478 ***Constitutional Provisions.*** Section 1 of the Constitution states that the Federal Parliament shall consist of the Queen, a Senate and a House of Representatives. It vests the legislative power of the Commonwealth in that Parliament. Section 58 provides that a law proposed for enactment by the Parliament does not become law unless it is passed by both Houses of the Parliament and receives the Royal assent. A proposed law passed by one House, but not the other, cannot become law except as provided for in sections 57 and 128.

4.479 The Constitution also declares the general rule to be that in legislating, the Senate and the House of Representatives have equal powers; that is, both may propose laws for enactment and both may amend or reject Bills passed by the other House. This general rule is contained in the last paragraph of section 53 which states:

> Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

4.480 The exceptions to the general rule which are set out in the preceding paragraphs of section 53 are:

(a) Bills appropriating revenue or moneys, or imposing taxation, must originate in the House of Representatives;

(b) the Senate cannot amend a Bill imposing taxation or appropriating revenue or moneys for the ordinary annual services of the Government; nor can it amend any Bill 'so as to increase any proposed charge or burden on the people';

(c) the Senate may, at any stage, return to the House of Representatives a Bill it cannot amend with a request that the Bill be amended.

But, section 53 also declares:

> a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.[354]

4.481 Section 53 does not expressly require the approval of the Senate of Bills that it is prohibited from originating or amending, but the generally held view is that, subject to sections 57 and 128, every Bill must be passed by the Senate for it to become law. In other words, should the Senate reject or fail to pass such a Bill, the Bill as passed by the House of Representatives cannot become law even if it should receive the Royal assent.

4.482 From time to time there have been disagreements between the Senate and the House of Representatives about whether a Bill transmitted by the House was susceptible to amendment by the Senate.[355] These disagreements have been resolved in various ways, for example, by the Senate simply requesting amendment, by the House agreeing to the Senate's amendment, or by the Senate not pressing its amendment.

4.483 There have also been differences over whether, if a Bill is one the Senate cannot amend, and the Senate requests its amendment, the Senate can then press its requests, not just once in any of the stages of the passage of the Bill, but on two or more occasions.[356]

354 There have, from time to time, been differences of opinion about whether a Bill does or does not fall into any of these categories. See JR Odgers, *Australian Senate Practice* (5th ed 1976) 372, 390-1; JR Pettifer, *House of Representatives Practice* (1981) 376-7.

355 id, 377-9.

356 Odgers, op cit, 406-10; Pettifer, op cit, 380-4.

Since the only way in which a Government's money Bills can be enacted into law is to have them passed by the Senate, a Government must, in practice, take notice of repeated requests for amendment by the Senate. If it does not accede to them, it risks total rejection of those Bills.

4.484 Section 53 is followed by two sections the object of which is to ensure that Bills which the Senate cannot amend do not include provisions which it can amend. Section 54 provides:

> The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

Section 55 provides:

> Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.
>
> Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

4.485 ***Judicial Review.*** Legislation alleged to infringe section 55 can be judicially reviewed and ruled invalid. Section 55 is not infringed by an Act which imposes taxation and which also includes provisions *dealing with* the imposition of taxation, for example, provisions on the rate of tax, provisions defining who is liable to taxation and in respect of what, and provisions for ascertaining the extent of the liability.

4.486 But if the Act contains other kinds of provisions, for example, provisions requiring returns to be made to tax officials, provisions imposing criminal penalties, or even provisions making taxpayers liable to pay additional tax if they fail to make returns, then these other provisions are invalid.[357] The provisions dealing with the imposition of taxation will, unless they offend against some other provision of the Constitution, be sustained. On the other hand, if an Act violates the second paragraph of section 55, the whole Act would probably be held invalid.[358]

4.487 No case has arisen in which a court has been required to rule on the validity of an Act on the ground that it was passed contrary to section 53 or 54, or to rule on whether a Bill is one the Senate cannot originate or amend. But there are High Court dicta that since these sections, unlike section 55, refer to 'proposed laws', rather than 'laws', they are non-justiciable. 'Whatever obligations are imposed by these sections', Griffith CJ observed in 1911, 'are directed to the Houses of Parliament whose conduct of their internal affairs is not subject to review by a Court of law.'[359] Mr Justice Barton concurred. The sections were, he said, 'merely directory'.[360]

4.488 ***Appropriation for ordinary annual services of the Government.*** While judicial decisions in contexts other than section 53 have dealt with the question of what is an Act to appropriate revenue or moneys[361] and what is a Bill imposing or dealing with taxation,[362] the question of whether a Bill is for appropriation of 'revenue or moneys for the ordinary annual services of the Government' has been left to be resolved by the Houses themselves. How the question is resolved may, of course, be affected by legal opinions.

357 *Re Dymond* (1959) 101 CLR 11.
358 *Resch v Federal Commissioner of Taxation* (1942) 66 CLR 198, 222; *Collector of Customs (NSW) v Southern Shipping Co Ltd* (1962) 107 CLR 279, 302, 306.
359 *Osborne v Commonwealth* (1911) 12 CLR 321, 336.
360 id, 352. See also 355 (O'Connor J); *Buchanan v Commonwealth* (1913) 16 CLR 315; 329 (Barton ACJ); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 188 (Isaacs J).
361 See E Campbell, 'Parliamentary Appropriations' (1971) 4 *Adelaide Law Review* 145.
362 eg High Court decisions on section 55.

4.489 In 1952 the Solicitor-General (KH Bailey) advised the Auditor-General that appropriation for expenditure on capital works could be classified as expenditure for ordinary annual services.[363] Following this advice, a motion was moved in the Senate that capital expenditure should be regarded as being for the ordinary annual services of the Government. The Senate was equally divided and, accordingly, the motion was defeated.[364]

4.490 In 1961 the Solicitor-General (KH Bailey) gave further advice on what could be characterised as an appropriation for the ordinary annual services of the Government, this time to the Joint Committee of Public Accounts. He advised that

> 'the ordinary annual services of the Government' may be described as those services provided or maintained within any year which the Government may, in the light of its powers and authority, reasonably be expected to provide or maintain as the occasion requires through the departments of the public service and other Commonwealth agencies and instrumentalities. Accordingly, if the expenditure is to be incurred for an item which is itself such a service, it may be regarded, without more, as proper for inclusion in an ordinary Appropriation Bill.[365]

The Solicitor-General went on to say that, 'with the possible exception of certain types of grants', there were 'no legal objections to the inclusion in an ordinary annual Appropriation Bill of all the provisions' that were then 'customarily included in an annual Appropriation (Works and Services) Bill.' But, he added, 'insofar as questions of law are involved, they are matters to be determined by the Parliament, and not by the courts.'

4.491 In 1964 the supply and appropriation Bills were drafted in accordance with the advice of the Solicitor-General. The Senate passed the Bills, but not without strong opposition to the form in which they had been presented.[366] A Committee Appointed by Government Senators on Appropriation Bills and the Ordinary Annual Services of the Government (the Cormack Committee) recommended that the new practice be abandoned.[367] Subsequently the Government agreed to present its supply and appropriation Bills substantially in the form recommended by the Committee.

4.492 ***Compact of 1965.*** What is known as the 'compact of 1965' was announced by the Treasurer in his second reading speech on Supply Bill No 1, 1965-6 on 13 May 1965.[368] Under that compact, the annual appropriation and supply Bills were to be divided into two main categories. The first category would comprise Bills for the ordinary annual services of the Government and would cover items such as public service salaries, administrative expenses, services provided by departments and defence expenditure. Bills in this category were accepted as being not subject to amendment by the Senate. The second category would comprise Bills to authorise expenditure on or for:

(a) construction of public works and buildings;

(b) acquisition of sites and buildings;

(c) items of plant and equipment clearly identifiable as capital expenditure;

(d) grants to States under section 96 of the Constitution;

(e) new policies not authorised by special legislation.

363 PP 95 of Session 1951-3, 168-70; cf the contrary view of Isaacs and Rich JJ in *Commonwealth v Colonial Ammunition Co Ltd* (1923) 34 CLR 198, 220-1.
364 Odgers, op cit, 381-3.
365 PP 70/1961.
366 *Hansard*, Senate 12 May 1964, 1054-88; 25 August 1964, 207-8.
367 PP 55/1967.
368 *Hansard*, HR, 13 May 1965, 1484-5.

It was accepted that the Senate could amend Bills in this second category.

4.493 The Treasurer indicated that Bills of the first class – that is Bills for appropriation of revenue or moneys for the ordinary annual services of the Government – would include items for expenditure on policies which were new when the prior budget was introduced.

4.494 ***Budget cycle.*** The annual calendar for the main annual, appropriation Bills is now as follows:

Mid August – the Budget for period to 30 June

Appropriation Bill No 1 – ordinary annual services

Appropriation Bill No 2 – capital works, special purpose grants to States and the Northern Territory, etc

Appropriation (Parliamentary Departments) Bill – recurrent and capital expenditure of the Parliament.[369]

March – Additional Estimates for period to 30 June

Appropriation Bill No 3 – additional expenditure for ordinary annual services

Appropriation Bill No 4 – additional expenditure for purposes in Appropriation Bill No 2

Appropriation (Parliamentary Departments) Bill No 2 – additional expenditure

April-May – Supply for period 1 July-30 November

Supply Bill No 1 – ordinary annual services

Supply Bill No 2 – for the same purposes as Appropriation Bills Nos 2 and 4

Supply (Parliamentary Departments) Bill.[370]

4.495 ***Standing appropriations.*** In addition to the annual appropriation and supply Bills there are Bills for what are known as special or standing appropriations. These are to authorise expenditure for purposes other than the ordinary annual services of the Government, for specific or indeterminate periods. The amount to be appropriated may also be specific or indeterminate. Special or standing appropriations account for 70% of federal expenditure. They include expenditure on remuneration and allowances of members of Parliament, Ministers, judges and various other office holders; pensions and other income support payments; retirement benefits and superannuation payments; election funding; bounties and other subsidies; assistance to primary industry; debt charges; general revenue and special purpose grants to States; and financial assistance to local government.[371]

4.496 ***Recent history.*** The appropriation Bills which, at present, are regarded as being subject to amendment by the Senate are:

(a) all the annual appropriation and supply Bills except Appropriation Bills Nos 1 and 3 and Supply Bill No 1;

(b) Bills for grants to States under section 96 of the Constitution;

(c) Bills to appropriate moneys for the parliamentary departments;

369 There have been separate Bills in this category since 1982-3. This practice was adopted following recommendations of the Senate Select Committee on Appropriations and Staffing.

370 The items in supply Bills are subsequently incorporated in the main appropriation Bills introduced in August.

371 The estimates of payments from special appropriations and the Acts containing those appropriations are set out annually in budget paper No 2. See *The Commonwealth Public Account 1987-88* (PP 205/1987) 28-40.

(d) loan Bills; and

(e) special appropriation Bills.

4.497 Up till the end of 1973 the Senate passed all of the Government's annual appropriation and supply Bills notwithstanding that in nineteen out of the seventy-two years of the Parliament, the Government did not have a majority in the Senate.[372]

4.498 In April 1974, the Leader of the Opposition announced in the House of Representatives that the Opposition would oppose the Government's appropriation Bills and that if, as he expected, they were also opposed in the Senate (in which the Government did not have a majority), the Government would be forced to an election. The Prime Minister replied that if the Senate rejected any money Bill, he would advise the Governor-General to dissolve both Houses. Following an indication by the non-Government parties in the Senate that they would defer consideration of the Bills until the Prime Minister agreed to a general election for the House of Representatives, the Prime Minister advised the Governor-General to dissolve both Houses under section 57 of the Constitution, on the ground that six other Bills satisfied the requisite conditions for a double dissolution. The Senate then passed the appropriation Bills and the Governor-General dissolved both Houses.

4.499 In October 1975, the non-Government parties in the Senate again resolved to defer consideration of financial measures – a loan Bill and Appropriation Bills Nos 1 and 2 – until the Government agreed 'to submit itself to the judgment of the people, the Senate being of the opinion that the Prime Minister and his Government no longer . . . [had] the trust and confidence of the Australian people . . .'.[373]

4.500 On receiving the Senate's ultimatum, the House had resolved that the action of the Senate in delaying passage of the Bills 'for the reasons given in the Senate resolution is . . . contrary to established constitutional convention . . .'.[374] On being informed of this resolution, the Senate had passed a resolution defending its action. Its action was, it was asserted, 'a lawful and proper exercise within the terms of the Constitution of the powers of the Senate'.[375] It was further asserted:

(a) that the powers of the Senate were expressly conferred on the Senate as part of the Federal Compact which created the Commonwealth of Australia;

(b) that the legislative power of the Commonwealth is vested in the Parliament of the Commonwealth which consists of the Queen, the Senate and the House of Representatives;

(c) that the Senate has the right and duty to exercise its legislative power and to concur or not to concur, as the Senate sees fit, bearing in mind the seriousness and responsibility of its actions, in all proposed laws passed by the House of Representatives;

(d) that there is no convention and never has been any convention that the Senate shall not exercise its constitutional powers; and

372 A list of the annual appropriation and supply Bills passed by the Senate in those 19 years is set out in ACC, Standing Committee D, *Special Report to Executive Committee: The Senate and Supply* (1977) 43-5.
373 See Report of Standing Committee D, 23 June 1977, 7-8, ACC Proc, Perth 1978.
374 id, 10.
375 id, 11.

(e) that the Senate affirms that it has the constitutional right to act as it did and now that there is a disagreement between the Houses of the Parliament and a position may arise where the normal operations of government cannot continue, a remedy is presently available to the Government under section 57 of the Constitution to resolve the deadlock.

The House responded to the Senate's resolution by passing a resolution affirming its earlier stand, but in stronger and more specific terms. The events which ensued have already been described in Chapter 2 of this Report.[376]

4.501 ***Unresolved issues.*** It is clear that the Constitution raises a number of problems which are still unresolved and for which there is no clear answer.

4.502 The first problem is whether the Constitution even allows the Senate to veto the money Bills which, by section 53, it is prohibited from amending. Some commentators have argued that the Constitution, by implication and read in the light of relevant history, does not give the Senate that power.[377] Most have, however, taken the view that the Senate does, legally, have a power of veto. This view is supported by High Court dicta in the *PMA Case* of 1976.[378]

4.503 A second question is, assuming that the Senate does, legally, have power to veto Bills it cannot amend, were the Senate's actions in 1974 and 1975 in breach of constitutional convention? This question is, again, one on which opinions were, and still are, divided. Some have questioned whether there was an applicable convention. Others have, both then and since, differed over what convention required. For example, did convention require that the Senate refrain from exercising its power of veto only if the Senate objected to the finance Bills on their merits?

4.504 The disputation has shown that there are no universally accepted 'right' answers to the issues raised by the Senate's actions in 1974 and 1975. There is still disagreement about what the Constitution means and that disagreement is unlikely to be resolved by judicial decision. There is also disagreement about proprieties – about how legal power should be exercised. The only point on which there is general agreement is that the general issue about 'the Senate and supply' is, constitutionally, one of great importance because it goes to the heart of a federal system of responsible parliamentary government. Since 1975, all major political parties represented in the Federal Parliament have supported moves for revision of the Constitution to deal with the issue. They have not, however, agreed on what the solution should be.

4.505 We describe the recent proposals for revision of the Constitution, so far as it deals with the Senate and supply, later on in this part of the Chapter under the heading of 'Previous proposals for reform'.[379]

Powers of other upper Houses over money Bills

4.506 In its report, the Advisory Committee on Executive Government observed:

376 For the chronology see Pettifer, op cit, 62-4; also para 2.215-2.217.
377 These arguments are summarised in ACC, Standing Committee D, *Special Report to Executive Committee: The Senate and Supply* (1977) 31-5.
378 *Victoria v Commonwealth and Connor* (1975) 134 CLR 81, 121 (Barwick CJ), 143 (Gibbs J), 168 (Stephen J), 185 (Mason J).
379 para 4.528-4.541.

> The Senate's power to reject supply and some of its other legislative powers are not shared by most upper houses operating in the parliamentary executive system. Indeed, the Australian Senate is a far more powerful upper house than is normal in most other countries which have systems of parliamentary government.[380]

The Committee referred to limitations on the powers of upper Houses in the United Kingdom and in New South Wales. It noted also that:

> Some countries, such as Sweden, New Zealand and Papua New Guinea, the Canadian provinces, the State of Queensland and the Northern Territory have either abolished their upper houses or have never had one. Others have considerably reduced the powers remaining to their upper houses.[381]

4.507 The Australian Senate is, in some respects, unique. Unlike the House of Lords in the United Kingdom, it is an elected chamber. Unlike the upper Houses in the Australian States, it is a chamber in which States are represented, and by equal numbers of senators. It differs from the Canadian Senate, the members of which are appointed rather than elected. It resembles the Senate in the United States Congress in that States are equally represented, but differs from it because the United States Senate operates under a presidential rather than a Westminster-type system.

4.508 We have nevertheless thought it desirable to have regard to the powers of certain other upper Houses in relation to money Bills, in particular those of the House of Lords and of the Legislative Councils in the States. We consider experience in the States is particularly relevant. In drafting the provisions of the Constitution relating to the powers of the Senate, the Founders were attentive to the problems which had already arisen in a number of the colonies concerning the powers of the upper Houses. Indeed, section 53 of the Constitution was based largely on a 'compact' which both Houses of the South Australian Parliament had agreed on in 1857. Provisions in the *Constitution Acts* of South Australia, Tasmania, Victoria and Western Australia are similar to sections 53-55 of the Federal Constitution, though in recent years there have been moves to alter them.

4.509 It is also worth noting that following the events of 1975 in the federal sphere, resolutions were passed in four of the State Parliaments expressing opinions on the propriety of withholding of supply. The Legislative Assemblies in New South Wales and Victoria passed resolutions which, in effect, supported the Senate's action.[382] In contrast both Houses of the South Australian Parliament and the Tasmanian House of Assembly condemned refusal of supply by an upper House.[383]

4.510 ***United Kingdom.*** Under the *Parliament Act 1911* the House of Lords' power to amend and reject money Bills was removed entirely. Section 1 of the Act provides that if a money Bill has been passed by the House of Commons at least one month before the end of the session, and is not passed by the House of Lords without amendment within one month after its transmission to the Lords, the Bill shall, unless the House of Commons directs to the contrary, be presented for the Royal assent. The term 'Money Bill' is defined in sub-section 2 of that section to mean a public Bill which, in the opinion of the Speaker, contains only provisions dealing with certain subjects. These subjects include the imposition or regulation of taxation, supply and appropriations. The Speaker's certificate is endorsed on the Bill and once given is conclusive for all purposes.

380 Executive Report, 22.
381 ibid.
382 NSW *Debates* (1975-76) No 35, 2583, 2588; Vic, 324 *Debates* (1975) 8042.
383 SA *Debates* (1975) 1855, 1887; Tas, *Journals and Printed Papers of Parliament*, Vol 192, Pt 1, 398.

4.511 ***New South Wales.*** Section 5 of the *Constitution Act 1902* provides that all appropriation Bills shall originate in the Legislative Assembly. Section 5A, which was inserted in 1933,[384] provides:

> (1) If the Legislative Assembly passes any Bill appropriating revenue or moneys for the ordinary annual services of the Government and the Legislative Council rejects or fails to pass it or returns the Bill to the Legislative Assembly with a message suggesting any amendment to which the Legislative Assembly does not agree, the Legislative Assembly may direct that the Bill with or without any amendment suggested by the Legislative Council, be presented to the Governor for the signification of His Majesty's pleasure thereon, and shall become an Act of the Legislature upon the Royal Assent being signified thereto, notwithstanding that the Legislative Council has not consented to the Bill.
>
> (2) The Legislative Council shall be taken to have failed to pass any such Bill, if the Bill is not returned to the Legislative Assembly within one month after its transmission to the Legislative Council and the Session continues during such period.
>
> (3) If a Bill which appropriates revenue or moneys for the ordinary annual services of the Government becomes an Act under the provisions of this section, any provision in such Act dealing with any matter other than such appropriation shall be of no effect.

The term 'ordinary annual services' is not defined.

4.512 Other money Bills are treated in the same manner as ordinary Bills. This means that if they have twice been rejected by the Legislative Council, or if the Council fails to pass them within two months of transmission, and the deadlock cannot be resolved by other means, they may be submitted to a referendum. If they are approved by a majority of electors, they may be presented for the Royal assent.[385]

4.513 The class of Bills to which section 5A applies is much more narrow than the class of Bills to which the *Parliament Act 1911* (UK) applies. It does not, for example, include taxation Bills.

4.514 A further point to be noted is that although the *Constitution Act* does not expressly prohibit the Council from amending money Bills, sections 5A implies that the Council cannot amend Bills appropriating moneys for the ordinary annual services of the Government, but may merely request amendments.

4.515 ***Victoria.*** The *Constitution Act 1975* contains provisions similar to sections 53 and 54 of the Federal Constitution, but the class of appropriation Bills which the Legislative Council is prohibited from amending is wider than that referred to in section 53. The Council cannot amend any Bill to appropriate any part of the Consolidated Revenue Fund, but it may reject such a Bill.[386]

4.516 In 1984 the *Constitution Act 1975* was amended to provide for a qualified fixed term for the House of Assembly and to change the fixed term of Legislative Councillors to a term of two Assemblies. Both the rejection of supply by the Legislative Council and the development of a deadlock between the Houses over 'a Bill of special importance' are exceptions to the new fixed term rule.

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384 The section is entrenched.
385 See section 5B.
386 Section 62. Bills were rejected by the Council in 1947 and 1952.

4.517 If the Legislative Council rejects or fails to pass 'a Bill dealing only with the appropriation of the Consolidated Fund for the ordinary annual services of the Government' within one month after its transmission to the Council, the Governor may dissolve the Assembly. A Bill of this type is defined not to include 'a Bill to appropriate monies for:

(a) the construction or acquisition of public works, land or buildings;

(b) the construction or acquisition of plant or equipment which normally would be regarded as involving an expenditure of capital;

(c) appropriation for services proposed to be provided by the Government which have not formerly been provided by the Government; or

(d) appropriation for or relating to the Parliament.'

4.518 The Act further provides for the Speaker to certify that a Bill is one which deals only with the appropriation of the Consolidated Fund for the ordinary annual services of the Government. The certificate is conclusive for all purposes.

4.519 With respect to other Bills, the *Constitution Act* now provides that, if the Council rejects a Bill passed by the Assembly and the Assembly resolves that it is a 'Bill of special importance' and passes it for the second time, the Governor may dissolve the Assembly if the Bill is rejected again by the Council. A Bill is deemed to have been rejected if it is not passed within two months after transmission to the Council.

4.520 ***South Australia.*** The *Constitution Act 1934* includes provisions similar to those in Victoria's *Constitution Act* relating to the powers of the Legislative Council over money Bills.[387] But it also makes it clear that non-observance of these provisions does not affect the validity of any Act assented to by the Governor.[388]

4.521 Following the dissolution of the Federal Parliament on 11 November 1975, both Houses of the South Australian Parliament resolved, on 12 November 1975, *inter alia,* that 'The Lower House of the Parliament grants Supply. The Upper House may scrutinise and suggest amendments to money Bills but should not frustrate the elected Government by refusing or deferring Supply'.[389]

4.522 In 1984 the *Constitution Act* was amended along the lines of the 1984 amendments to the Victorian *Constitution Act.* No distinction, however, was made between appropriation Bills and other Bills.

4.523 ***Western Australia.*** Under section 46 of the *Constitution Acts Amendment Act 1899-1983* the powers of the Legislative Council over money Bills are restricted in much the same way as the Senate's are and, like the Senate, the Council may reject any money Bill it cannot amend. This power has never been exercised.

4.524 The Act makes no provision for resolution of disputes between the two Houses. The Royal Commission into Parliamentary Deadlocks, appointed in 1984,[390] has recommended that the Act be amended to include such provisions. Specifically it has recommended that a suspensory veto along the lines of section 5A of the *Constitution Act* of NSW should be adopted as the method which should be prescribed for overcoming deadlocks over supply Bills. With regard to other Bills (which would include other

387 Sections 59-64.
388 Section 64.
389 South Aust Parl, *Debates* (1975) 1855, 1887.
390 Royal Commission into Parliamentary Deadlocks, Report, 71-9.

financial Bills, for example Bills imposing taxation and annual appropriation Bills other than supply) it recommended that a procedure based on section 57 of the Federal Constitution should be adopted to resolve deadlocks.

4.525 The recommendations of the Royal Commission have not been implemented to date.

4.526 ***Tasmania.*** The *Constitution Act 1934* prohibits the Legislative Council from originating or amending an Act appropriating revenue for the ordinary annual services of the Government, income tax and land tax rating Bills. The Council may, however, reject any such Bill.[391] There are also anti-tacking provisions, and so much of an Act which contains items which offend against these provisions are declared to be of no effect. It is also provided that a Bill for appropriating moneys for the ordinary annual services of the Government shall not appropriate for a period in excess of one year.[392]

4.527 The *Constitution Act* provides no mechanism for resolving any dispute between the Houses over proposed laws. In 1981 the Royal Commission into the *Constitution Act 1934* was established to inquire into the settlement of deadlocks. With respect to money Bills, its main recommendations were that:

(a) an appropriation or supply Bill confined to the ordinary services of the Government should be subject to Royal assent if not passed by the Legislative Council within six weeks of its transmission to that chamber;

(b) the proposed six week suspensory veto should apply to all Bills solely concerned with the appropriation of funds other than appropriation for new policies not authorised by special legislation or in respect of which funds have not been appropriated in the previous year. If a Bill appropriating funds contains other provisions, the Legislative Council's power should be the same as that in respect of any general legislation, provided that any amendment does not insert any provision for the appropriation of moneys or impose or increase any burden on the people;

(c) the proposed six week suspensory veto should apply to all Bills dealing with taxation.[393]

The recommendations of the Royal Commission have not been implemented to date.

Previous proposals for reform

4.528 ***Senate Select Committee on the Constitution Alteration (Avoidance of Dissolution Deadlocks) 1950.*** The Committee recommended that if a money Bill (which was not defined) had not been passed by the Senate within two months of its receipt, the Bill should be referred to a joint sitting of the two Houses. If passed by an absolute majority of the members of the two Houses it should be presented for the Royal assent.[394]

4.529 ***Joint Committee on Constitutional Review.*** The Committee recommended alteration of section 57 to make special provision for deadlocks between the two Houses over proposed laws which impose taxation and proposed laws for appropriation of revenue or moneys for the ordinary annual services of the Government. It proposed that the section be altered to provide that:

391 The Council withheld supply in 1948.
392 Sections 37-45.
393 See Report (1982) 49-57.
394 Senate Paper No S1 of 1950.

> A deadlock shall be deemed to arise between the two Houses of the Parliament in relation to a proposed law imposing taxation or appropriating revenue or moneys for the ordinary annual services of the Government where the House of Representatives, in any session, passes the proposed law and transmits it to the Senate for the concurrence of the Senate and, at the expiration of a period of thirty days after the date on which the proposed law is transmitted to the Senate, the Senate has not passed the proposed law and the session has not ended.[395]

Once a deadlock of this kind had arisen, the Governor-General in Council should be able to (a) convene a joint sitting of the two Houses to vote together on the proposed law as last passed by the House of Representatives, or (b) dissolve the Senate and House of Representatives simultaneously. If a joint sitting was convened and the proposed law was there approved by an absolute majority of the members of both Houses and half the total number of members of both Houses from a particular State, in at least half the States, the Bill should be deemed to have been passed by both Houses.

4.530 A Bill based on the Committee's recommendations was introduced in the Senate in 1964 but was not pursued.[396]

4.531 ***Australian Constitutional Convention.*** At the Hobart (1976) session of the Convention in 1976 two proposals dealing with the Senate's powers over money Bills were moved. The Hon EG Whitlam moved:

> that the Constitution be amended so as to remove the power of the Senate to reject, defer, or in any other manner block the passage of laws appropriating revenue or moneys, or imposing taxation.[397]

The Hon Sir Charles Court moved an amendment:

(a) that if the House of Representatives passes a proposed law appropriating revenue or moneys for the ordinary annual services of the Government and the Senate rejects it or fails to pass it within 30 days of it having been transmitted to the Senate the Governor-General shall forthwith dissolve the Senate and the House of Representatives simultaneously;

(b) that if after such dissolution the House of Representatives again passes the proposed law it shall be taken to have been duly passed by both Houses of Parliament and shall be presented to the Governor-General for the Queen's assent; and

(c) that during the period from the time of the commencement of the dissolution until after the House of Representatives next meets the Governor-General in Council may to the extent not otherwise provided by existing legislation authorise the drawing and expenditure of funds for the expenses of the election and the expenses necessary to maintain government in the meantime.[398]

After debate the Convention resolved that the motion and amendment be referred to Standing Committee D for consideration and report.[399]

4.532 The Committee received submissions from delegates and others, and commissioned four background papers. It presented its report to the Executive Committee of the Convention at the end of June 1977.[400] In the report the Committee canvassed the legal arguments for and against the proposition that the Senate has no power to reject supply, and the arguments for and against the existence of that power. It

395 1959 Report, 28.
396 The *Constitution Alteration (Disagreement between The Senate and the House of Representatives)* Bill of 1964.
397 ACC Proc, Hobart 1976, 98.
398 ACC, Hobart 1976, 106-7.
399 id, 113.
400 *Special Report to Executive Committee: The Senate and Supply.*

considered various proposals for constitutional amendment, and in particular the Whitlam and Court proposals. Draft amendments to give effect to those proposals were prepared. The Committee itself made no recommendations.

4.533 The Court proposal was approved at the Perth (1978) session of the Convention by 50 votes to 39 votes. The voting was on party lines.[401] The Convention then agreed to refer the resolution to Standing Committee D for detailed drafting consideration.

4.534 A draft Bill prepared for and approved by the Committee[402] was endorsed by the Adelaide (1983) session of the Convention, but with the addition of a clause to define what classes of Bills were not to be classed as Bills appropriating revenues or moneys for ordinary annual services of Government. This clause mirrored the 1965 compact.[403]

4.535 The Bill was the basis for *Constitution Alteration (Appropriation Bills)* Bills introduced by Senator Rae in 1983 and 1984.[404]

4.536 ***Constitution Alteration (Fixed Term Parliaments) 1981.*** In November 1981 Senator Evans (ALP) introduced a Bill to provide for fixed parliamentary terms. Clause 8 of the Bill proposed that section 53 of the Constitution be altered by adding, after the last paragraph, the following words:

> Where the House of Representatives passes a proposed law appropriating revenue or moneys or imposing taxation and transmits it, at least one month before the date fixed under section twenty-eight of this Constitution for the expiry of the House of Representatives, to the Senate for the concurrence of the Senate and, at the expiration of one month after the date on which the proposed law is so transmitted to the Senate, the Senate has not passed the proposed law in the form in which it was so transmitted to the Senate, or with any amendments made or requested by the Senate to which the House of Representatives has agreed, the proposed law shall be presented to the Governor-General for the Queen's assent as if it had been passed by both Houses of the Parliament.

The new clause, it was explained, would formalise what the practical situation would be under the proposed fixed term provisions. Under those provisions there would be little point in the Senate blocking supply if it were impossible thereby to force a dissolution of the Parliament, or dismissal of the Government.

4.537 In March 1982, Senator Evans moved an amendment to the proposal for alteration of section 53.[405] Under this amendment the paragraph to be added to the section would apply only to those appropriation and tax Bills the passage of which was considered essential to the Government's capacity to govern, that is, Bills imposing taxation and Bills appropriating revenue or moneys for the ordinary annual services of the Government. Although the amendment was agreed to, the motion as amended was defeated by 30 votes to 20.[406] Amendments moved by Senator Macklin (Australian Democrats) were also defeated. One such amendment was to omit section 54 of the Constitution and substitute a section to read 'Laws appropriating revenue or moneys for the ordinary annual services of the Government shall contain only such appropriation, and any law which contravenes this section shall be of no effect.'[407]

401 ACC Proc, Perth 1978, 205.
402 Standing Committee 'D', *Fourth Report to Executive Committee* in ACC Proc, Adelaide 1983, vol II, 68-85.
403 ACC Proc, Adelaide 1983, 202-5.
404 See below.
405 *Hansard,* 18 March 1982, 1005-6.
406 *Hansard,* 28 October 1982, 2020-1.
407 id, 2021.

4.538 ***Constitution Alteration (Appropriation Bills) Bills.*** In 1983, and again in 1984, Senator Rae (Liberal) introduced a Bill to incorporate in the Constitution provisions to give effect to the Court proposal. The Bill was substantially that approved by the Australian Constitutional Convention in 1983. It also included the clause, recommended by the Convention, to define appropriations for the ordinary annual services of the Government. Unless the Parliament otherwise provided, such appropriations would not include appropriations for:

(a) the construction of public works or buildings;

(b) the acquisition of land or buildings or major items of plant or equipment;

(c) financial assistance to the States;

(d) the implementation of new policies not previously specifically authorized by legislation; or

(e) the services of the Parliament.

4.539 There was a further clause to require appropriation of revenue or moneys for certain ordinary annual services of the Government to relate to the services of a particular year only and to be passed by the Senate not earlier than six months before the commencement of that year. The appropriations to be subject to this rule were those for:

(a) salaries and allowances of officers of the Executive Government of the Commonwealth (other than Ministers of State);

(b) other administrative expenses of the departments of State; or

(c) pay and allowances of members of the defence forces of the Commonwealth.

The effect of this clause would have been to prevent the enactment of laws appropriating moneys for these ordinary annual services for an indefinite period of time. A further clause proposed that the only appropriation Bills which the Senate should be prohibited from amending were those to appropriate moneys for the particular, ordinary annual services referred to above. All other appropriation Bills would be amendable by the Senate.

4.540 If an appropriation Act contained amendable items and unamendable items, a State, or a senator for a State, could bring action in the High Court for a declaration that so much of the Act which contained amendable items was of no effect.

4.541 Senator Rae's Bills were opposed by the Government and did not proceed beyond the second reading debate.

Advisory Committee's recommendations

4.542 The Senate's powers in relation to appropriation Bills were considered by the Advisory Committee on Executive Government.[408] All but one member of the Committee considered that the most desirable alteration of the Constitution would be to remove the Senate's power to block supply for more than 30 days. But 'in the event of no change being made to the Senate's power to reject supply, the government which is refused supply should be able (at its option) to obtain a double dissolution of the Senate as well as the House of Representatives.'[409] One member of the Committee preferred this solution.

4.543 We mention and comment on the Committee's reasons for its recommendations below.

408 Executive Report, 20-8.
409 id, 28.

Submissions

4.544 We received a large number of submissions on the subject of the Senate's powers over money Bills. Most of them were from individuals, but there were also several from organisations. The Queensland and Tasmanian Governments made submissions on the recommendations of the Advisory Committee.

4.545 The submissions were concerned principally with the question of whether the Senate should continue to have power to refuse to pass a Government's annual appropriation measures. Opinions were more or less equally divided on this question. Almost as many favoured maintenance of the present position as proposed alterations to limit the Senate's powers. The different points of view reflected in the submissions were essentially those set out in the following statement of issues and arguments.

Issues and arguments

4.546 The main issue is whether the Senate's powers in relation to appropriation Bills should be diminished and, if so, how. In particular, should the Senate's power to veto such Bills, or specified classes of such Bills, be removed, or should the power of veto be retained, subject to a proviso that, if it is exercised (whether by rejection of a Bill or failure to pass it within a specified time of its transmission), it shall be open to the Governor-General to dissolve both Houses?

4.547 The arguments which have been advanced for removing or restricting the Senate's power of veto are:

(a) Although a vote by the Senate of no confidence in the Government is, by convention, not a ground for removal of the Government or for dissolution of the House of Representatives, the power of the Senate to veto the Government's annual appropriation measures effectively gives it a power to decide how long a Government, which has the confidence of the House, shall remain in office and when a general election for the House shall be held. If the Senate exercises the power, the Government will not have legal authority to withdraw moneys from the Consolidated Revenue Fund for payment of the salaries of public servants and routine government services. In short, the Government will not be able to govern. Again, if the Senate exercises the power to force a general election for the House, it cannot itself be dissolved unless there is a Bill or Bills over which the two Houses are deadlocked and which satisfy the conditions for a double dissolution laid down in section 57 of the Constitution.[410]

(b) The Senate is unlikely to exercise its power of veto except when the Government does not have a majority of supporters in that House. This means that the power to force a general election for the House of Representatives is effectively in the hands of the non-Government parties in the Senate.

(c) Even if the Senate's refusal to pass the Government's annual appropriation measures is followed by a double dissolution, there is no guarantee that the ensuing elections will resolve the differences in party control of the two Houses.

(d) Because of the time-table of annual appropriation measures, the Senate's power of veto is, in theory, exercisable every six months. This can have a destabilizing effect on the conduct of government, can contribute to the

410 See id, 22 and 25.

frequency of elections and can deter a Government from introducing unpopular, though necessary or defensible measures.[411] (We note, however, that some contend that there is no evidence to support these contentions about the practical effect of the mere existence of the Senate's power of veto.)

(e) Even though the Framers of the Constitution envisaged that section 57 of the Constitution would provide a means of resolving deadlocks between the two Houses over financial measures, the time-table for the annual appropriation Bills is such that the conditions which have to be satisfied before both Houses may be dissolved under that section can never be met, under existing practices, before current legislative authority for annual expenditures expires:[412]

(f) [T]he important role of the Senate as a house of review is impaired by the present power it possesses to refuse supply and threaten to bring down the government . . . [T]he ultimate political power which the Senate possesses distracts unnecessarily both the Senate and those who observe it from its checking role . . . [I]ts function as a house of review would be emphasised if it were not also the possessor of that far stronger power.[413]

4.548 The arguments against diminution of the Senate's power to veto a Government's financial measures depend heavily on certain premises about the proper role of the Senate within the federal system of parliamentary government, and about the proper role of an upper House in a parliamentary system in which, it is claimed, the political executive – the Ministry – controls the lower House and, in turn, is controlled by a caucus of the parliamentary members of the Government party or parties. The arguments also acknowledge that power over the nation's pursestrings is of critical importance in the general conduct of government and that a power to veto a Government's annual appropriation measures is a power, not merely to disapprove those measures, but also to censure a Government for actions or proposals which have no necessary connection with the proposed appropriations.

4.549 Some central points which have been made by those who oppose removal or reduction of the Senate's power to veto a Government's financial measures are as follows:

(a) The Australian Senate, unlike the House of Lords and the Canadian Senate, is a democratically elected legislative chamber. Arguments for reducing the powers of the Senate which rely on United Kingdom and Canadian law and practice are therefore based on false analogy.

(b) The Constitution implies, or at least is not inconsistent with the proposition, that the Executive Government of the Commonwealth is responsible to both Houses of the Federal Parliament in the sense that both have, and can legitimately exercise, powers which are effective to unseat a Government and force elections.

(c) The Senate's powers under the Constitution are an integral and valuable part of a system of checks and balances against abuses of governmental power which the Constitution was meant to enshrine. The Senate's power to veto a Government's annual financial measures is a safety-valve in that it provides a means of forcing a corrupt, extravagant or incompetent Government to the polls and thereby to the judgment of 'the people'.

411 See id, 21, 25.
412 See id, 21.
413 id, 25. Some members of the Advisory Committee did not 'regard this as a particularly compelling reason' for removing the Senate's power to block supply.

Because party discipline in the House of Representatives is strict, the Senate is the only effective censor of the Executive Government, and the only effective safeguard against what has been termed 'elective dictatorship'.

(d) The Senate was intended to have, and still has, a role in the protection of the interests of States. The Constitution assures the Original States equal representation in the Senate, regardless of the size of their populations. Assurance of that equal representation was a condition which many of the Australian colonies insisted upon before they would agree to federation. The Senate's power to veto a Government's annual financial measures is still a means whereby the interests of States may be protected.[414] The Constitution forbids the Federal Parliament from enacting laws with respect to taxation which discriminate between States or parts of States[415], and forbids it to make any revenue law which gives 'preference to one State or any part thereof over another State or part thereof'.[416] But the Constitution does not prohibit the Federal Parliament from enacting appropriation laws which discriminate between States. In consequence, it is possible for the Parliament to impose, say, uniform taxation, yet appropriate the revenue thereby yielded in a discriminatory way, to the advantage of the States which have the greatest representation in the House of Representatives. The Senate's power of veto of a Government's financial measures, it is argued, provides a safeguard against the enactment of discriminatory measures of this kind.

4.550 Generally, the opponents of constitutional amendment to diminish the Senate's powers over money Bills have queried whether, if those powers were to be substantially reduced, the Senate would have any substantial role in the government of the nation. They have suggested that removal of the Senate's power of veto would be tantamount to destruction of the Senate as a real force in federal government. On the other hand, many of these opponents have not resisted the proposition that if the Senate's power of veto is retained, the power should be qualified so that, if the Senate elects to exercise it, all of its members should be forced to the polls through a simultaneous dissolution of both Houses.

4.551 Several of those who have argued against certain proposals for alteration of the Constitution to diminish the powers of the Senate over money Bills have drawn attention to the likely consequences of adopting those proposals.[417]

4.552 It has, for example, been suggested that, if the Senate's powers over money Bills were to be reduced, one likely consequence would be to lessen parliamentary scrutiny and control of public finance. This point was made by AR Cumming Thom, until recently the Clerk of the Senate. In a submission to the Commission[418] Mr Thom drew attention to the system which the Senate has developed in recent years to scrutinise the financial proposals of Governments. This system has, he said:

> compelled governments and their administrative departments to provide more detailed explanations of financial and administrative proposals and to consider more carefully estimates of expenditure. This has resulted in greatly improved public awareness of government operations and has improved the quality of government itself. If the Senate were to have no powers in relation to financial legislation, this could well lead to governments ignoring any attempts by the Senate to scrutinize estimates and expenditure,

414 cf id, 23-4.
415 Section 51(ii).
416 Section 99.
417 See AR Cumming Thom S2694, 15 October 1987; H Evans S2527, 2 October 1987.
418 S1061, 26 February 1987.

and, in the long run, to a considerable lessening of parliamentary scrutiny and control of government finance, one of the most fundamental ingredients in the system of representative parliamentary government.

It has also been suggested by Mr Thom[419] that were the Senate's power to veto appropriation Bills to be removed, the result would, in effect, be to

> allow all legislation to be enacted by the House of Representatives alone, and thereby achieve a situation of de facto unicameralism. A great many Bills passed by the Parliament contain clauses which have the effect of appropriating money, whether of an unspecified or a specified amount. It would be an easy step for a government to insert in almost every government Bill an appropriation clause, and this could be made to appear quite legitimate. Virtually all legislation could then be enacted without the consent of the Senate.

Mr Thom went on to suggest that

> In order to avoid the situation just described it would be necessary to have some enforceable constitutional guarantee against this new form of "tacking", that is, the inclusion of appropriation clauses in Bills which are not intended primarily to be appropriation Bills . . . Such a provision, however, would lead to the anomalous situation of action in the courts being necessary to preserve the powers of one of the Houses of Parliament. It could also lead to a state of some artificiality in the legislation of the Commonwealth, in that legislation requiring expenditure for its operations would be separated from the laws providing the necessary money. Amongst other things, this could have the effect of indirectly giving the government of the day the same complete legislative power which it would gain if all appropriation Bills could be passed without the consent of the Senate. Future governments could well rely on a combination of appropriations and administrative actions for most of their activities.

4.553 Another officer of the Department of the Senate made similar points in his submission on the Report of the Advisory Committee on Executive Government.[420]

Reasons for recommendations

4.554 ***General.*** It is now widely recognised that the provisions of the Constitution concerning the Senate's powers over money Bills are not satisfactory and should be altered. Precisely how they should be altered the political parties have yet to agree upon.

4.555 The essential issue, it seems to us, is how long a Government which has the confidence of the House of Representatives should be entitled to govern and who is to decide when it is to face an election? Is the Government to be held responsible to both Houses so that if the Senate chooses to deny the Government the financial authority required to enable the functions of government to be carried out, the Government must resign or risk dismissal and the House of Representatives dissolved? In our view the primary principle to which the Constitution should give expression is that Governments are formed, effectively, by the House of Representatives and are entitled to govern so long as they have the confidence of that House. For that reason we have concluded that it should not be open to a Senate, in which a Government may not have a majority of supporters, to deny a Government essential means of governing and thereby force a general election for the House, unless the Senate itself has to face the judgment of the people at the same time.

419 ibid.
420 H Evans S2527, 2 October 1987.

4.556 The purpose of our proposals is to remove from the Senate the power to deny a Government financial means to administer programs and policies which have been the subject of appropriations in the previous financial year or which have already been approved by legislation. The Senate will, in such cases, be left with no more than a suspensory veto.

4.557 The changes which we recommend in relation to the Senate's powers over money Bills are integral to the changes we recommend in relation to the minimum and maximum terms of the Federal Parliament, the circumstances in which the Houses of that Parliament may be dissolved, and the circumstances in which the appointments of Ministers may be terminated. The relevant recommendations on these matters are, in summary, as follows:

(a) The maximum term of a Federal Parliament should be increased from three years to four years.

(b) The House of Representatives may not be dissolved within the first three years of a Parliament unless the House of Representatives resolves that the Government does not have its confidence.

(c) The appointment of a Prime Minister may not be terminated unless the House of Representatives resolves that the Government does not have its confidence.[421]

(d) Elections for the Senate and the House of Representatives shall be simultaneous and the terms of senators shall be limited accordingly.

4.558 For the system contained in the above proposals to be workable it is essential that, during the first three years of a Parliament, a Government which has the confidence of the House be assured of essential supplies. It is for this reason that we recommend that if, during the first three years of a Parliament, the Senate rejects or fails to pass certain appropriation Bills within 30 days of their transmission, those Bills may become law notwithstanding that they have not been passed by the Senate.

4.559 It can, of course, be argued that if the minimum term of Parliament is fixed, and the House of Representatives is not capable of being dissolved before the expiration of the term unless it passes a vote of no confidence in the Government, there would be no point in the Senate exercising a power to veto appropriation Bills. If, however, a Senate dominated by non-Government parties was determined to force early elections, a power to veto appropriation Bills might still be used against the Government.

4.560 We consider it not unreasonable to allow the Senate to exercise a power of veto over financial measures in the last year of a maximum four year parliamentary term and to do so in order to force elections. On the other hand, we agree that if the Senate chooses to exercise its power of veto, it should do so in the knowledge that it will thereby create a basis for a double dissolution. It is for this reason that we recommend that if, in the fourth year of the life of a Parliament, the Senate rejects or fails to pass within 30 days of transmission, any money Bill which it is prohibited from amending, the Governor-General in Council may dissolve both Houses simultaneously, thus forcing both of them to the polls.

4.561 We have not been persuaded by the argument that the Senate's power to veto appropriation Bills, at any time, should be preserved as a check on corrupt, extravagant or grossly incompetent Governments. While we do not deny that the Senate has a significant role to play as a House of review, its ability to perform that role is not, we

421 See para 5.58-5.72.

believe, dependent on its having power to veto a Government's annual appropriation Bills. Such a power is one which, when exercised, is, more likely than not, to be exercised only or mainly for party political purposes.

4.562 Equally, we have not been persuaded by the argument that the Senate's present powers with respect to money Bills should be preserved so as to safeguard the interests of the States, and particularly the States with the smallest representation in the House of Representatives. While we concede that there have been instances in which senators have voted against Government measures because they believed those measures not to be in the interests of the States they represented, it is clear that on the two occasions on which the Senate chose to assert its power to veto annual appropriation Bills, party political considerations were paramount. State interests can be and are represented by members in their party political rooms.

4.563 Another argument against limitation of the Senate's power of veto over money Bills which we have considered, but not found persuasive, is that if the power to veto certain appropriation Bills were to be removed, Governments might be disposed to use appropriation Bills which could not be vetoed by the Senate as a vehicle for introducing measures which ought properly be the subject of non-financial legislation. In our view the scope for employment of appropriations in lieu of other legislation is extremely limited. Furthermore, under the alterations to the Constitution we propose, the Senate would have power to amend and veto any provision in an appropriation Bill for a new purpose.

4.564 Finally, we draw attention to the fact that later in this Chapter[422] we recommend revision of the procedure laid down in section 57 of the Constitution for resolving deadlocks between the two Houses. The revised procedure we recommend does not apply to disagreements over money Bills which the Senate cannot amend. We are satisfied that section 57, as it now stands, does not provide an appropriate means of resolving deadlocks over annual financial measures. Although it has been suggested that the section would be better fitted for that purpose if the annual budgeting time-table were altered, we believe it to be unrealistic to proceed on the basis that such a change will come about.

4.565 Having given general reasons for our recommendations, it is necessary to explain and justify particular features of our proposals.

4.566 ***Principles to be preserved.*** The alterations to the Constitution we propose in this part of the Chapter would not change a number of the principles already enshrined in sections 53 and 54 of the Constitution. In particular, the proposed alterations would preserve the following basic principles:

(a) Subject to specified exceptions, the Senate shall have equal powers with the House of Representatives in respect of all proposed laws.

(b) Proposed laws for appropriating revenue or moneys or for imposing taxation can originate only in the House of Representatives.

(c) Defined categories of money Bills are not subject to amendment by the Senate, but the Senate may request amendment of any such Bills.

(d) The Senate may not amend any Bill so as to increase any proposed charge or burden on the people.

(e) Bills which the Senate may not amend must not include extraneous provisions, that, clauses proposing laws which the Senate can amend.

422 para 4.613.

4.567 The proposed new section 54A also preserves provisions in the present section 53 which permit certain money Bills to be initiated in the Senate and amended by it. They are Bills for the imposition or appropriation of fines or other pecuniary penalties, and Bills for the demand, payment or appropriation of fees for licences for services under the proposed law.

4.568 It is also relevant to note here that, for reasons we give later in this Chapter,[423] we propose that the principle expressed in section 56 of the Constitution be maintained. This principle is one the effect of which is to prevent any proposed appropriation of revenue or moneys being passed unless the proposal is recommended by the Government of the day.

4.569 ***Appropriation Bills not subject to Senate veto.*** The appropriation Bills which, under our proposals, the Senate would be prohibited from amending, and over which it would have merely a suspensory veto are Bills appropriating revenue or moneys for ordinary annual services of the Government. At present such Bills are the only appropriation Bills which the Senate is prohibited from amending. But in our scheme, there is an important proviso. Under it the Senate could amend and reject any appropriation Bill so far as it appropriates revenue or money for a new purpose, as defined. We comment on the definition of an appropriation for 'a new purpose' and explain our reasons for recommending the proviso below.[424]

4.570 In considering what types of appropriation Bills should not be subject to amendment or veto by the Senate, except when they provide for expenditure for a new purpose, we have had regard to the 1965 Compact.[425] This was intended to resolve previous disagreements about what appropriation Bills should be classified as Bills to appropriate revenue or moneys for the ordinary annual services of the Government and what should not. Only the former category of Bills would not be susceptible to amendment by the Senate. Bills to authorise expenditure on construction of public works and buildings, on the acquisition of sites and buildings, on items of plant and equipment clearly definable as capital expenditure, and on grants to States under section 96 of the Constitution, were categorised as Bills the Senate could amend.[426]

4.571 Under our proposals the Senate would, subject to the proviso covering 'new purposes', be denied power to amend not only Bills to appropriate revenue or moneys for the ordinary annual services of the Government. It would also be denied power to amend certain other appropriation Bills which, under the 1965 Compact, the Senate can amend – namely Bills to appropriate moneys for the construction of public works or buildings, for the acquisition of land, or for the acquisition of plant or equipment.

4.572 The only power the Senate would have over all of these types of appropriation Bills would be a power of suspensory veto. The reason why we consider that Bills of these types should be subject to the same rules as apply to Bills appropriating moneys for ordinary annual services of the Government is this. If the object of limiting the Senate's powers over appropriation Bills is to prevent the Senate denying a Government, which has the confidence of the House of Representatives, the financial means to administer programs and policies which have already been approved by the Parliament, the distinction made in the 1965 Compact is not an altogether rational one. On this point we agree with the Tasmanian Royal Commission into the *Constitution Act 1934*. They stated:[427]

423 para 4.591 and following.
424 para 4.576-4.582.
425 para 4.492.
426 See also the proposed section 54A agreed on by the Australian Constitutional Convention in 1983; ACC Proc, Adelaide, 1983, vol I, 322.
427 *Report* (1982), 54.

> The policy should be to ensure that government can be carried on in the normal manner. This militates against the division made in the "1965 Compact" between such matters as salaries to public servants on the one hand and "construction of public works and buildings" or "capital expenditure" on the other . . . [M]ost expenditure on capital works is part of the normal expenses of government, such as plant and equipment used for government departments. Similarly, annual appropriations to meet ongoing capital works that were commenced some time, perhaps years, before are as much continuing governmental commitments as many salaried items. Results, universally considered undesirable, that follow a rejection of supply, such as the dismissal of public servants, would also follow a closure of public works projects and the sacking of those working on them.

4.573 It should be noted that the types of appropriation Bills which, under our proposals, would not be subject to amendment by the Senate do not include Bills to appropriate moneys for grants to States pursuant to section 96. Nor do they include, expressly, Bills to appropriate moneys for the ordinary annual services of the parliamentary departments. Both of these types of appropriation Bills are presently accepted as being subject to amendment by the Senate.

4.574 ***Taxation Bills not subject to Senate veto.*** The taxation Bills which, under our proposals, would not be susceptible to amendment by the Senate, and would thus be subject only to its power of suspensory veto, include not merely Bills imposing taxation. They include also Bills *dealing with* the imposition, assessment or collection of taxation, and only with those matters. This class of taxation Bills is, to some extent, wider than that presently described in section 53 of the Constitution. At present the only taxation Bills the Senate is prohibited from amending are those imposing taxation. Yet the 'anti-tacking' provision contained in the first paragraph of section 55, as judicially interpreted, recognises a somewhat wider class of taxation measures, that is, measures *dealing with* the imposition of taxation, and only with that subject.

4.575 The taxation Bills which, we recommend, should be unamendable by the Senate include the broader class of Bills indicated by the first paragraph of section 55, together with Bills dealing with the assessment or collection of taxation, but only with those subjects. If the object is to prevent the Senate from denying a Government, which has the confidence of the House of Representatives, the financial means by which to govern, the Senate's power needs to be limited not only in relation to appropriations, but also in relation to the measures necessary for the raising of revenue. To raise revenue available for expenditure, it is clearly not enough to impose taxation. There must also be laws dealing with assessment of liability to tax and collection of the taxes which taxpayers are liable to pay.

4.576 ***Appropriations for new purposes.*** We have recommended that the limitations to be imposed on the Senate's powers to amend and reject designated classes of appropriation Bills should not apply to any such Bill so far as it appropriates revenue or moneys for a new purpose. A new purpose is defined to mean:

(a) a purpose in respect of which revenue or moneys were not appropriated for expenditure in the previous financial year; or

(b) a purpose the accomplishment of which is not specifically authorised by law or is dependent upon the enactment of a proposed law.

4.577 The effect of the proviso may be illustrated by two hypothetical examples. First, if an annual appropriation Bill (say Appropriation Bill No 1) for the ordinary annual services of the Government were to include an item for expenditure on a criminal injuries compensation scheme, and the scheme was entirely new and not authorised by any enactment, the Senate could either amend or reject the item. Secondly, if a Bill to

appropriate revenue or moneys for the kinds of items presently included in Appropriation Bill No 2 were to include an item for expenditure on an entirely new, and previously unauthorised, public works project, that item also would be subject to amendment or veto by the Senate.

4.578 The concept of an appropriation for a new purpose is not an unfamiliar one. A similar concept is employed in South Australia's *Constitution Act 1934* to define when the Legislative Council may request amendment of an appropriation Bill and when it cannot. Bills appropriating money for a previously authorised purpose cannot be the subject of such a request,[428] and an appropriation Bill 'for any previously authorized purpose ... [must] not contain any provision appropriating revenue or other public money for any purpose other than a previously authorized purpose.'[429] The term 'previously authorized purpose' is defined[430] to mean:

(a) a purpose which has been previously authorized by Act of Parliament or by resolution passed by both Houses of Parliament; or

(b) a purpose for which any provision has been made in the votes of the Committee of Supply whereon an appropriation Bill previously passed was founded.

4.579 The concept of appropriations for new purposes is also reflected in the 1965 Compact. As we have already mentioned,[431] the categories of appropriation Bills which, it has been accepted, may be amended by the Senate include Bills to authorise expenditure on 'new policies not authorised by special legislation'. But subsequent appropriations for such items are included in the Bill which is not subject to amendment by the Senate, that is, the Bill for the ordinary annual services of the Government.

4.580 We note also that under the alterations to the Constitution recommended by the Australian Constitutional Convention, Bills appropriating moneys for ordinary annual services of the Government would have been defined to exclude, *inter alia,* Bills appropriating revenue or moneys for 'the implementation of new policies not previously specifically authorised by legislation'.

4.581 The concept of 'a new purpose' as we have defined it is, in our view, preferable to that of 'a new policy'. The latter concept lacks the precision that is desirable in any constitutional definition. It would be difficult to differentiate between a new policy and a mere variation or new example of an existing policy.

4.582 The proviso we recommend, it should be added, is similar to that the Tasmanian Royal Commission into the *Constitution Act 1934* recommended in relation to the Legislative Council's power to veto appropriation Bills.[432]

4.583 ***Tacking.*** We have included in our proposed alterations a provision the object of which is to prevent what is referred to as 'tacking', that is, the inclusion in a Bill which the Senate cannot amend of extraneous matter. The provision will mean that even if the Bill receives the Royal assent, notwithstanding that it has not been passed by the Senate, the extraneous provisions will be of no effect.[433] Adoption of this provision would render the

428 Section 62.
429 Section 63.
430 Section 60(4).
431 para 4.492.
432 para 4.526-4.527.
433 Similar provisions on 'tacking' in appropriation Bills are contained in Constitution Act 1902, section 5A(3) (NSW); Constitution Acts Amendment Act 1899, section 46(7) (WA).

first paragraph of section 55 of the Constitution otiose. Indeed, if the provision we recommend were to be adopted, and the first paragraph of section 55 were to remain, a question could arise as to whether the latter had been repealed by implication.

4.584 We therefore recommend that the first paragraph of section 55 be omitted.

4.585 We assume that the question of whether a law does contain extraneous provisions which, under our proposal, will have no effect, could be determined by the High Court, on the application of any person or body having the requisite standing to sue.

4.586 ***Requests for amendment of money Bills.*** The fourth paragraph of section 53 presently provides that, even if a proposed law is not one the Senate can amend, the Senate may, at any stage, return the proposed law to the House of Representatives with a request that it be amended. This paragraph would be reproduced in the new sections we propose. Thus throughout the life of a Parliament the Senate would continue to have power to return an unamendable Bill to the House, at any stage, with a request for its amendment. On the other hand the power of the Senate to press its request for amendment would be curtailed. As we have already explained,[434] the Senate is now in a position to persevere with its requests for amendment of Bills it cannot amend until such time as the House of Representatives capitulates. It can do this notwithstanding that the House has never conceded that the Senate has a constitutional right to press its requests more than once at any stage in the passage of a Bill, and notwithstanding many legal opinions in support of the House's interpretation of the fourth paragraph of section 53.[435]

4.587 Were our proposals to be adopted, a Senate which repeatedly requested amendments of money Bills it could not amend would have no more than 30 days, commencing from the day on which a Bill was transmitted by the House, within which to press its requests for amendment.

4.588 ***Period for consideration of unamendable money Bills.*** In selecting 30 days as the period during which the Senate may exercise what we have, for short, called its power of suspensory veto, we have been guided by the opinions of those who have first hand knowledge of parliamentary processes. We note that well before that 30 day period would begin to run (that is, from the transmission of a Bill by the House), senators will have knowledge of the contents of the Bills which will eventually come before the Senate. The contents of those Bills will be a matter of public record as soon as they are introduced in the House.

4.589 We note also that, in practice, the budget papers are tabled in the Senate shortly after they have been tabled in the House and that Appropriation Bills Nos 1 and 2 and Appropriation (Parliamentary Departments) Bill No 1 are referred to the Senate Estimates Committees before those Bills are passed by the House and transmitted to the Senate. In the 1987 budget session, Appropriation Bills Nos 1 and 2 were read for the first and second times on 15 September. They were referred to the Senate's Estimates Committees on 22 September for report on or before 5 November. Appropriation Bill No 1 was finally passed by the House on 8 October, and Appropriation Bill No 2 and Appropriation Bill (Parliamentary Departments) Bill No 1 on 20 October. All three Bils were received by the Senate on 21 October. Appropriation (Parliamentary Departments) Bill was finally passed by the Senate on 19 November; Appropriation Bills Nos 1 and2 on 26 November. Thus in each case the time which elapsed between the transmission of the Bill to the Senate and its third reading by that House was approximately thirty days.

434 para 4.483.
435 JR Pettifer, op cit, 380-4.

4.590 ***Certification of money Bills.*** In the draft alterations to the Constitution to give effect to our proposals we have made provision whereby in the event of the Senate failing to pass a money Bill of the kind it cannot amend or veto, the Bill cannot receive the Royal assent, or be the basis for a double dissolution, unless there is endorsed on it a statement by the Speaker of the House of Representatives that the Bill is of that kind and that the prescribed conditions have been met. This statement would not, however, be binding on a court of law.[436]

Recommendation of money votes

Recommendation

4.591 We *recommend* that section 56 of the Constitution be altered by omission of the word 'Governor-General' and substitution of the words 'Governor-General in Council'. This alteration would make it clear that the Crown's financial initiative is exercisable by the Governor-General only on Ministerial advice.

Current position

4.592 Section 53 of the Constitution requires that 'proposed laws appropriating revenue or moneys, or imposing taxation' shall originate in the House of Representatives. Section 56 provides:

> A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

This section gives expression to the well established principle of Westminster parliamentary government that financial initiatives are the preserve of the Crown. The Executive Government is charged with management of the public revenues and other public moneys and it alone may request parliamentary authorisation of expenditures. This request is formally communicated to the House by message from the Governor-General.

4.593 Standing Order 292 of the House of Representatives expands on the requirements of section 56. It provides:

> No proposal for the appropriation of any public moneys shall be made unless the purpose of the appropriation has in the same session been recommended to the House by message of the Governor-General, but a Bill, except an Appropriation or Supply Bill, which requires the Governor-General's recommendation may be brought in by a Minister and proceeded with before the message is announced. No amendment of such proposal shall be moved which would increase, or extend the objects and purposes or alter the destination of, the appropriation so recommended unless a further message is received.

The exception referred to in Standing Order 292 applies only to Class 2 Bills, that is, special appropriation Bills. In practice messages concerning such Bills are announced after the Bill has been introduced and read for a second time.[437] In contrast ordinary appropriation and supply Bills (Classes 4 and 5) are introduced only after the Governor-General's message has been announced.

436 cf *Parliament Act 1911*, section 3 (UK).
437 JA Pettifer, op cit, 349.

4.594 One consequence of section 56 is that an amendment of an appropriation Bill to increase or extend the objects and purposes, or alter the destination of the proposed appropriation, cannot be passed without a further message from the Governor-General recommending appropriation for the purposes of the amendment.[438] The further message in such a case is announced before the amendment is moved.

4.595 Section 56 does not preclude the passing by the House of motions to reduce the amounts of money which the Government recommends should be appropriated for designated purposes. When the motion for the second reading of the main appropriation Bill (that is, Appropriation Bill No 1 of Class 4) is moved, it is customary for the Leader of the Opposition to move an amendment to that motion to the effect that the House condemns the Government's Budget for specified reasons. The object is to initiate general debate on the Government's policies and performance. When the Government's Bills are deliberated on by the House at the Committee stage – the stage at which detailed amendments of clauses may be moved and voted on – private members may move reduction of the amount of proposed expenditures on designated items or else total omission of items. The typical form in which such an amendment is moved in relation to an item in Appropriation Bill No 1 is 'That the proposed expenditure for the Department of . . . be reduced by $10'.[439]

4.596 The last occasion on which a motion of this kind was successfully moved was in 1941. Four days after the House had passed the amendment the Government resigned.[440]

Advisory Committee's recommendation

4.597 The Advisory Committee on Executive Government, with two members dissenting, recommended that section 56 of the Constitution be deleted.[441] It so recommended for two main reasons. The first was that section 56:

> is in part redundant and, in one regard, offensive to parliamentary independence. It is redundant because the government can only continue in office if it has the support of the House of Representatives. In practice, no financial measure is passed by the House without the approval of the government.[442]

The second reason was to assure the Parliament greater independence from the Executive and greater control over the funding of parliamentary activities. The Committee observed that:

> The executive government can hamstring the work of the parliament by refusing to recommend the approval of expenditure on specific items of parliamentary activity, such as the establishment of particular parliamentary committees, or the provision of facilities for members and senators or the support staff provided by the parliament.[443]

The Committee did, however, concede that deletion of section 56:

> would not guarantee adequate funding for parliament, because such repeal would not remove the government's ability to control the lower house and determine the legislation which it is to pass.[444]

438 id, 350-2, 359-60.
439 Pettifer, op cit, 359-60.
440 id, 358-9.
441 Executive Report, 28-9.
442 id, 29.
443 ibid.
444 ibid.

The dissenting members of the Committee were of the view that the problem of securing adequate funding of Parliament should be resolved without alteration of section 56.[445]

Submissions

4.598 In its Report the Executive Committee referred to oral evidence given by Senator Peter Baume commenting on the Executive's control over funding of the Parliament.[446]

4.599 Since the publication of the Committee's Report we have received submissions on the Committee's recommendation from the Clerk of the House of Representatives, AR Browning[447] and from three former Clerks of the House, NJ Parkes, JA Pettifer and DM Blake.[448] All opposed the Committee's recommendation that section 56 be deleted. Its adoption, they suggested, would abrogate an important and perfectly defensible constitutional principle. It was also pointed out that the deletion of section 56 would not achieve the result desired by the Committee because even without the section, the Executive Government would still be in control.

Issues

4.600 The main issues are:

(a) whether the Constitution should be altered to remove entirely the Executive Government's monopoly over the initiation of appropriation Bills; and

(b) whether, if section 56 is retained, it be qualified by a further provision which would permit Bills for appropriation of moneys for the purposes of the Parliament to be initiated and passed without a recommendation from the Governor-General.

Reasons for recommendation

4.601 We are not persuaded that there is any need to alter the Constitution to abrogate the fundamental and long-standing principle that no appropriation Bill may be passed unless it has been recommended by the Executive Government. To remove section 56 from the Constitution would mean that any member of the House could initiate Bills for appropriation of federal moneys. But a Government having the confidence of the House would still be able to prevent any appropriation Bill which did not have its support from being passed.

4.602 In our view, there are good reasons for retaining in the Constitution the general principle which section 56 expresses. It is a principle which ensures that appropriation and supply Bills reflect a Government's overall policies in regard to public expenditures. Existing parliamentary procedures do not make it impossible for private members of Parliament to offer suggestions for change in the appropriation Bills which a Government has initiated. It is true that when an amendment is moved to increase the proposed appropriation, to extend its objects and purposes or to alter its destination, the amendment cannot be passed unless the Executive Government first approves it and does so by formal message from the Governor-General. But the fact remains that parliamentary processes do provide opportunities for private members to criticise the appropriations proposed by the Government and to suggest alterations for the Government's consideration.

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445 ibid.

446 ibid. The Committee referred also to an article on the subject by Senator Baume in *The Australian*, 5 May 1986.

447 S2705, 16 October 1987

448 S2679, 9 October 1987.

4.603 In the case of special appropriation Bills, (ie Class 2 Bills), the procedure is for a private member to move that the Bill be withdrawn and redrafted with a view to bringing forward another Bill which incorporates the desired changes. Such a motion, if passed, does not effect an amendment of the Government's Bill. It is merely declaratory of the opinion of the House and its passage by the House indicates that even the Government's supporters in the House believe that the Bill should be revised.[449]

4.604 We are not unsympathetic to the argument that the Parliament should not be beholden to the Executive Government for the funding of its activities. Section 56 does, of course, mean that a Parliament's capacity to perform its functions, including that of scrutinising Executive acts, can be impaired by the Executive's refusal to approve the requests of the parliamentary departments for funding at the level they desire. But like the minority of the Advisory Committee, we are not convinced that the problem should be resolved by the extreme measure of total repeal of section 56. Nor are we persuaded that the problem can be satisfactorily resolved by introduction of a special constitutional provision for the funding of Parliament.

4.605 In this connection it is relevant to note that, since 1982-83, there have been separate annual appropriation Bills for the parliamentary departments, that is, for the Senate, the House of Representatives, the Parliamentary Reporting Staff, the Parliamentary Library, and the Joint House Department. These cover all recurrent and capital expenditure items administered by the parliamentary departments and include advances to the presiding officers of the two Houses. The Bills are prepared on the basis of estimates prepared within the departments, subject to the approval of the Minister of Finance. In the case of the Senate, the estimates are prepared by a standing committee known as the Appropriations and Staffing Committee.

4.606 This Committee was established for the first time in March 1982[450] following the report of the Select Committee on Parliament's Appropriations and Staffing (the Jessop Committee). The appointment of the Select Committee, in turn, followed expressions of concern by senators, over a period of years, about the practice of including appropriations for the parliamentary departments within the annual appropriation Bills for the ordinary annual services of the Government. Appropriations for the parliamentary departments, it had been argued, were not properly characterised as appropriations for the services of *the Government,* that is the Executive Government[451] The Select Committee recommended that the annual appropriations for the parliamentary departments be contained in separate Bills. It also expressed the view that there should be no need for such Bills to be recommended by a message from the Governor-General. It should be possible for Bills of this kind to originate in either House.

4.607 The Leader of the Government in the Senate (Senator Sir John Carrick) announced on 25 March 1982 that the Government had agreed to the Select Committee's proposal that there be separate appropriation Bills for the parliamentary departments which would not be treated as being for the ordinary annual services of the Government. But, on the general issue of Parliament's control of its own funding, he stated that the Government firmly believed that it needed

449 See Pettifer, op cit, 350.

450 *Hansard* (Senate), 19 November 1981, 2408-18; 26 November 1981, 2676-9; 25 March 1982, 1213.

451 See *Hansard,* 12 May 1964, 1075 (Senator Murphy); Report from the Committee appointed by Government Senators on Appropriation Bills and the Ordinary Annual Services of the Government (Cormack Committee 1965) – PP 55/1967, paras 98-101; *Hansard* (Senate), 10 September 1968, 479-82; Report of Senate Estimates Committee A, 1974.

to maintain control over the total amount of funds available for expenditure by the Parliament because of the constitutional responsibility of the Government for budgetary policy and for the level of public expenditure.

4.608 On the other hand, the Government had recognised that detailed control over expenditure items was unnecessary. It therefore proposed to approve overall figures for each department (broken down into capital and recurrent items) so that the departments and the presiding officers would have responsibility for determining the direction of expenditure.[452]

4.609 Although the Minister for Finance has the final say on whether the appropriation Bill for the parliamentary departments shall be in accordance with the departmental estimates, in practice the Minister consults with the relevant parliamentary officer or body before varying the estimates.[453]

4.610 While there are bound to be differences of opinion, from time to time, between the Government and the parliamentary departments over what is an adequate level of funding for those departments, we agree that the Government should continue to have the ultimate responsibility for approving the departmental estimates.

4.611 We therefore support the retention of the principle contained in section 56. The only alteration of the section we recommend is one to make it clear that the requisite recommendation to the House be by the Governor-General in Council rather than the Governor-General. This recommendation is in line with our general view that where it is well understood that a power vested in the Governor-General may be exercised only according to ministerial advice, the Constitution should reflect the established convention and do so in the customary way. A power vested in the Governor-General in Council is a power which the Governor-General may exercise only as advised by the Federal Executive Council. That body represents the will of the Ministry for the time being.

4.612 We deal with the Federal Executive Council and its composition in Chapter 5 of this Report.[454]

Disagreement between the Houses over non-money Bills

Recommendations

4.613 Section 57 of the Constitution should be renumbered as section 57B and altered as follows:

(i) It should apply only to proposed laws which may be amended by the Senate; that is, non-amendable money Bills should be excluded from its operation.

(ii) Simultaneous dissolution of the House of Representatives and the Senate following the second 'rejection', as defined, of a proposed law by the Senate should be permitted only in the fourth year of the term of the House of Representatives.

(iii) It should be made clear that the Governor-General acts on the advice of Ministers when dissolving the two Houses and, following the third rejection of a proposed law, when convening a joint sitting.

(iv) The drafting of the section should be clarified in the following ways:

452 *Hansard* (Senate), 25 March 1982, 1214.

453 See Senate Estimates Committees A-F – Report to the Senate on Departmental Estimates for 1986-87 – PP 216/1987, paras 4-6.

454 para 5.104-5.127.

- 'rejection' of a proposed law by the Senate should be defined to include the concepts of 'failure to pass' and 'passage with amendments to which the House of Representatives will not agree';
- the only amendments to a proposed law which should be considered and voted on at a joint sitting are those which have been made by the Senate and not agreed to by the House of Representatives;
- it should be made explicit that the period which must elapse before the second passage of a proposed law by the House of Representatives runs from its rejection by the Senate;
- the intervening period should be expressed as 'ninety days' rather than 'three months'.

(v) Affirmation by a special majority of members at the joint sitting should be required before:

- an amendment to a proposed law shall be taken to have been agreed to;
- a proposed law shall be taken to have been duly passed by both Houses of the Parliament.

The special majority should consist of an absolute majority of the total number of members of both Houses and at least half the total number of senators and members chosen for or in a particular State, in at least half the States.

(vi) A proposed law should not lose its identity as the proposed law which is the subject of the section if it contains only such alterations as are necessary by reason of the time which has elapsed since its introduction or which represent amendments made by the Senate.

(vii) Section 58 (assent to Bills) should not apply to a proposed law passed at a joint sitting unless the Speaker of the House of Representatives has certified that it has complied with all the requirements set out in section 57 as amended.[455]

Current position

4.614 Section 57 of the Constitution provides a means of resolving a disagreement between the House of Representatives and the Senate over a proposed law which has been passed by the House of Representatives. In general terms it provides that if the Senate twice rejects or fails to pass a proposed law or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve both Houses of Parliament simultaneously. (These are the only circumstances in which the Senate can be dissolved). If the disagreement persists after the election of a new Parliament, there may be a joint sitting of both Houses to vote on the proposed law. If the proposed law is passed by an absolute majority of the total number of members of both Houses, it becomes law after receiving the Royal assent.

4.615 Section 57 reads as follows:

> If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the

455 The Speaker's certificate will not be conclusive of compliance with the provisions.

Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queens's assent.

4.616 The Senate and the House of Representatives have been dissolved simultaneously on six occasions. On 4 June 1914 the Governor-General agreed to dissolve both Houses on the ground that the Senate had twice rejected the *Government Preference Prohibition Bill.* The dissolution took place on 30 July. In the election on 5 September the Government was defeated. The Bill was not reintroduced in the new Parliament.

4.617 On 17 March 1951 the Governor-General agreed to a double dissolution on the ground that the Senate had not yet passed the *Commonwealth Bank Bill* which had been presented for a second time on 11 October 1950, over five months earlier. The dissolution took place on 19 March and the election on 28 April. The Government was re-elected with a majority in both Houses and secured the passage of the Bill.

4.618 On 11 April 1974 the Governor-General dissolved both Houses on the ground that the Senate had twice rejected six Bills, a Bill for one vote one value on 29 August 1973, two Bills concerning representation of the Territories in the Senate on 14 November 1973, two Medibank Bills on 9 April 1974 and the *Petroleum and Minerals Authority Bill* on 10 April 1974. At the election on 18 May 1974 the Government was re-elected without a majority in the Senate but with an absolute majority of the total number of members of the two Houses. In the new Parliament the Senate rejected three of the Bills and was evenly divided on three others. (Under section 23 of the Constitution, they were therefore deemed to have passed in the negative.) The six Bills were passed at a joint sitting on 6 and 7 August 1974.

4.619 On 11 November 1975 the Leader of the Opposition was commissioned as caretaker Prime Minister on condition that he recommend a double dissolution on the basis of 21 Bills which the Senate had twice rejected on dates between 11 December 1974 and 8 October 1975. At the election on 13 December 1975 the new Prime Minister was elected with a majority in both Houses but none of the Bills was reintroduced.

4.620 On 10 March 1982 the Senate rejected nine sales tax Bills for a second time. The House of Representatives could not continue beyond 25 November 1983, three years from its first meeting; any dissolution, therefore, could not take place within six months of that date. The double dissolution was proclaimed on 4 February 1983, almost 11 months after the necessary circumstances had arisen. Four other Bills fulfilled the conditions for a double dissolution, a social service Bill which had been rejected by the

Senate for the second time on 25 March 1982 and three education Bills which had been rejected for the second time on 19 May 1982. The Government was defeated at the election on 5 March 1983 and none of the Bills was reintroduced.

4.621 On 2 April 1987 the Senate rejected the *Australia Card Bill* a second time. On 27 May the Prime Minister advised and the Governor-General approved a double dissolution. It was proclaimed on 5 June. At the election on 11 July the Government was re-elected without a majority in the Senate but with an absolute majority of the total number of members of the two Houses. The Bill was not reintroduced.

4.622 The double dissolutions of 1914, 1951 and 1974 were founded on eight Bills in all, of which seven were subsequently enacted. The double dissolutions of 1975, 1983 and 1987 were founded on 35 Bills in all, none of which was subsequently reintroduced.

4.623 The political exigencies and rationalisations of the time have produced wide variations in the form and publication of communications which have passed between Prime Ministers and Governors-General in respect of double dissolutions. The note accompanied by a memorandum which the Prime Minister sent to the Governor-General on 4 June 1914 and the three subsequent notes which they exchanged on the same day were tabled in Parliament on 8 October, the opening date of the new Parliament. The letter which the Prime Minister sent on 16 March 1951 with opinions from the Attorney-General and Solicitor-General and the Governor-General's reply of the following day were tabled with a foreword by the Prime Minister on 24 May 1956.

4.624 The letter which the Prime Minister sent on 10 April 1974, accompanied by a joint opinion by the Attorney-General and Solicitor-General and another opinion by the Attorney-General, a further letter which the Prime Minister sent on 11 April and the Governor-General's reply of that date were tabled with a foreword by the Prime Minister on 30 October 1975. The Governor-General himself published immediately the letter and statement of reasons which he gave to that Prime Minister on 11 November 1975. On 20 February 1979, 15 months after the Governor-General had resigned, the new Prime Minister tabled an opinion which the Solicitor-General gave on 12 November 1975 and related correspondence with a foreword by himself.[456]

4.625 On 4 June 1984 the Prime Minister tabled the letters which his predecessor delivered to the Governor-General and the reply which the Governor-General gave on 3 February 1983 about the double dissolution proclaimed the following day. On 23 November 1987 the Prime Minister tabled his letter to the Governor-General and the Governor-General's reply of 27 May concerning the double dissolution which took place on 5 June.

4.626 The 1974 double dissolution and subsequent joint sitting gave rise to three cases in which the High Court considered the meaning of section 57: *Cormack v Cope*,[457] *Victoria v Commonwealth and Connor (PMA Case)*[458] and *Western Australia v Commonwealth (Territory Senators Case)*.[459] As a result, the following points may be regarded as settled:

456 On the same day he tabled, with a foreword by himself, the letter he sent to the former Governor-General on 26 October 1977 and the reply of 27 October concerning the issue of writs for the general election of members of the House of Representatives and Territorial senators on 10 December and an invitation to the Governor of each State to issue writs for the election of half the senators for his State on the same day. The terms of these senators, elected on 13 December 1975, were due to expire on 30 June 1978. The terms of the members of the House of Representatives were to expire on 17 February 1979. This has been the only occasion on which correspondence has been tabled concerning premature elections.

457 (1974) 131 CLR 432.

458 (1975) 134 CLR 81.

459 (1975) 134 CLR 201.

(a) The provisions of section 57 are justiciable in relation to whether an occasion has arisen on which a joint sitting may be convened and whether legislation passed at the joint sitting is valid. In the *PMA Case* the High Court ruled that one of the six Bills passed at the joint sitting, the Petroleum and Minerals Authority Bill 1973, was invalid on the basis that the requisite three months had not passed between the Senate's failure to pass the Bill and its second passage by the House of Representatives. The majority judges indicated, however, that they did not regard the dissolution of the Parliament as justiciable. In their view, if the double dissolution had been granted on the basis of the *Petroleum and Mineral Authorities Bill* only and thus unauthorised by section 57, the ensuing elections would ensure that the new Parliament would be legitimate. This means that the legitimacy of the Parliament elected following a double dissolution under section 57 cannot be challenged, but a law enacted by a joint sitting of that Parliament may be ruled invalid on the basis of events preceding the double dissolution.

(b) The section operates distributively, so that a double dissolution may be granted or a joint sitting convened in relation to more than one Bill.[460] This means that a Government can build up a 'stockpile' of Bills on which to base a double dissolution and, potentially, have them all passed at a joint sitting. It is an open question whether a declaration as to the invalidity of the dissolution could be obtained before a proclamation dissolving both Houses.[461]

(c) There is no time limit within which a double dissolution must occur following the second rejection of a Bill by the Senate (provided that, as specified by the section, it does not take place within six months before the expiry of the House of Representatives).[462]

(d) The three months interval which must elapse before the second passage of the Bill by the House of Representatives runs from the Senate's rejection of, or failure to pass, the Bill. The expression 'fails to pass' involves the notion that a time has arrived when, allowing for a reasonable period for deliberation, the Senate ought to decide whether or not to pass the Bill or make amendments to it for the consideration of the House of Representatives.[463]

4.627 The cases on section 57 have not resolved all aspects of its interpretation. Indeed the court cannot be expected to define the expression 'fails to pass' any more precisely than it has done in the *PMA Case*. The problem is a conceptual one. Each stage of the procedure set out by section 57 may be triggered by the Senate's failure to pass a particular Bill but it is impossible to say precisely when a failure to do something, that is, a non-event, occurs. Consequently, there may be doubt about whether a Bill has satisfied the requirements of the section and whether the Government can properly advise the Governor-General to dissolve both Houses.

4.628 The meaning of the section is also unclear in relation to a Bill passed by the Senate 'with amendments to which the House of Representatives will not agree'. It is not clear whether the three months begin to run from the date of passage by the Senate or the decision of the House not to accept the amendments. Doubts may also arise as to when it can be considered that the House 'will not agree' to the Senate's amendments.

460 *Cormack v Cope.*
461 See, for example, *PMA Case* (1975) 134 CLR 81, 156-7 (Gibbs J).
462 *First Territories Representation Case.*
463 *PMA Case.*

Issues

4.629 The major issues which have emerged in our review of section 57 may be summarised as follows:

(a) Should the procedure set out in the section apply to all Bills passed by the House of Representatives?

(b) Should a procedure for resolving a disputed Bill or Bills involve a double dissolution and an ensuing election?

(c) If so, should the Government be able to advise the Governor-General to dissolve both Houses at any time after the second rejection of a particular Bill or Bills?

(d) What should be the function of the Governor-General in relation to section 57?

(e) Should the section be clarified and, if so, how?

(f) In view of our recommendation to break the nexus in size between the House of Representatives and the Senate, should the requirement that a proposed law be passed by an absolute majority at a joint sitting be altered?

Previous proposals for reform

4.630 ***Senate Select Committee on the Constitution Alteration (Avoidance of Double Dissolution Deadlocks) 1950.*** The Committee recommended as follows:

> that when the circumstances have arisen that would under the broad provisions of section 57 of the Constitution justify the granting of a double dissolution, or if an ordinary Public Bill has not become law within six months – and two months in the case of what, without precise definition, we call a Money Bill – of the receipt of the Bill by the Senate from the House of Representatives, then the dispute or the Bill as the case may be should be referred to a joint sitting of the two Houses, at which the will of an absolute majority of the total number of the members of the Senate and the House of Representatives shall prevail. This proposal would necessitate the repeal and redrafting of section 57 of the Constitution and would result in the elimination of the provisions for a double dissolution. The opportunity could – with advantage – be taken to clear up ambiguities in the present wording of section 57 . . . .[464]

4.631 ***Joint Committee on Constitutional Review.*** The Committee concluded that section 57:

> was no longer appropriate to modern conditions of parliamentary government and shoud be modified to draw a distinction between money bills and other bills and to provide the government with more than one possible means by which the resolution of a deadlock might be obtained.[465]

In summary, the procedure it recommended for resolution of deadlocks over proposed laws other than annual supply Bills or Bills imposing taxation was as follows:

1. A deadlock is deemed to arise between the two Houses if:

   (a) the Senate has not passed a proposed law transmitted to it from the House of Representatives within 90 days and the session has not ended; and

   (b) the House of Representatives passes the proposed law again in the same or the next session; and

464 Paper No. S1 1950-1951, xxvii.
465 1959 Report, 19.

(c) the Senate either rejects it again or has not passed it within 30 days after transmission from the House.

2. When a deadlock is deemed to arise the Governor-General may:

(a) convene a joint sitting to vote together on the proposed law as last passed by the House of Representatives; or

(b) dissolve the Senate and the House of Representatives simultaneously.

3. If the proposed law is affirmed at a joint sitting by an absolute majority of the total number of members of both Houses and by at least half the total number of members of both Houses drawn from a particular State, in at least half the States, it is deemed to have passed both Houses.

4. If, following a double dissolution or the dissolution or expiry of the House of Representatives within one year after the deadlock has arisen, the House of Representatives passes the proposed law again and the Senate rejects it again or has not passed it within 30 days, the Governor-General may convene a joint sitting.

5. If the proposed law is passed by an absolute majority of the total number of members of both Houses, it is deemed to have been passed by both Houses.

The amendments proposed by the 1959 Joint Committee were contained in a Bill, *Constitution Alteration (Disagreement between the Senate and the House of Representatives) 1964*, which was introduced by the Leader of the Opposition in the Senate. A debate took place but no vote was taken.

4.632 ***Australian Constitutional Convention.*** Consideration of section 57 by a Standing Committee of the Australian Constitutional Convention was overtaken by the events of 1974 and 1975. Since that time, debate concerning section 57 has been in the context of the role of the Senate in relation to supply and the powers of the Governor-General. In relation to the latter, the Perth (1978) session requested one of its Standing Committees to consider the conventions (or accepted practices) which applied under the Constitution. The Standing Committee's recommendation concerning the Governor-General's role under section 57 was that the Constitutional Convention should recognise and declare that the following practice should be observed as a convention in Australia:

> The Governor-General may refuse advice to dissolve both Houses if he is not satisfied that ... the conditions in section 57 have been complied with ...[466] recommendation was considered by the Adelaide (1983) session but referred to the Standing Committee for further consideration. The following practices were finally adopted without division by the Brisbane (1985) session:
>
> K. The Governor-General, having satisfied himself on the advice of the Prime Minister that the conditions in section 57 of the Constitution have been met and that a double dissolution should be granted dissolves both Houses of the Parliament simultaneously on the advice of the Prime Minister.
>
> L. All advice tendered by the Prime Minister to the Governor-General in connection with a dissolution of the House of Representatives or a dissolution of both Houses of Parliament and the Governor-General's response thereto, should be committed to writing and published before or during the ensuing election campaign.
>
> ...

466 Fourth Report of Standing Committee D To Executive Committee, 37, ACC Proc, Adelaide 1983, vol II.

P. The Governor-General, having satisfied himself on the advice of the Prime Minister that the conditions in section 57 of the Constitution have been met, acts on prime ministerial advice in exercising his power to convene a joint sitting of the members of the Senate and of the House of Representatives.[467]

Disagreements between the Houses of the State Parliaments

4.633 In considering the issues raised by section 57 we have taken into account the manner in which disagreements over proposed laws are dealt with by the Parliaments of the States. In summary, the position is as follows:

4.634 ***New South Wales.*** The *Constitution Act 1902* was amended in 1933[468] to include machinery for the resolution of deadlocks over supply and other Bills. With respect to 'other Bills' it provides, in summary, that if the Legislative Council twice rejects a Bill passed by the Assembly, or fails to pass it within two months of its transmission to the Council, and the deadlock is not resolved by a free conference between managers of each chamber or debate at a joint sitting, the Assembly may, by resolution, direct that the Bill be put to referendum. If a majority of the electors voting approve the Bill it becomes law.[469]

4.635 ***Victoria.*** In 1984 the *Constitution Act 1975* was amended[470] to provide for a qualified fixed term for the House of Assembly and to change the fixed term of Legislative Councillors to a term of two Assemblies. With respect to Bills other than supply Bills the amended Act provides that, if the Council rejects a Bill passed by the Assembly and the Assembly resolves that it is a 'Bill of special importance' and passes it for the second time, the Governor may dissolve the Assembly if the Bill is rejected again by the Council. A Bill is deemed to have been rejected if it is not passed within two months after transmission to the Council. The Governor cannot dissolve the Assembly pursuant to this provision after one month has elapsed since the last rejection of the Bill.

4.636 ***Queensland.*** The Parliament has consisted of only the Legislative Assembly since 1922.

4.637 ***Western Australia.*** There is no statutory provision for the resolution of deadlocks. *A Royal Commission into Parliamentary Deadlocks* was established in 1984 and reported in February 1985.[471] It recommended that a procedure based on section 57 of the Federal Constitution should be adopted to resolve deadlocks over Bills other than supply Bils, with the proviso that the double dissolution option should only be available within three months of the second rejection of a Bill by the Council. Its recommendations have not been implemented to date.

4.638 ***South Australia.*** The *Constitution Act 1934* was amended in 1985[472] along similar lines to Victoria's. However, it draws no distinction between supply Bills and other Bils and retains a double dissolution provision to resolve a deadlock in certain circumstances.

4.639 ***Tasmania.*** There is no statutory deadlock provision. In 1981 the Royal Commission into the *Constitution Act 1934* was established to inquire into the settlement of deadlocks between the Legislative Council and Legislative Assembly. It recommended that the

467 ACC Proc, Brisbane 1985, vol I, 416-7. All the principles and practices which the ACC resolved shouldbe observed as conventions in Australia are set out in Chapter 2, para 2.224.
468 *Constitution Amendment (Legislative Council) Act 1933.*
469 *Constitution Act 1902* (NSW), section 5B.
470 *Constitution (Duration of Parliament) Act 1984*
471 WA Royal Commission into Parliamentary Deadlocks, *Report* (1984-5).
472 *Constitution Act Amendment Act 1985.*

following procedure should apply to all Bills other than constitutional amendment Bills, Bills dealing with taxation and appropriation and supply Bills (except appropriations for new policies):

> (a) Where the Council has not passed any bill within three months of its receipt from the Assembly, the Assembly may, by resolution, declare it to be a 'prescribed bill' or purposes of the Constitution Act.
>
> (b) If the Council has not passed a prescribed bill within six months of its having been so declared, the Governor may, on the advice of his ministers, either:-
>
> > (i) Issue a writ for a referendum of electors to decide whether the bill should become law; or
> >
> > (ii) Issue a writ for a referendum of electors to decide any questions in relation to the bill that have been agreed upon by resolution of both Houses; or
> >
> > (iii) Dissolve the Assembly.
>
> (c) A dissolution of the Assembly shall not be deemed to be in pursuance of paragraph (b) above if: –
>
> > (i) More than three months have elapsed since the Council rejected a prescribed bill, or voted that it should be read on this day six months; or
> >
> > (ii) More than nine months have elapsed since the Assembly declared a bill to be prescribed; or
> >
> > (iii) The dissolution occurred within six months of the expiration of the term of the Assembly.
>
> (d) If the Assembly is dissolved pursuant to the above provisions a prescribed bill may, if the Assembly so resolves, be presented to the Governor for assent without the approval of the Council at any time within three months of the first sitting of the Assembly after the return of the election writs. There should be no 'stockpiling', i.e. the procedure shall be available in the case of one bill only.
>
> (e) If a prescribed bill is approved by electors at a referendum it may be presented to the Governor for assent without approval of the Council at any time within three months of the return of the referendum writ, if the Assembly so resolves.[473]

These recommendations have not been implemented to date.

Submissions

4.640 Only a few submissions were received on aspects of section 57 other than its application to 'supply Bills'. Several submissions favoured altering section 57 to provide that, in the event of a second rejection of a Bill by the Senate, the Governor-General may *either* convene a joint sitting *or* dissolve both Houses simultaneously.[474] Several others favoured the Senate having the power only to delay a Bill for a certain period, not to reject it.[475] Other proposals were that a Bill rejected by the Senate or passed with amendments with which the House did not agree should become law for one year, then lapse unless reintroduced and passed;[476] and that the Governor-General, acting on the advice of the Full High Court, should be empowered to direct that a referendum be held on a deadlocked Bill.[477]

4.641 Mr CP Long[478] suggested that the reasons given for the withdrawal of the Australia Card legislation raised doubts about the interpretation of section 57. In his view, the special machinery set up by the section must be deemed to apply 'not merely to the Act it

473 Tasmania, Royal Commission into the Constitution Act 1934, Report (1982) 72.
474 Mr Justice R Else-Mitchell S085, 23 January 1987; FJ Reid S805, 12 January 1987.
475 JH Miller S067, 23 April 1986 (but no delay in relation to defence Bills); L Jarman S122, 20 June 1986.
476 G Jensen S1003, 20 February 1987.
477 Q McNaughton S1075, 3 March 1987.
478 S3202, 3 February 1988.

produces, but also to its regulations; in other words the regulations, as in the case of their Act, must be placed before a joint sitting of both Houses.' In his opinion, the matter should be clarified.

4.642 A detailed submission on section 57 was provided by Professor James Crawford[479] He considered that, apart from money Bills, the deadlock procedure is broadly satisfactory. In particular, he thought that the power to call a double dissolution should not be limited out of any concern that the power may be abused. In his view, any abuse of power would be a matter for the electorate to take into account. In relation to the problem of when a failure to pass a Bill or to accept proposed amendments to one can be said to have occurred, Professor Crawford thought that any constitutional alteration would be likely to be wordy and cumbersome. He submitted that it would be more fruitful for the Senate and the House of Representatives to adapt their procedures or even to introduce new rules which would determine when, for the purposes of the House, a Bill would be regarded as having been rejected.

Reasons for recommendations

4.643 ***Money Bills.*** We recommend that the procedure set out in the present section should not apply to those categories of money Bills which the Senate may not amend, that is, appropriation Bills (with the exception of those appropriating funds for new policies) and taxation Bills. This recommendation and our proposal for the resolution of deadlocks over such money Bills is discussed in detail earlier in this Chapter.[480]

4.644 The following discussion relates only to Bills initiated by the House of Representatives which the Senate may amend. It does not include, however, Bills for the alteration the Constitution. These are dealt with in Chapter 13.

4.645 ***Timing of double dissolution.*** In our view, the present procedure for resolving disagreement between the Houses over Bills passed by the House of Representatives is unsatisfactory. While it is clear, both from the language of the section itself and upon the basis of precedent, that the procedure is not restricted to either the passage of vital Bills or to a situation where the Parliament has become unworkable, it is nevertheless open to abuse. If the conditions set out in the section are fulfilled, a Government can secure the dissolution of the Senate, as well as the House of Representatives, the only circumstances in which it can do so. A Government without a Senate majority could therefore obtain a double dissolution by the device of passing a Bill known to be totally unacceptable to the non Government party or parties.

4.646 It seems clear that the *Government Preference Prohibition Bill* which was the subject of the 1914 double dissolution was designed to provoke the opposition of the Senate and to bring about the conditions for a double dissolution. On that occasion, however it appears that the Parliament may well have been unworkable.[481] Sir Robert Menzies, discussing the double dissolution of 1951 in his memoirs, said that, frustrated by a hostile majority in the Senate and confident of victory in an election, he decided to 'work towards a double dissolution on a lively issue' and selected the *Commonwealth Bank Bill* for the purpose.[482]

479 S808, 7 January 1986.
480 para 4.475-4.590.
481 PP Vol 5 1914-17, 129.
482 RG Menzies, *The Measure of the Years* (1972) 43; See also 44-7.

4.647 Further, provided that a Bill exists which has been twice rejected in accordance with the section it is possible for a Government to bring about an election for both Houses at any time because there is no time limit within which a double dissolution must occur following the second rejection of a Bill by the Senate. In other words, a Government could use a disputed Bill or Bills as the justification for an early election (including a full Senate election) at a time it considered opportune for its own political success.

4.648 In an earlier part of this Chapter[483] we have set out our views on the timing and frequency of elections. We have recommended that the House of Representatives may not be dissolved during the first three years of its four year maximum term unless the Government loses the confidence of the House and no Government can be formed from the existing House. Obviously, that part of section 57 which provides for the simultaneous dissolution of both Houses is incompatible with that recommendation.

4.649 In considering this matter, we noted that both Victoria and South Australia, which have recently adopted terms for their lower Houses comprising a maximum of four years and a minimum of three years, provided an exception in the case of 'deadlocked' Bills. We concluded, however, that to allow for further exceptions to the minimum term would defeat the purpose of our proposals, that is, to provide for stability and certainty in our parliamentary system.

4.650 The history of the use of section 57 to bring about a double dissolution rather than to resolve a disagreement over proposed legislation confirmed us in that view. We consider that, in its present form, section 57 is detrimental to stable government. It is also detrimental to the review function of the Senate because the Senate is put at risk if it rejects a Bill.

4.651 It may also be argued that a general election is not an appropriate way to resolve conflict over proposed legislation because on most occasions the disputed Bill or Bills have attracted little or no attention during the election campaign. Further, the election results may not alter the balance of power in the two Houses with the result that, even though the Government may be able to obtain passage of its 'section 57 Bills' at a joint sitting, the Senate could continue to frustrate the Government's legislative program if it so wished. In other words, the election would not have resolved anything that could not have been resolved by a joint sitting without an intervening election.

4.652 Another argument against providing for a general election in this context is that, once members and senators are elected for a term of office, they should be responsible for resolving their own internal conflicts throughout that term.

4.653 For these reasons, we initially proposed that dissolution of the Parliament should not be part of the procedure for dispute resolution and that, instead, the Government should have the option of a joint sitting on disputed Bills. We announced this on 2 October 1987 at a press conference detailing the scheme we were considering proposing to the Government in relation to parliamentary terms, the Senate's power over money Bills and legislative deadlocks.

4.654 Our provisional proposals provoked widespread comment in the media and in Parliament and, as a result, we reconsidered our position on joint sittings. It was said that the effect of our proposal would have been that, in most circumstances, a Government could have achieved the passage of any legislation, notwithstanding the opposition of the

483 para 4.345-4.443.

Senate, within approximately six months of its introduction in the House of Representatives. That, however, would have depended on what provisions we would have recommended in relation to a special majority which we had not at that time formulated.

4.655 Since the option of a joint sitting is not essential to our recommendation that the House of Representatives have a minimum term of three years, we have decided, on balance, that a modified version of the present system is to be preferred.

4.656 It is clear that the Senate's rejection of or failure to pass an ordinary, amendable Bill is not critical to the life of a Government as would be its rejection or failure to pass vital financial legislation. We have decided, therefore, to recommend that, for the first three years of a Government's term, the two Houses should be left to resolve disputed legislation between themselves.

4.657 In the fourth year, if a Bill or Bills exist which satisfy the requirements of section 57 (as altered), we consider that a Government should be able to secure a double dissolution on that basis and, if it is returned at the ensuing election, have the disputed legislation put to a joint sitting.

4.658 In other words, the Government should not be able to advise the Governor-General to dissolve both Houses at any time after the second rejection of a particular Bill or Bills by the Senate.

4.659 We recommend that simultaneous dissolution should only be permitted in the fourth year of the term of the House of Representatives.

4.660 ***Function of the Governor-General.*** Section 57 provides that, following the second rejection of or failure to pass a Bill by the Senate, 'the Governor-General may dissolve the Senate and the House of Representatives simultaneously.' There has been considerable speculation about whether, notwithstanding the conventions of responsible government, the Governor-General has any discretion to refuse a Prime Minister's request for a double dissolution. As noted earlier in our general discussion of the 'reserve powers' of the Governor-General in Chapter 2,[484] the debate has covered two questions: whether the Governor-General should be satisfied *independently* that the conditions of section 57 have been met and whether, if satisfied that they have been met, the Governor-General has any discretion to refuse to grant a double dissolution.

4.661 Whether the conditions set out in section 57, as presently formulated, have been fulfilled and therefore constitute the legal basis for dissolution of the Parliament, may involve issues of law. The legal issues can be resolved by the High Court at a later date and a law wrongly passed in reliance on the section can be invalidated, as occurred in relation to the *Petroleum and Minerals Authority Act 1973.*

4.662 Such a course of action would not, of course, be of assistance in a case where the dissolution (at least, of the Senate) might itself be illegal. As noted above,[485] it is highly unlikely that the Court would declare void a dissolution and subsequent election, even if it were established that they were unauthorised by section 57. We will therefore recommend in Chapter 6[486] that, on the application of the Governor-General in Council, the High Court should be empowered to issue a declaratory judgment relating to any question of law as to the manner and form of enacting a proposed law. This will allow the Court to determine, prior to a proclamation of dissolution, whether the requirements of

484 para 2.214-2.223.
485 para 4.626.
486 para 6.237-6.271.

section 57 have been fulfilled. In the face of a negative ruling by the Court, any advice already given to the Governor-General to dissolve both Houses pursuant to section 57 would be withdrawn.

4.663 If a number of our other recommendations relating to section 57 are accepted, the uncertainty surrounding its operation should, in any event, be removed. It should be clear, simply from a reading of the parliamentary record, whether disputed legislation fulfills the conditions precedent for a double dissolution. We discuss this further below.

4.664 The second matter, which has been the subject of some disagreement over the years, is whether the Governor-General, even if satisfied that the requirements of the section have been met, may refuse to dissolve the Parliament. It has been argued that a Governor-General is entitled to be satisfied that either the proposed law over which the Houses have been unable to agree is of such public importance that it should be referred to the electors or that the Parliament is in such a state of practical deadlock that it is unworkable. It is noteworthy in this regard that Prime Ministers, in their letters of advice to the Governor-General of the day, have not confined themselves to establishing that the requirements of section 57 have been complied with but have pointed to difficulties within the Parliament and/or the importance of the disputed legislation.

4.665 We do not, however, regard this as evidence in favour of an independent role for the Governor-General. In our view, it is to be regarded as setting out, as a matter of public record, the political justification for a double dissolution. Any exercise of political judgment by a Governor-General is inappropriate and could be expected to cause serious constitutional difficulties and public controversy.

4.666 In practice, a Governor-General would have no choice but to grant a double dissolution to a Prime Minister who retained the confidence of the House of Representatives and threatened to resign unless his or her advice was accepted. In this situation the Governor-General would be unable to find a replacement Prime Minister.

4.667 Therefore, we recommend that the relevant part of section 57 be altered to read, '... the Governor-General in Council may dissolve the Senate and the House of Representatives simultaneously.' The addition of the words 'in Council' make it clear that the Governor-General may act only on the advice of the Ministry. For the same reason, 'in Council' should be added to the words 'Governor-General' in the context of the convening of a joint sitting, so that the relevant part reads, '... the Governor-General in Council may convene a joint sitting of the members of the Senate and the House of Representatives.'

4.668 ***Clarification of section 57.*** The drafting of the present section, particularly the use of the expression 'fails to pass', is unsatisfactory. We have noted above[487] the conceptual difficulty involved in attempting to ascertain precisely when a non-event can be said to occur.

4.669 Further, even if it is accepted that the High Court, as the 'guardian of the Constitution' should be able to review the internal workings of Parliament to ensure that procedures set out in the Constitution are adhered to, there is a problem as to how it should inform itself in relation to the Senate's failure to pass a Bill. How much regard should it have, for example, to statements in *Hansard* or the press about the Senate's intention? This highlights the problem with the wording of the section for there are no objective criteria to determine when a failure to pass has occurred.

487 para 4.626-4.627.

4.670 We also noted above[488] that, in relation to a Bill passed by the Senate 'with amendments to which the House of Representatives will not agree', it is unclear whether the three months which must elapse before the House passes the Bill for the second time runs from the date of passage by the Senate or the decision of the House not to accept the amendments. Further, it might not always be clear when it can be said that the House 'will not agree' to the Senate's amendments.

4.671 These difficulties can and should be resolved in the interests of certainty. It is intolerable that a risk exists that the Parliament might, in good faith, be dissolved in reliance on a Bill which, on one interpretation of events, fulfills the requirements of the section but which is later held not to have done so. This risk should, so far as possible, be removed. Similarly, the risk of legislation passed at a joint sitting being invalidated because vague or ambiguous procedural requirements were not met, should be removed.

4.672 Therefore, we recommend that the relevant steps of the procedure set out in the section should be triggered only by the 'rejection' of a Bill by the Senate. If, at the expiration of sixty days after the transmission of a Bill, the Senate has not passed it or has passed it with amendments to which the House of Representatives has not agreed, the Senate is to be taken to have rejected it. In our view, sixty days allows the Senate adequate time to consider a Bill.

4.673 Another aspect of section 57 which requires clarification relates to the amendments to a Bill which may be considered and voted on at a joint sitting. The application of section 57 in respect of a particular Bill at each stage of the procedure depends upon that Bill retaining its identity as the Bill originally passed by the House of Representatives, or that Bill with such amendments only as have been made, suggested or agreed to by the Senate. Notwithstanding this, the final paragraph of the section provides for the joint sitting to vote upon the proposed law as last proposed by the House of Representatives '. . . and upon amendments which have been made therein by one House and not agreed to by the other . . .'.

4.674 On its face, this appears to allow for the possibility of the House of Representatives amending its own Bill during the period following its third rejection by the Senate but before a joint sitting. Assuming a Government had the numbers, it could then have the amended Bill passed at the joint sitting.

4.675 We do not think that that result was intended by those who drafted the section. It would make nonsense of the requirement that the Bill maintain its identity throughout the procedure and would be very unfair to the Senate. If the House of Representatives amends a Bill without the agreement of the Senate, the process should start again. We recommend, therefore, that it be made clear that the only amendments which can be considered and voted on at a joint sitting are those which have been made by the Senate and not agreed to by the House of Representatives.

4.676 In addition, we recommend:

(i) that it be made explicit that the period which must elapse before the second passage of a proposed law by the House of Representatives runs from its rejection by the Senate; and

(ii) that the intervening period should be expressed as 'ninety days' rather than 'three months'.

488 para 4.628.

4.677 ***Majority requirement at joint sitting.*** We have discussed above our recommendation that the size of the House of Representatives should not be tied to being twice the size of the Senate and our decision not to make this subject to the condition that the present weight of a senator's vote in relation to that of a member of the House of Representatives be preserved at a joint sitting.[489]

4.678 We acknowledge, however, that concern has been expressed that the position of the less populous States (which are more strongly represented in the Senate than in the House) might be weakened if the nexus is broken and only an absolute majority is required for the passage of legislation at a joint sitting.

4.679 We have decided, therefore, to recommend that a special majority which takes into account State groupings of senators be required. To this end, we have adopted the formula proposed by the 1959 Joint Committee, that is, a proposed law will be deemed to have passed both Houses if it is affirmed at a joint sitting by an absolute majority of the total number of members of both Houses and by at least half the total number of members of both Houses drawn from a particular State, in at least half the States.[490] This means that at least half the total number of members and senators in each of at least three States must vote for the Bill in addition to an absolute majority of the whole Parliament.

4.680 We also recommend that the same special majority be required before an amendment to a proposed law shall be taken to have been agreed to at a joint sitting.

4.681 ***Identity of proposed law.*** It has been pointed out by Mr CK Comans, CBE, QC, former First Parliamentary Counsel,[491] that the double dissolution of 1983 demonstrates a possible problem of identity of proposed laws which are the subject of section 57. Each of nine Bills (relating to sales tax) listed in the double dissolution Proclamation contained a clause providing for its commencement on 1 January 1982. The Bills were originally transmitted to the Senate on 27 August 1981 but were not passed. They were introduced for the second time in the House of Representatives on 16 February 1982 but because of 'constitutional considerations' still expressed to come into operation on 1 January 1982. The Government took the view that section 57 required that the Bills be in exactly the same form as those originally passed by the House. The Treasurer announced, however, that a new commencement date of 29 March 1982 had been set and that, once the Bills had passed both Houses, the Government intended to introduce a further Bill altering the commencement date. According to Comans:

> it can surely be argued that the Bills, as rejected by the Senate on the second occasion, were not the same proposed laws as were not passed on the first occasion even though the text remained unchanged. The Minister's own statement recognized that the Bills could no longer have the operation originally intended and provided by their texts.[492]

He suggested that the awkward position which arose in relation to the sales tax Bills could have been avoided if section 57 had included a paragraph along the lines of the following provision in section 2(4) of the *Parliament Act 1911* (UK):

> (4) A Bill shall be deemed to be the same Bill as a former Bill sent up to the House of Lords in the preceding session if, when it is sent up to the House of Lords, it is identical with the former Bill or contains only such alterations as are certified by the Speaker of the House of Commons to be necessary owing to the time which has elapsed since the date of the former Bill . . . .

489 para 4.280-4.299.

490 The recommendation of the Joint Committee related only to a joint sitting held in the absence of a prior double dissolution.

491 CK Comans, 'Constitution, Section 57 – Further Questions' (1985) 15 *Federal Law Review* 243, 247-8.

492 id, 248

4.682 We agree that section 57 should be altered to resolve the problem posed by a Bill which is in identical terms to the original Bill but requires alteration by reason of the time which has elapsed since its introduction. We recommend a provision along the lines of the United Kingdom provision quoted above, but we think that the test should be an objective one rather than dependent upon certification by the Speaker.

4.683 Therefore, we recommend that a proposed law should not lose its identity as the proposed law which is the subject of the section if it contains only such alterations as are necessary by reason of the time which has elapsed since its introduction or which represent amendments made by the Senate.

4.684 ***Royal assent.*** We have recommended a number of changes to section 57 designed to remove the present uncertainty surrounding its operation. We have also emphasised that the Governor-General, in dissolving both Houses simultaneously and in convening a joint sitting under the section, acts on the advice of Ministers. In Chapter 2[493] we recommend that section 58 be altered to provide expressly that the Governor-General acts on the advice of Ministers in relation to assenting to Bills passed by both Houses.

4.685 In order to ensure that the Governor-General is not placed in an awkward position, by reason of any uncertainty about whether a Bill has complied with section 57, we recommend that section 58 not apply to a Bill passed at a joint sitting unless the Speaker of the House of Representatives has certified that it has complied with all the requirements of section 57. The Speaker's certificate would not be conclusive (that is, whether an Act was authorised by section 57 would still be a justiciable issue) but it would form part of the Government's advice to the Governor-General.

SALARIES OF MEMBERS OF PARLIAMENT

Recommendation

4.686 We *recommend* that section 48 be omitted and that the following section be substituted:

> Each senator and each member of the House of Representatives shall receive such remuneration as the Parliament may fix.

Current position

4.687 Section 48 of the Constitution provides:

> Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat.

In exercise of its power under section 51(xxxvi.) of the Constitution,[494] the Federal Parliament has, from time to time, enacted laws to vary the allowances payable to senators and members of the House of Representatives under section 48. For purposes of appropriations, however, a distinction is made been salaries payable to members of the Parliament and allowances for travel and other expenses. There are separate Acts of the Parliament making special (that is, standing) appropriations for both purposes.[495]

493 para 2.167-2.174.

494 The power to make laws with respect to 'matters in respect of which this Constitution makes provision until the Parliament othewise provides'.

495 See *Parliamentary Allowances Act 1952; Remuneration Tribunal Act 1973.*

Previous proposals for reform

4.688 ***Australian Constitutional Convention.*** Section 48 was considered by the Australian Constitutional Convention at the Melbourne (1975) and Hobart (1976) sessions as part of its general review of expended and outmoded provisions in the Constitution. It was agreed that the section is out of touch with reality and it was resolved that it be omitted and that the following section be substituted:

> The Parliament shall determine, or provide for the determination of, the remuneration, salaries and allowances of each Senator and each member of the House of Representatives to be reckoned from the day on which he takes his seat.[496]

4.689 The Bill, *Constitution Alteration (Removal of Outmoded and Expended Provisions) 1983* made no provision for alteration of section 48.

Reasons for recommendation

4.690 We agree with the Australian Constitutional Convention that section 48, like section 66 which deals with salaries payable to Ministers, is outmoded and should be replaced by a new provision. We think it desirable that the Parliament should have an express power to make laws on the remuneration of members of Parliament. The only question is, therefore, how the new provision should be expressed.

4.691 We are satisfied is that the term 'allowances' is no longer apt to describe the subject matter of the power and that it would be preferable to employ the term 'remuneration'.

4.692 Terms such as 'salaries', 'allowances' and 'remuneration' have been employed in a variety of statutory contexts, but none of them has a fixed or special legal meaning. Examination of judicial decisions in which the terms have been interpreted suggests that the term 'remuneration' has a wider connotation than 'salaries' and 'allowances'. A salary is thus but one form of remuneration. An allowance may also be a form of remuneration, but, when payable in connection with a person's service as an employee, or as the holder of a public office, it usually connotes a payment in respect of costs such as costs of travel or costs of living away from a person's place of residence.[497]

4.693 We have no doubt that the term 'allowance', in the context of section 48 of the Constitution, would be interpreted liberally so as to encompass both payments by way of salary for services, and payments by way of allowances in the narrow sense. Nevertheless we consider it more in accord with modern English usage to describe the Federal Parliament's power to fix salaries payable to members of the Parliament, and to authorise payment to them of moneys to cover incidental costs incurred by them in discharging their duties, as a power to fix their remuneration.

PARLIAMENTARY PRIVILEGES

Recommendation

4.694 We *recommend* that section 49 of the Constitution be omitted and the following sections be substituted:

> 49. The powers, privileges and immunities of the Senate and of the House of Representatives, and of the members and committees of each House –
>
> (a) are such as are declared by the Parliament; and

496 ACC Proc, Melbourne 1975, 174; ACC Proc, Hobart 1976, 206-7.

497 See *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237, 242, 265, 269; *WJ & F Barnes Pty Ltd v Federal Commissioner of Taxation* (1957) 96 CLR 294, 302, 310; *Federal Commissioner of Taxation v Hatchett* (1971) 125 CLR 494.

(b) subject to such a declaration, are the powers, privileges and immunities that those Houses, members and Committees respectively possessed immediately before the commencement of the *Constitution Alteration (Parliamentary Privileges)* 19..[498]

Current position

4.695 Section 49 of the Constitution provides:

> The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

4.696 The effect of section 49 is twofold. First, it confers on the Houses of the Federal Parliament, their members and committees the powers, privileges and immunities of the House of Commons in the United Kingdom, its members and committees, as of 1 January 1901. Secondly, it empowers the Federal Parliament to enact legislation declaring the powers, privileges and immunities of each House, its members and committees.

4.697 The object of section 49 was to ensure that when the Federal Parliament came into being, its Houses, members and committees would have the same powers, privileges and immunities as the House of Commons, and its members and committees, and would not be in the position of colonial legislative assemblies whose inherent privileges were, under the common law, less extensive.[499] The section was similar to provisions enacted in Victoria in 1857 and in South Australia in 1872.

4.698 Broadly, Parliamentary privileges exist to facilitate the performance of Parliamentary functions and to protect Parliamentary institutions against improper interference and attacks on their authority. In England, assertions of privilege by the Commons had been central to the contests of the 17th century between the Crown and the Parliament for political supremacy. For the Commons, recognition of those privileges, and of the House's power to enforce them, had been seen as vital to the establishment and maintenance of their independence of the Crown.

4.699 The privileges of the Commons which, by virtue of section 49 of the Constitution, became the privileges of the Houses of the Federal Parliament, their members and committees included freedom of speech and debate,[500] freedom of members from arrest in civil causes, exemption from jury service, and exemption from attendance as witnesses before courts or other outside bodies, during sessions of Parliament and for 40 days before and after sessions. The powers and privileges acquired by the Houses of the Parliament also included the power to regulate their internal affairs and procedures;[501] the

498 Date of alteration to be inserted.

499 *Kielley v Carson* (1841-2) 13 ER 225; *Fenton v Hampton* (1858) 14 ER 727; *Doyle v Falconer* (1866) 16 ER 293; *Barton v Taylor* (1886) 11 App Cas 197; cf NSW, *Report from the Joint Select Committee of the Legislative Council and Legislative Assembly upon Parliament Privilege* (1984-5) 18.

500 In the terms of Article 9 of the *Bill of Rights 1689* which provided 'That the freedom of speech and debats or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament.'

501 See also section 50.

power to suspend and expel members; the power to make inquiries and to require the attendance of witnesses and the production of documents, and the power to appoint committees of members to carry out such inquiries; the right to require witnesses to give evidence on oath;[502] the power to try, and punish by committal to prison, breaches of privilege and contempt of the House; and the power to direct the Attorney-General to prosecute for contempts of the House which were also criminal offences.

4.700 The Houses' jurisdiction to adjudicate allegations of breach of privilege and contempt of Parliament involves exercise of judicial powers. Although Chapter III of the Constitution prohibits the exercise of the judicial powers of the Commonwealth except by the courts mentioned in section 71, the High Court has held that section 49 operates as an exception to this general rule.[503]

4.701 Courts in Australia, as in the United Kingdom, have accepted that their role in the administration of the law of Parliamentary privilege is a limited one. In appropriate cases they will determine whether what is asserted to be a privilege of Parliament exists and, if so, the scope of that privilege.[504] In certain cases the courts will themselves enforce the law of Parliamentary privilege, for example, by recognising that defamatory publications in the course of Parliamentary proceedings are not actionable or punishable, and by recognising the immunities of members in respect to certain court processes. On the other hand, until the enactment of the *Parliamentary Privileges Act 1987* (Cth), the scope for judicial review of adjudications by the Houses of Parliament was extremely limited. In the case of *Fitzpatrick and Browne*[505] the High Court, following English precedents[506] held that if a person has been imprisoned by order of a House of the Federal Parliament, and then seeks *habeas corpus,* or damages for false arrest or imprisonment, and the claim is met by production of a general warrant, that is, a warrant which states merely that the claimant has been adjudged by the House to be guilty of an unspecified breach of privilege or contempt of the House, and is directed to be imprisoned, the claim is sufficiently answered and must be dismissed. In other words, the court cannot inquire whether the privilege the claimant was found to have breached was a recognised privilege, or whether there was any evidence to support the House's finding. Likewise, the court cannot inquire into whether the claimant's conduct could reasonably have been adjudged to be in contempt of the House, or into whether the procedures adopted by the House conformed with the principles of natural justice.

4.702 Section 49[507] of the Constitution empowers the Federal Parliament to enact legislation declaratory of the powers, privileges and immunities of the Houses of the Parliament, their members and committees. This power is supplemented by section 51(xxxix.) which grants to the Parliament power to make laws with respect to, *inter alia,* 'matters incidental to the execution of any power vested by' the Constitution in either House. The scope of the legislative power conferred by section 49 is not altogether clear, but the High Court has held that the statutory protections against liability conferred by the *Parliamentary Papers Act 1908* (Cth) and the *Parliamentary Proceedings Broadcasting Act 1946* (Cth) do not rest on that section. They rest, rather, on legislation enacted under section 51(xxxix.).[508] The Court has also indicated that federal legislation made pursuant

502 See *The Parliamentary Witnesses Oaths Act 1871* (UK).
503 *The Queen v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.
504 See *Stockdale v Hansard* (1839) 112 ER 1112.
505 (1955) 92 CLR 157.
506 *Earl of Shaftsbury's Case* (1676) 86 ER 792; *Murray's Case* (1751) 95 ER 629 and the *Case of the Sheriff of Middlesex* (1840) 113 ER 419.
507 In conjuction with section 51(xxxvi.) of the Constitution.
508 *The Queen v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

to section 49 will not be interpreted as denuding the Houses, their members and committees of the privileges, etc, they possess under the transitional provision with which the section ends, unless that legislation, expressly or by implication, 'covers the field'.[509]

4.703 The *Parliamentary Privileges Act 1987* (Cth) is the first statute, so entitled, to be enacted by the Federal Parliament.[510] The Act does, in a sense, 'cover the field'. In several respects it modifies or clarifies the prior law, but it also provides, in section 5, that except to the extent that the Act 'expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and the committees of each House, as in force under section 49 of the Constitution immediately before the commencement of . . . [the] Act, continue in force.'

4.704 The *Parliamentary Privileges Act 1987* (Cth) was enacted following the final report of the Joint Select Committee on Parliamentary Privilege in 1984.[511] The changes effected by the Act are, in summary, as follows:

(a) The maximum term of imprisonment either House may impose for a breach of the privileges or immunities, or a contempt of the House or of the members of committees, as adjudged by the House, is six months.[512] Previously, the Houses could not order imprisonment for a period in excess of the current session of the Parliament.

(b) If either House determines that a person or body has been guilty of a breach of the privileges or immunities, or a contempt of the House or of the members or committees, the House may, instead of imposing a penalty of imprisonment, impose a fine. The maximum fine which may be imposed is, in the case of a natural person, $5,000, and in the case of a corporation, $25,000.[513] Previously, neither House had power to impose fines.[514]

(c) Where a House imposes a penalty of imprisonment for an offence against the House, the resolution of the House imposing the penalty and the warrant committing the offender to custody must set out the particulars determined by the House to constitute the offence.[515] This new rule means that if either House determines that a person has been guilty of a breach of privilege or contempt, and imposes a penalty of imprisonment, the person can seek judicial review of the determination. The court from which remedy is sought may then inquire into and determine whether the assertions contained in the House's resolution or warrant are, if true, capable of being regarded as a breach of privilege or contempt.[516]

509 id, 167-8.

510 *The Jury Exemption Act 1965* did, however, modify the law ordained by the transitional clause in section 49.

511 PP 219/1984.

512 Section 7.

513 Section 7.

514 The House of Commons once claimed a power to impose fines for breaches of its privileges and for contempt, but this power had not been exercised since 1660. In *R v Pitt* and *R v Mead* (1762) 97 ER 861, Lord Mansfield said that the power to fine no longer existed.

515 Section 9.

516 See *Burdett v Abbot* (1811) 104 ER 501, 550 128; *R v Paty* (1704) 92 ER 232; *Stockdale v Hansard* (1839) 112 ER 1112, 1162 (Lord Denman); *Case of the Sheriff of Middlesex* (1840) 113 ER 419, 425-6; *The Queen v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162-6 (Dixon CJ).

(d) Conduct is declared not to 'constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.'[517]

(e) Words or acts (except words spoken or acts done in the presence of a House or a committee) are not to 'be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member.'[518] Contempt by libel of Parliament is thus substantially abolished.

(f) The power of the Houses to expel members is removed.[519] This power has been exercised only once in the history of the Parliament.[520]

(g) The immunities of members, officers of the Houses and Parliamentary witnesses from arrest in civil causes, and from requirements to attend before courts and tribunals are defined.[521]

(h) Article 9 of the *Bill of Rights 1689* is expressly declared to apply to the Federal Parliament and the phrase 'proceedings in Parliament' is defined. Reception by courts and tribunals of evidence as to proceedings in Parliament is regulated.[522]

(i) Protections against liability are granted to officers of each House who publish to members any document that has been laid before the House,[523] and to persons who publish fair and accurate reports of proceedings at a meeting of a House or committee.[524]

(j) Criminal offences, triable before the ordinary courts of law, are created. These are to protect parliamentary witnesses[525] and to penalise unauthorised disclosure of evidence given to the Houses and their committees.[526]

The *Parliamentary Privileges Act 1987* is not, it should be stressed, a complete code on Parliamentary privilege and, except to the extent that it expressly provides otherwise, the privileges in force under section 49 of the Constitution remain in force.

4.705 On 25 February 1988 the Senate adopted a series of resolutions, in the terms recommended by the Joint Select Committee on Parliamentary Privilege in its Final Report of 1984, on various topics relating to Parliamentary privilege, among them:

(a) procedures to be observed by Senate committees for the protection of witnesses appearing before them;

(b) procedures for the protection of witnesses appearing before the Privileges Committee of the Senate;

517 Section 4.
518 Section 6.
519 Section 8.
520 The case of Hugh Mahon MHR in 1920.
521 Section 14.
522 Section 16.
523 Section 11.
524 Section 10. This provision is probably supported by section 51(xxxix.) of the Constitution rather than by section 49.
525 Section 12.
526 Section 13.

(c) criteria to be taken into account by the Senate when determining whether matters which may possibly involve contempt should be referred to the Committee of Privileges, and also to be taken into account by the Committee of Privileges when inquiring into any matter referred to it by the Senate;

(d) procedures whereby persons who have been referred to in the Senate and who claim to have been prejudiced by the reference may have their complaints investigated by the Committee of Privileges and may have their response incorporated in the Parliamentary record;

(e) conduct which the Senate may treat as contempts; and

(f) matters to be taken into account by senators in exercising their freedom of speech in the Senate or in committee.

Position in the States and Territories

4.706 All the Parliaments of the States, except the Parliament of New South Wales,[27] have enacted general legislation on the powers, privileges and immunities of their Houses, committees and members. None of this legislation is, however, entrenched.

4.707 As has already been mentioned, the legislation in South Australia and Victoria is similar to section 49 of the Federal Constitution in that it adopts the powers, privileges and immunities of the House of Commons, its members and committees as of a certain date.[528] The same formula has been adopted in Western Australia, except that there the privileges are declared to be those of the Commons for the time being. They are, moreover, subject to a number of other specific provisions, notably those defining the offences which the Houses may try and punish.[529] The legislation in Queensland and Tasmania deals principally with the offences which are triable and punishable by the Houses.[530] They establish an exhaustive code of the offences punishable as contempt of Parliament.

4.708 The Northern Territory's *Legislative Assembly (Powers and Privileges) Act 1977* deals with Parliamentary privileges in considerably more detail than any of the other Australian legislation on the subject, but, like the Western Australian legislation and now the federal *Parliamentary Privileges Act 1987*, it includes a provision which states that, to the extent that they are not declared elsewhere in the Act, the privileges of the Assembly shall be those of the House of Commons at the establishment of the Commonwealth. Contraventions, or failure to comply with provisions of the Act are triable in a court of summary jurisdiction, but only if the Speaker orders prosecution.

Position in other countries

4.709 In the older countries of the Commonwealth of Nations the usual practice has been to grant to the constituent Houses of the legislature the same powers and privileges as are

527 cf *Parliamentary Evidence Act 1901*.
528 *Constitution Act 1934*, section 38 (SA); *Constitution Act 1975*, section 19 (Vic).
529 *Parliamentary Privilege Act 1891*.
530 *Constitution Act 1867*, sections 41-56 (Q); *Parliamentary Privilege Act 1858* (Tas); *Parliamentary Privilge Act 1898* (Tas).

possessed by the House of Commons at Westminster, and also to grant to the legislature a power to legislate generally on parliamentary privilege. This is the position both in New Zealand[531] and in Canada.[532]

4.710 In other Commonwealth countries it has been customary to include in the Constitution provisions which allow the legislature power to legislate on Parliamentary privileges, but which also entrench certain privileges, notably that of freedom of speech and debate.[533] Many of these constitutions also include entrenched provisions to guarantee fundamental rights and freedoms. Those provisions may impinge on the exercise of Parliamentary privileges and on the power of legislatures to define their privileges.

4.711 The Supreme Court of India, for example, has held that the fundamental rights provisions contained in Part III of the Constitution of India inhibit the exercise of both the powers and privileges conferred on the Houses of the national and State legislatures by articles 105(3) and 194(3) of the Constitution, and the powers granted to those legislatures to define Parliamentary privileges.[534] The power of legislative chambers to try and punish for contempt of the House is thus controlled by the guarantee in article 21 that 'No person shall be deprived of his life or personal liberty except according to procedure established by law'; by article 32 which gives Indian citizens the right to bring proceedings in courts for protection of guaranteed rights; and articles in the Constitution investing courts with jurisdiction to issue writs of *habeas corpus.* In the principal case, the Supreme Court relied on the guarantees contained in articles 21 and 32 to support its conclusion that a general warrant of commitment, of the kind produced in the Australian case of *Fitzpatrick and Browne,* was not conclusive in judicial proceedings to test the validity of a legislative chamber's order that a person be imprisoned for breach of Parliamentary privileges or contempt of Parliament.[535]

4.712 Certain powers of the Houses of the United States Congress have also been held to be subject to the constitutional guarantees contained in the Bill of Rights. Under Article 1 of the United States Constitution, each House has the right to be 'the Judge of the Elections, Returns, and Qualifications of its own Members', to 'determine the Rules of its Proceedings', to 'punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member'. Freedom of speech and debate is also assured. And, except in cases of treason, felony and breach of the peace, members are 'privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same;'. The Houses are also recognised to have an inherent power to undertake inquiries ancillary to the legislative function and an inherent contempt power, but these powers are also subject to the Bill of Rights. Congressional investigations must, therefore, be conducted in accordance with the due process requirement imposed by the Fifth Amendment.[536] 'The right of the people', under the Fourth Amendment, 'to be secure in their persons, houses, papers, and effects, against

531 *Legislature Act 1908* (NZ).

532 *Constitution Act 1867* (formerly the *British North America Act),* section 18; repealed and re-enacted by *Parliament of Canada Act 1875* (Imp). But the Parliament cannot create privileges which exceed those of the British House of Commons as of 1867.

533 eg Constitution of India, articles 105 and 194; Constitution of Belize, section 74; Constitution of Tuvalu, section 69; Constitution of Papua New Guinea, section 115. Constitution of Malaysia, Article 63.

534 *Gunupati v Nafisul Hasan,* AIR 1954, SC, 636; *MSM Sharma v Sinha,* AIR 1959, SC 395; *Special Reference No 1 of 1964,* AIR 1965, SC 745.

535 *Special Reference No 1 of 1964,* AIR 1965, SC 745, para 127.

536 *Groppi v Leslie,* 404 US 496 (1972).

unreasonable searches and seizures' must be respected[537] and witnesses cannot be required to incriminate themselves.[538] The congressional powers are also subject to the First Amendment guarantee of free speech.[539]

4.713 The implied powers and privileges of the Houses of the United States Congress, that is to say, their investigatory powers and their power to punish for contempt, are limited not only by the Bill of Rights.

4.714 The power of the Houses and their committees to investigate, and consequently the coercive powers which may be employed in aid of an investigation, are, the Court has held, constrained by the requirement that the subject matter of the investigation be related to a valid legislative purpose.[540] In modern times, this limitation has not, however, proved to be of great significance. The investigatory power, the Supreme Court has said,

> encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.[541]

4.715 The power, it has also been said 'is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.'[542]

4.716 In this connection it is worth noting that, although it has been suggested that the investigatory powers of the Australian Federal Parliament under section 49 of the Constitution are also limited to inquiries in aid of the legislative functions of the Parliament, and are not therefore as wide as those of the House of Commons,[543] no case has yet arisen in which the High Court has had to determine whether the powers of the Houses are limited in this way.

4.717 It is, however, clear that the powers of the Houses of the Australian Federal Parliament to punish for contempt are considerably broader than those of the corresponding powers of the United States Congress. The United States Supreme Court has held that the express powers conferred on the Houses by Article I of the Constitution permit them to punish members guilty of disorderly conduct or who fail to perform their duty to attend the House.[544] But the implied power to imprison for contempt has been held to be limited to cases where the performance of legislative functions is obstructed. The power, it has been said,

> does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation; that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty, or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed.[545]

537 *McPhaul v United States*, 364 US 372 (1960).
538 *Quinn v United States*, 349 US 155, 162 (1955). The privilege against self-incrimination conferred by the Fifth Amendment does not, however, apply where the witness is accorded immunity against use of evidence in other proceedings – *Kastigar v United States* 406 US 441, 453 (1972).
539 *Watkins v United States*, 354 US 178, 188 (1957); *Barenblatt v United States*, 360 US 109 (1959).
540 *Kilbourn v Thompson*, 103 US 168 (1880); cf *McGrain v Daugherty*, 273 US 135 (1927).
541 *Watkins v United States*, 354 US 178, 187 (1957).
542 *Barenblatt v United States*, 360 US 109, 111 (1959).
543 *Parliamentary Committees: Powers over and Protection Afforded to Witnesses* – PP 168/1972, para 23, 28-32; see also *Attorney-General for the Commonwealth v MacFarlane* (1971) 18 FLR 150, 157 (Forster J).
544 *Kilbourn v Thompson*, 103 US 168 (1880).
545 *Marshall v Gordon*, 243 US 521, 542 (1917).

4.718 Acts which justify the exercise of the inherent contempt power include physical disruption of the legislative body or of members, assaults on members for action or words spoken in the body, bribery of members, and 'contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel.'[546] But what is not punishable as contempt is defamation of a House or any of its subcommittees.[547]

4.719 In confining the implied contempt power in the way it has, the United States Supreme Court has drawn, to a large extent, on the principles which the Judicial Committee of the Privy Council evolved in the 19th century in relation to the inherent privileges of legislative assemblies in Britain's colonial empire.[548] The Court, has, however, also been concerned to uphold, as far as possible, the separation of powers doctrine. The exercise of judicial power by the Houses of the Congress has, thus, been regarded as something which should be confined.[549]

4.720 Of the legislative bodies whose powers and privileges have been considered here, only one lacks any form of contempt power and is constitutionally prohibited from exercising such a power. Under the Constitution of Papua New Guinea, the powers and privileges which have been conferred on the Parliament are declared not to 'include the power to impose or provide for the imposition of a fine, imprisonment, forfeiture of property or other penalty of a criminal nature'. Parliament may create offences in the nature of contempt but, if it does so, they are triable only within the National Judicial System.[550]

Issues

4.721 The issues which we have considered are, in summary, as follows:

(a) Should section 49 of the Constitution be retained without alteration?

(b) Should section 49 be replaced by a section definitive of the powers, privileges and immunities of the Houses of the Federal Parliament and their members and committees?

(c) Should section 49 be replaced by a provision to the effect that, until the Parliament otherwise provides, the privileges, etc, shall be as set out in the section?

(d) Should section 49 be altered to indicate that the powers, etc, it confers are subject to other provisions of the Constitution, so that it is made clear that, for example, 'due process' rights conferred by the new Chapter on Rights and Freedoms which we recommend in Chapter 9 of this Report shall apply to the exercise of the coercive and judicial powers of the Houses of the Parliament?

(e) Should the Constitution be altered so as to remove judicial powers from the Houses of the Federal Parliament, to restrict those powers, or to provide that decisions made in purported exercise of those powers are reviewable by the High Court, either on the merits or in accordance with the principles which the Court already applies when exercising its supervisory jurisdiction, for example, in matters described in section 75(v.) of the Constitution?

546 id, 543. See also *Anderson v Dunn*, 19 US (Wheat) 204, 231; *Jurncy v McCracken*, 294 US 120 (1935); *Groppi v Leslie*, 404 US 496 (1972).
547 *Marshall v Gordon*, 243 US 521 (1917).
548 See Fn 499 above.
549 See *Kilbourn v Thompson*, 103 US 168, 183-93 (1880).
550 Section 115(9).

(f) Should section 49 be altered to define the privileges, etc, of the Houses of the Parliament, their committees and members, otherwise than by reference to the privileges, etc of the House of Commons of the Parliament of the United Kingdom as of the date when the Commonwealth of Australia was established?

Advisory Committee's recommendation

4.722 The Advisory Committee on Individual and Democratic Rights recommended that section 49 of the Constitution be altered by adding, at the beginning of the section, the words 'Subject to the Constitution'.[551] This recommended alteration was seen as consequential to the Committee's main recommendations for alteration of the Constitution.

4.723 The reasons for the Committee's recommendation were as follows:

> The Committee received submissions arguing that Parliamentary privilege has been used from time to time in an arbitrary way, particularly in some State Parliaments. The Committee is aware of the Report of the Joint Committee on Parliamentary Privilege, presented in 1984, which examined these and other problems in great detail. The Committee considers that the basic restrictions on the power of governments, which are contained in its recommendations in this report will operate as limitations on the possible arbitrary conduct of Parliaments in dealing with alleged breaches of privilege.[552]

Submissions

4.724 Submissions on the subject of the privileges of Parliament were relatively few. Most of them were concerned not with the question of whether Parliament should retain power to define and delimit those privileges, or with whether existing privileges are justifiable. The main concern was about the adequacy of existing safeguards against abuse of those privileges.[553]

4.725 One member of the South Australian Legislative Assembly suggested that freedom of speech and debate in Parliament should be entrenched in the Constitution.[554]

Reasons for recommendation

4.726 The effect of the alteration of section 49 of the Constitution we recommend is to remove the reference to the powers, privileges and immunities of the House of Commons, its members and committees, but so as to preserve the powers, privileges and immunities of both Houses of the Federal Parliament in force immediately before the recommended alteration to the Constitution takes effect. This recommended change is similar to that made to article 105(3) of the Constitution of India by the *Constitution (Forty-Fourth Amendment) Act 1978.* If our recommendation is adopted, the privileges, etc, of the Houses of the Parliament will be as declared by the *Parliamentary Privileges Act 1987,* subject to any subsequent amendments of that Act.

4.727 We have recommended that section 49 be altered in this way partly in the light of our Terms of Reference which require us to report on revisions to the Constitution in order to, *inter alia,* 'adequately reflect Australia's status as an independent nation'. Although, historically, the privileges of the Houses of the Federal Parliament are derived

551 Rights Report, 50.
552 ibid.
553 eg JHL Beament S76, 5 July 1986; T Stavridis S2662, 15 October 1987; P Momber S3459, 15 November 1986.
554 M Evans MP S194, 4 August 1986.

from those of the House of Commons at Westminster, and although section 5 of the *Parliamentary Privileges Act 1987* continues to define those privileges, in part, with reference to those of the Commons, we believe that it is neither necessary nor appropriate for the Constitution to link the privileges of the Houses of the Federal Parliament to those of a House of a Parliament which has ceased to have any authority to legislate for Australia.

4.728 We agree with the Advisory Committee that the privileges of the Houses of the Federal Parliament, and also the power of the Parliament to declare those privileges, should be subject to provisions in the Constitution to guarantee rights and freedoms such as those we recommend in Chapter 9 of this Report.[555] But we do not think that it is necessary for section 49 of the Constitution to be altered in the way the Advisory Committee has recommended.

4.729 Our view is that if the Constitution were to be altered in the way we recommend in Chapter 9, a number of the guaranteed rights and freedoms would, in any case, apply to the exercise of powers under section 49 of the Constitution, for example the exercise of the coercive and punitive powers of the Houses of the Parliament. We also believe that the recommended freedom of speech guarantee would, to a large degree, underwrite the freedom of speech and debate already accorded to participants in Parliamentary proceedings and would prevent unjustifiable abridgment of it by Act of Parliament.

4.730 Another reason why we do not favour an alteration to section 49 to include the words 'subject to this Constitution' is that, were these words to be added to the section, the section might then be interpreted as being subject to Chapter III of the Constitution. If it were to be subject to Chapter III, the Houses of Parliament would be denuded of their present judicial powers and the Parliament would be powerless to restore them.

4.731 We have not thought it appropriate to include in the Constitution a codification, or even a partial codification, of the privileges of the Houses of the Federal Parliament. Codification or partial codification, we believe, would make for undue rigidity at a time when the Parliament has already shown its readiness to undertake comprehensive review of existing law and to revise it by legislation.

4.732 We have also concluded that the Constitution should continue to allow the Houses of Parliament to exercise the judicial power they presently have, namely, the power to try and punish breaches of their privileges and contempts of the Parliament. We are aware of the criticisms which have been made of the existing system, but we believe that many of these criticisms can be met by the adoption by the Houses of procedures which ensure that adjudications of allegations of breach of privilege or of contempt conform with the principles of natural justice. We note also that, under existing arrangements, the Parliament can, if it chooses to do so, enact legislation to provide for the trial of offences against Parliament in the ordinary courts of law.

4.733 The question of whether the Houses of Parliament should retain their penal jurisdiction was considered at length by the Joint Select Committee on Parliamentary Privilege in its Final Report in 1984. The Committee conceded that 'there are ... attractive and compelling arguments ... to support a transfer of the penal jurisdiction to the Courts'. But it concluded 'that the jurisdiction should remain with Parliament'.[556] Its reasons were:

555 We comment on the application of the proposed guarantees to the exercise of the penal jurisdiction of the Houses of Parliament in Chapter 9 para 9.668-9.675.

556 Final Report (PP 219/1984) para 7.5.

(a) '[W]ith the abolition of defamatory contempts, a major source of widespread concern and of possible conflict between Parliament and those who criticise Parliament and its Members vanishes'.[557]

(b) '[T]he basic rationale of the penal jurisdiction is that it exists as the ultimate guarantee of Parliament's independence and its free and effective working.'[558] The Committee noted that the exercise of this jurisdiction 'involves at least three steps: determining the relevant facts; deciding whether those facts constitute a breach of privilege or other contempt; and if the first two elements are made out, deciding whether action is required and, if so, what it should be . . .'. The Committee agreed that 'courts are ideally suited to determine the relevant facts' and, in some cases, 'to determine whether a contempt has been committed.' But it thought it would be difficult for a court to determine whether contempt had been committed when the conduct alleged to constitute the offence involved determination of whether the conduct obstructed or impeded Parliament or its members in the performance of their functions.[559]

(c) The Houses of Parliament have greater flexibility than the courts in deciding what penalty, if any, should be imposed, and may have regard to considerations which a court could not properly take into account, for example, 'the political consequences for Parliament and the principal Parliamentary actors if they act harshly, capriciously or arbitrarily when dealing with a complaint of contempt.'[560]

(d) Were the penal jurisdiction of the Houses, or part of it, to be transferred to courts, 'a real potential would arise for clashes between the views expressed in Parliament and those expressed in the courts . . . . Even the most prudent judge might find himself disposed to express clear and reasoned disagreement with Parliament's decision to send the matter to the courts'.[561]

(e) Were the penal jurisdiction to be transferred, in whole or in part, to courts, 'there is a risk that the transfer could also involve the transfer to the courts of the odium that Parliament sometimes attracts when it exercises that jurisdiction'.[562]

4.734 The case thus made out for retention of the penal jurisdiction of the Houses of Parliament indicates that any proposal to alter the Constitution to eliminate or reduce that jurisdiction would not be acceptable to the Parliament.

QUALIFICATIONS AND DISQUALIFICATIONS OF MEMBERS OF FEDERAL PARLIAMENT

Introduction

Recommendations[563]

4.735 ***Qualifications of members of the Parliament.*** We *recommend* that the Constitution be altered:

557 id, para 7.7.
558 ibid.
559 ibid.
560 id, para 7.8.
561 id, para 7.9.
562 id, para 7.10.
563 These recommendations are presented as proposed alterations in Bill No 8 at *Appendix K*. We have been concerned only with membership of the Federal Parliament and not with membership of State Parliaments.

(i) to make Australian citizenship a necessary qualification for membership of the Parliament;

(ii) to make the age qualification for members of the Parliament eighteen years or such lower age as is prescribed by the Parliament (we do *not recommend* any upper age limit); and

(iii) to make unsoundness of mind a disqualification for membership of the Parliament.

Entitlement to vote should not be a necessary qualification to be or become a member of the Parliament.

4.736 We *recommend* that the Parliament should also have power to make laws which could, as a qualification for membership of the Parliament, require a person to comply with reasonable conditions as to residence in Australia; and which could disqualify a person whilst he or she is undergoing imprisonment for an offence against a law of the Commonwealth or a State or Territory of the Commonwealth; and to lay down procedures for determining whether a person is of unsound mind.

4.737 ***Disqualification of members of the Parliament.*** We *recommend* that the Constitution be altered to provide that:

(i) any person who has been convicted of treason under a law of the Commonwealth, and not subsequently pardoned, should be disqualified from being a senator or a member of the House of Representatives. (At present the Constitution disqualifies any person who is 'attainted of treason'.) Other criminal convictions would not be prescribed in the Constitution as an automatic disqualification.

(ii) A member of the Parliament who becomes:

- a judge or holds any other judicial office;
- a member or employee of the federal, a State or a Territorial public service;
- a member of the Defence Force;
- a member of any other Australian Parliament or legislature; or
- a member, officer or employee of certain public authorities,

should also be disqualified from being a senator or a member of the House of Representatives.

4.738 On the other hand, a person in such a position who subsequently becomes a member of the Parliament would be deemed to have ceased to be so employed or to hold that office on the day immediately before becoming a member of the Parliament and so would be qualified to be a member.

4.739 We *recommend* that the Parliament have power, subject to the Constitution, to make laws to disqualify members of the Parliament who hold interests which might constitute a material risk of conflict between their public duty and private interests, and to disqualify any person convicted of an offence relating to corrupt practices or improper influence. Subject to any such law, the existing constitutional disqualification provisions should continue to apply to any person who has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than 25 persons. Candidates for or members of the Senate or the House of

Representatives should no longer be disqualified under section 44(iv.) for holding any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth. The place or a senator or member of the House of Representatives should no longer become vacant under 45(iii.) if he or she directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State.

4.740 We *recommend* that any person who sits as a member of the Parliament while disqualified should be liable to such pecuniary penalties payable to the Commonwealth as are prescribed by the Parliament.

4.741 We *recommend* that the House in which the question arises should continue to be able to determine any question respecting the qualification of a member of that House, or respecting a vacancy in that House, and any question of a disputed election to that House; but that any elector in the electorate of the person whose qualification or membership is in question should be able to apply to the High Court for a declaration as to the person's qualification or membership, and that a declaration of the High Court should have full force and effect notwithstanding any determination of the respective House of the Parliament.

4.742 ***Section 43.*** We *recommend* that no change be made to section 43 which provides that a member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House.

4.743 The above recommendations would substitute new provisions for sections 34, 44, 45, 46 and 47.

4.744 We *recommend* that sections 44(i.) and 44(iii.) and 45(ii.) be omitted and not replaced. Section 44(i.) disqualifies any person who is 'under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen of a foreign power' from being chosen or of sitting as a member of Parliament. Section 44(iii.) disqualifies a person who is an undischarged bankrupt or insolvent. Under section 45(ii.) a member's place in the Parliament also becomes vacant if he or she takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors.

Current position

4.745 Sections 16, 34 and 43-47 of the Constitution deal with the qualifications and disqualification of members of the Parliament. They provide:

> 16. The qualifications of a senator shall be the same as those of a member of the House of Representatives.
>
> 34. Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:-
>
> (i.) He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen:
>
> (ii.) He must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.
>
> 43. A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House.

44. Any person who –

(i.) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or

(ii.) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

(iii.) Is an undischarged bankrupt or insolvent: or

(iv.) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v.) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by an person whose services are not wholly employed by the Commonwealth.

45. If a senator or member of the House of Representatives –

(i.) Becomes subject to any of the disabilities mentioned in the last preceding section: or

(ii.) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or

(iii.) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State:

his place shall thereupon become vacant.

46. Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.

47. Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

4.746 Sections 16 and 34 of the Constitution, which were to apply until the Parliament made other provision, have now been superseded by section 163 of the *Commonwealth Electoral Act 1918* which provides:

163.(1) The qualifications of a Member of the House of Representatives shall be as follows:

(a) He must be of the full age of 18 years;

(b) He must be an Australian citizen; and

(c) He must be either –

(i) an elector entitled to vote at the election of Members of the House of Representatives; or

(ii) a person qualified to become such an elector.

(2) To entitle a person to be nominated as a Senator or a Member of the House of Representatives he must have the qualifications specified in sub-section (1).

4.747 Because of section 163(1)(c) and (2), the provisions of the *Commonwealth Electoral Act* relating to the qualifications and disqualifications of electors also amount to qualifications and disqualifications of members of Parliament. The categories of persons generally disqualified from the franchise are:

(a) holders of temporary entry permits and prohibited non-citizens;

(b) persons of unsound mind;

(c) persons convicted of treason or treachery; and

(d) persons convicted and under sentence for an offence carrying a maximum penalty of more than five years' imprisonment.

4.748 Section 93 of the *Commonwealth Electoral Act* provides:

93. (1) Subject to sub-sections (7) and (8) and to Part VIII,[564] all persons –

(a) who have attained 18 years of age; and

(b) who are –

(i) Australian citizens; or

(ii) British subjects (other than Australian citizens) whose names were, immediately before the date fixed under sub-section 2(5) of the *Statute Law (Miscellaneous Amendments) Act 1981* –

(A) on the roll for a Division; or

(B) on a roll for the purposes of the *Australian Capital Territory Representation (House of Representatives) Act 1973* or the *Northern Territory Representation Act 1922,*

shall be entitled to enrolment.

(2) Subject to sub-sections (3), (4), (5) and (6), an elector who name is on the Roll for a Division is entitled to vote at elections of Members of the Senate for the State that includes that Division and at elections of Members of House of Representatives for that Division.

(3) An elector –

(a) whose name has been placed on a Roll in pursuance of a claim made under section 100; and

(b) who has not attained 18 years of age on the date fixed for the polling in an election,

is not entitled to vote at that election.

(4) Notwithstanding section 100 or any enrolment in pursuance of a claim made under that section, for the purposes of this Act in its application in relation to an election, a person who has not attained 18 years of age on the date fixed for the polling in that election shall not be taken to be –

(a) entitled to be enrolled on a Roll; or

(b) enrolled on a Roll.

(5) A person is not entitled to vote more than once at any Senate election or any House of Representatives election, or at more than one election for the Senate or for the House of Representatives held on the same day.

(6) An elector, other than a relevant elector, is not entitled to vote at an election as an elector of the Division in respect of which he is enrolled unless his real place of living was, at some time within the 3 months immediately preceding polling day for that election, within that Division.

(7) A person who is –

(a) the holder of a temporary entry permit for the purposes of the *Migration Act 1958;* or

(b) a prohibited non-citizen under that Act,

is not entitled to enrolment under Part VIII.

564 Part VIII deals with the machinery for enrolment as an elector.

(8) A person who –

(a) by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting;

(b) has been convicted and is under sentence for an offence punishable under the law of the Commonwealth or of a State or Territory by imprisonment for 5 years or longer; or

(c) has been convicted of treason or treachery and has not been pardoned,

is not entitled to have his name placed on or retained on any Roll or to vote at any Senate election or House of Representatives election.

(9) In sub-section (6) –

'real place of living', in relation to a person, includes the place of living to which the person, when temporarily living elsewhere, has a fixed intention of returning for the purpose of continuing to live at that place;

'relevant elector' means –

(a) an Antarctic elector;

(b) an eligible overseas elector; or

(c) an itinerant elector.

(10) The reference in sub-section (8) to treason or treachery includes a reference to treason or treachery committed in relation to the Crown in right of a State or the Northern Territory or in relation to the government of a State or the Northern Territory.

4.749 The main features of the present constitutional provision on the qualifications and disqualifications of members of the Parliament are:

(a) The Constitution prescribes the qualifications of members of the House of Representatives but these may be altered from time to time by the Parliament.[565] Parliament has legislated pursuant to sections 34 and 51(xxxvi.) of the Constitution to prescribe qualifications which supersede those laid down in section 34.[566] A person who has the necessary qualifications when elected can lose those qualifications, for example by ceasing to be an Australian citizen, or by ceasing to be an elector entitled to vote, or by ceasing to be a person qualified to become an elector. The circumstance most likely to raise a question about a member of Parliament's qualification to remain a member of Parliament is a suggestion that the member of Parliament has become a person of unsound mind and by reason thereof a person 'incapable of understanding the nature and significance of enrolment and voting' as an elector.[567]

(b) The qualifications prescribed for members of the House are exactly the same as the qualifications for senators.[568]

(c) The Constitution prescribes disqualifications from being chosen or sitting as a member of Parliament. It also provides that if a person is validly chosen as a member of Parliament, but subsequently becomes disqualified, the seat thereupon becomes vacant.[569]

565 Sections 34 and 51(xxxvi.).
566 *Commonwealth Electoral Act* section 163.
567 See *Commonwealth Electoral Act* section 163 and section 93(8).
568 Constitution, section 16.
569 Sections 43-45.

(d) The place of a member of Parliament also becomes vacant if, for two consecutive months of any session of the Parliament, the member, without the permission of the House of which he or she is a member, fails to attend that House.[570]

(e) The provisions prescribing disqualifications, and also sections 20 and 38, cannot be changed except by altering the Constitution. The Parliament cannot itself make a law which would have the effect of making a person capable of being chosen or sitting where that person is, under the Constitution, not capable. On the other hand, the Parliament's power to prescribe the qualifications of members of Parliament may be used to create what are, in effect, additional disqualifications from being chosen and sitting.[571] It is also open to the Parliament to make laws affecting the operation of sections 44 and 45, for example laws on bankruptcy and laws creating criminal offences.

(f) The Constitution provides that, until the Parliament otherwise provides, a member of Parliament who sits in Parliament when incapable of sitting shall be liable to a monetary penalty for every day on which he or she sits while incapable.[572] Suit for the penalty may be instituted by any person. Parliament has otherwise provided by the *Common Informers (Parliamentary Disqualifications) Act 1975.*

(g) The Constitution gives each House jurisdiction to determine (a) any question respecting the qualification of a member of that House; (b) any question respecting a vacancy in the House; and (c) any question of a disputed election to the House.[573] But the Parliament may otherwise provide for the determination of such questions[574] and it has done so, though there is some doubt whether it has done so in a way which completely ousts the jurisdiction of the Houses.[575]

(h) The powers and privileges conferred on each House by section 49 of the Constitution include the power to expel a member of the House regardless of whether the member is qualified or disqualified. But expulsion does not render a person incapable of being re-elected. Parliament has power to legislate to deprive the Houses of their power to expel members[576] and under the *Parliamentary Privileges Act* 1987 (Cth) this power has been removed.[577]

Issues

4.750 (a) Should the Constitution:

(i) be altered to enable the question of qualifications and disqualification of members to be left to Parliament; or

570 Sections 20 and 38.

571 See section 386 of the *Commonwealth Electoral Act* which declares that a person who has been convicted of bribery or undue influence at an election (sections 326-327) or found guilty of such misconduct by the Court of Disputed Returns, shall be incapable of sitting or voting as a Member of Parliament for two years after the conviction or finding.

572 Section 46. See also section 51(xxxvi.).

573 Section 47.

574 Sections 47 and 51(xxxvi.).

575 Senate Standing Committee on Constitutional and Legal Affairs Report, *The Constitutional Qualifications of Members of Parliament* 1981 PP 131/1981, 93-4, para 8.9-8.10.

576 Section 49.

577 Section 8.

(ii) specify the qualifications of members of Parliament, but be revised and modernised to reflect better the social and cultural realities of Australian society; or

(iii) remain unchanged?

(b) Are there outmoded provisions which should be omitted, or provisions which have caused interpretative doubts which should be clarified?

Preliminary remarks

4.751 Extensive reform of the provisions of the Constitution dealing with the qualifications and disqualification of members of the Parliament has been recommended in recent years, especially by the Senate Standing Committee on Constitutional and Legal Affairs in its 1981 report *The Constitutional Qualifications of Members of Parliament*[578] and by the Australian Constitutional Convention.

4.752 Our Terms of Reference require us to report on the revision of the Constitution to ensure that democratic rights are guaranteed. It is very important to the democratic life of Australia that the rules governing who can become and remain a member of the Parliament should be clearly stated, and that those rules should not arbitrarily disqualify a candidate or a member. The Constitution should guarantee, in effect, that persons are not arbitrarily prevented from putting themselves forward as candidates for election to the Parliament.

4.753 As far as practicable, the rules on who can and who cannot be a member should be laid down in the Constitution rather than left to the Parliament itself to stipulate. Nevertheless there are some matters in relation to which Parliament should have legislative power. We deal with those below.

4.754 Particular aspects of the constitutional provisions dealing with the qualifications and disqualifications of members of the Parliament will be discussed in turn. In each section we will first outline the current constitutional and legal position, then describe previous proposals for reform, and then give the reasons for our recommendations.

4.755 Relevant submissions will also be noted. We published a Background Paper on Qualifications of Members of Parliament (No 10, November 1986). Submissions were received on the issue overall, mainly in response to that Background Paper. The vast majority of submissions received on qualifications of Parliamentarians favoured the constitutional entrenchment of some qualifications. A few submissions maintained that there should be no change to the Constitution with regard to qualifications and disqualification of members of the Parliament.[579]

Age

Recommendations

4.756 We *recommend* that the Constitution be altered to make the age qualification for members of the Parliament eighteen years or such lower age as is prescribed by the Parliament. We do *not recommend* any upper age limit.

578 op cit.

579 J Newton S3209, 16 February 1987; I Smith S3226, 16 February 1987; NJ Murray S729, 7 December 1986; J Conway S275, 13 May 1986; Constitutional Association of Australia S1160, 23 October 1986.

Current Position

4.757 Section 34 of the Constitution provides in part:

> Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:-
>
> (i.) He must be of the full age of twenty-one years . . . .

In 1973 the Parliament reduced the age requirement for membership of Parliament from twenty-one to eighteen years of age.[580]

Previous proposals for reform

4.758 ***Australian Constitutional Convention.*** The Melbourne (1975) and Hobart (1976) sessions of the Australian Constitutional Convention resolved that section 34 be repealed and replaced by a section along the following lines:

> Until Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows: He must be 18 years of age . . .[581].

4.759 ***Senate Standing Committee on Constitutional and Legal Affairs (1981).*** The Committee recommended that section 34 of the Constitution be replaced by a section to the following effect

> A member of the House of Representatives must be at least eighteen years of age . . .[582].

4.760 ***Australian Constitutional Convention.*** The Brisbane (1985) session of the Convention resolved 'in principle' to support alterations to the provisions relating to the qualification of members of Parliament 'having regard to the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs and the Structure of Government Sub-Committee'.[583]

4.761 The Sub-Committee on Structure of Government had recommended that section 34 be replaced by a provision which would give future Parliaments the latitude to vary the age of majority in accordance with changing social attitudes.[584]

Advisory Committee's recommendation

4.762 The Rights Committee said that, in its opinion, no strong case had been made out either for varying the age of eighteen years as qualification for candidature or for providing a mechanism for Parliament to vary it, other than by referendum.[585]

Submissions

4.763 Most recognised the need to have a minimum age requirement, though there was some disagreement as to whether this should be set at 18[586] or at some higher age.[587] One submission suggested that there should be different requirements in this regard for

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580 *Commonwealth Electoral Act 1918*, section 163(1)(a).
581 ACC Proc, Melbourne 1975, 174; ACC Proc, Hobart 1976, 206.
582 op cit, ix, para 1; 14, para 2.26.
583 ACC Proc, Brisbane 1985, vol I, 423.
584 Structure of Government Sub-Committee Report *Constitutional Qualifications of Members of Parliament* (1984) 1, ACC Proc, Brisbane 1985, vol II.
585 Rights Report, 89.
586 PM Canet S610, 21 November 1986; F Arena S2505, 15 December 1986; NSW Australian Labor Party Immigration and Ethnic Affairs Policy Committee S1253, 17 March 1987; E Byrne S2937, 31 October 1987; Isaacs FEA Constitutional Committee S1323, 24 March 1987.
587 WT Gibbs S2504, 15 February 1986; AR Pitt S2585, 23 December 1987; D Beasant S2740, 24 October 1987.

senators[588] and another stated that there should also be a mandatory retiring age for all Parliamentarians.[589] Five persons submitted that a maximum retiring age for members of Parliament should be included in the Constitution. Some thought 65 years would be a suitable age.[590] Others argued that 70 years would be more appropriate.[591]

Reasons for recommendations

4.764 The age of majority now seems well established at 18 years of age. For example, persons who have attained that age are old enough, as the Senate Standing Committee on Constitutional Affairs noted in its report on the Constitutional Qualifications of members of Parliament, 'to marry, to pay tax, to contract for goods and services, to serve overseas in the Defence Force and to vote.'[592]

4.765 Accordingly, we believe that the Constitution should reflect that. It should refer to 18 years of age as the age at which a person may become a member of the Parliament. The provision now in the Constitution[593] allows the Parliament to vary the age qualification, either upwards or downwards. We think that the provision should prevent Parliament from increasing that age requirement. But it should remain open for the Parliament to lower the age limit, in line with future changes in social attitudes. Accordingly, our recommendations provides that a future Parliament could lower the age of eligibility.

4.766 Our approach is that it is for the electors to decide whom they want to represent them in the Parliament. Provisions which would disqualify potential candidates should, as far as possible, be minimised. Certainly it should be for the electors to decide if a person is too old to represent them.

4.767 The position is not analogous to federal judges, who, until 1977, had life tenure.[594] Unlike judges, members of Parliament are elected, and have to seek renewed appointment at election periodically.

Citizenship, residence, nationality and allegiance and entitlement to vote

Recommendations

4.768 We *recommend* that the Constitution be altered to make Australian citizenship a necessary qualification for membership of the Parliament. We *recommend* that the Parliament should also have power to make laws which could, as a qualification for membership of the Parliament, require a person to comply with reasonable conditions as to residence in Australia. These recommendations would substitute new provisions for section 34.

4.769 We *recommend* that no change be made to section 43.

4.770 We *recommend* that section 44(i.) be deleted and not replaced.

4.771 We do *not recommend* that the entitlement to be an elector should be a qualification to be a member of the Parliament.

588 R McGregor S1282, 17 March 1987.
589 Isaacs FEA Constitutional Committee S1323, 24 March 1987.
590 PH Springell S1391, 30 March 1987; N Cameron S2331, 10 May 1987; T Head S3027, 11 November 1987.
591 BG Tennant S2337, 26 July 1987; HC Dean S1086, 3 March 1987.
592 op cit, 7, para 2.5.
593 Section 34(i.).
594 In 1977 by referendum their maximum retiring age was fixed at 70.

Current position

4.772 The Constitution requires that, until the Parliament otherwise provides, a member of the Parliament must:

(a) be an elector entitled to vote for members of the House of Representatives or entitled to become an elector;

(b) have been a resident of the Commonwealth for at least three years; and

(c) be a subject of the Queen, either

(i) a natural born subject, or

(ii) a naturalized subject for at least five years under a law of the United Kingdom, or of the Commonwealth or a State.[595]

4.773 The Parliament has 'otherwise provided'. The *Commonwealth Electoral Act 1918* provides that to be a member of the Parliament a person must be:

(a) an Australian citizen; and

(b) an elector entitled to vote at the election of members, or a person qualified to be such an elector.

The provision has effectively removed the residency requirement and replaced the qualification of being a British subject by one of Australian citizenship.

4.774 In *Re Wood (Wood Case No 2)*[596] the High Court (sitting as the Court of Disputed Returns) held that, as a consequence of Wood not being an Australian citizen at the time of the poll taken on 11 July 1987,[597] he was disqualified from being chosen or sitting as a senator.

4.775 Under section 44(i.) of the Constitution any person who is 'under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen of a foreign power' is disqualified from being chosen or of sitting as a member of Parliament.[598] Those provisions cannot be varied by the Parliament in the way section 34 can.

4.776 In *Nile v Wood (Wood Case No 1)*[599] the High Court (sitting as the Court of Disputed Returns) considered the application of section 44(i). The Court said:

> ... it would seem that s 44(i) relates only to a person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and who has not withdrawn or revoked that acknowledgment.[600]

The Court noted, however, that this was a matter it did not have to decide.

595 Section 34. By force of section 16 the same qualifications also apply to the Senate.
596 (1988) 78 ALR 257.
597 Wood was granted citizenship on 3 February 1988.
598 The effect of disqualification is that, if the person is already a member of Federal Parliament, his or her place becomes vacant: section 45.
599 (1987) 76 ALR 91.
600 id, 96. In support of that conclusion the Court referred to *Crittenden v Anderson* (unreported decision of Fullagar J dated 23 August 1950 noted in (1977) 51 *Australian Law Journal*, 171), also Quick and Garran 490, 491 and Conv Deb, Adelaide (1897) 736.

Previous proposals for reform

4.777 ***Australian Constitutional Convention.*** The Hobart (1976) session of the Australian Constitutional Convention recommended that the current provision on the qualifications of members of Parliament should be replaced by provisions in the Constitution to the effect that, until Parliament otherwise provides, a person would have to be:

(a) an Australian citizen; and

(b) an elector entitled to vote at the election of members, or a person qualified to become such an elector.[601]

4.778 ***Senate Standing Committee on Constitutional and Legal Affairs.*** In its 1981 report, *The Constitutional Qualifications of Members of Parliament,* the Senate Standing Committee on Constitutional and Legal Affairs recommended that the Constitution provide that a member of Parliament must be at least 18 years of age and an Australian citizen.[602] If that were done, it recommended deletion of any residency requirement[603] and of the requirement that a member to be entitled to vote at elections.[604] The Committee thought that the entitlement to vote requirement was unnecessary, and that matters could be left to the ordinary electoral processes:[605]

> We consider that this link between the qualification for members and voting rights, which was originally expressed in s. 34 of the Constitution and later adopted by s. 69[606] of the Commonwealth Electoral Act, can be broken and left to the ordinary electoral processes to resolve the problem. While theoretically this would enable an Australian citizen to nominate and be elected without being on the electoral roll, we regard this possibility as so unlikely as not to warrant constitutional or parliamentary regulation. However, should such a situation arise, we are confident that the electorate can make a judgment of the particular circumstance of each case and take the appropriate action at the polling booth.

4.779 The Committee's recommendations would also remove the Parliament's power to make laws respecting the qualifications of members of Parliament – the constitutional qualifications would not be expressed to be alterable by the Parliament[607] though Parliament would have power (under section 51) to prescribe who is an Australian citizen.[608]

4.780 The Senate Standing Committee also recommended deletion of the constitutional disqualification of members who have some allegiance to a foreign power.[609] It recommended that the *Commonwealth Electoral Act* provide that a person seeking nomination to the Parliament:

(a) declare whether, to the person's knowledge, he or she holds a non-Australian nationality; and

(b) if so, declare that he or she has taken every step reasonably open to the person to divest the non-Australian nationality; and that, for the duration of any service in the Parliament, the person will not accept, or take conscious advantage of, any rights, privileges or entitlements conferred by possession of the unsought nationality.[610]

601 ACC Proc, Hobart 1976, 206.
602 op cit, 14, para 2.26.
603 id, 8, para 2.8.
604 id, 13, para 2.24.
605 id, 13, 2.24.
606 Now section 163.
607 Proposed section 34, id, 14, para 2.26.
608 We discuss the Parliament's power to make laws respecting citizenship at para 4.177-4.198.
609 id, 11, para 2.19; 14, para 2.26.
610 id, 12, para 2.20; 14, para 2.26.

The Committee believed that such a declaration would enable the electorate to judge the commitment and loyalty of the candidate.[611]

4.781 ***Australian Constitutional Convention.*** The Structure of Government Sub-Committee to the Australian Constitutional Convention agreed with the Senate Standing Committee's recommendation concerning citizenship requirements and entitlement to vote as a qualification. The Sub-Committee also agreed that a person should not be disqualified from becoming a member of Parliament because of unsought dual nationality. However, it recommended inserting a constitutional disqualification providing for the vacation of a member's seat where he or she ceases to be an Australian citizen, with a general power in the Parliament to deal with other situations as they arise.[612]

4.782 At the Brisbane (1985) session, the Australian Constitutional Convention decided that the constitutional provision should be expressed so that a person cannot be chosen or sit as a member of Parliament where, by his or her volition, the person is under any acknowledgement of allegiance, obedience or adherence to a foreign power, or is voluntarily a subject or a citizen entitled to the rights or privileges of a subject or a citizen of a foreign power and retains such rights, privileges and duties.[613]

4.783 This provision would not apply to a person who is vested with citizenship involuntarily and who has made all reasonable efforts to renounce a foreign citizenship or other allegiance, obedience, or adherence to a foreign power.

Submissions

4.784 A large number supported the imposition of a citizenship requirement.[514] Many were concerned about the effect that any added requirement (for example one relating to birthplace) would have on our ethnic communities' chances of having representation in Parliament.[615] There were therefore many submissions to the effect that citizenship should be the only requirement. On the other hand, some submissions maintained that citizenship is not enough, and that a qualification such as birth in Australia,[616] or, in the case of naturalized citizens, residence[617] in Australia for a certain period, should be added to that of citizenship. CW den Ronden[618] would like to see a residence requirement imposed for all potential senators, though this would relate to residence in the State in which the person is a candidate rather than residence in the Commonwealth.

4.785 J Taplin[619] submitted that anyone who is able to vote should be eligible to stand for Parliament. Several others included eligibility to vote amongst their preferred prerequisites for eligibility to stand.[620]

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611 id, 12, para 2.20.

612 Report on Constitutional Qualifications of Members of Parliament (1985) 1, ACC Proc, Brisbane 1985, vol 11.

613 ACC Proc, Brisbane 1985, vol I, 423.

614 PM Canet S610, 21 November 1986; Australian Natives Association S217, 8 July 1986; B Macintyre S226, 14 August 1986; NSW Australian Labor Party Immigration and Ethnic Policy Affairs Committee S1253, 17 March 1987; LA Cass S2993, 7 November 1987; C Gray S2693, 13 October 1987; JM Dunn S3228, 16 February 1987.

615 F Arena S2505, 15 December 1986; D Kozaki S926, February 1987; Ethnic Communities Council of NSW S849, February 1987.

616 C Bennett S243, 1 September 1986.

617 AR Pitt S2585, 23 December 1987; Citizens for Democracy S2262, 23 June 1987; D Knocks 2 September 1986.

618 S2949, 30 October 1987.

619 S3460, 15 November 1986.

620 eg PM Canet S610, 21 November 1986; AR Pitt S2585, 23 December 1987; Isaacs FEA Constitutional Committee S1323, 24 March 1987; Citizens for Democracy S2262, 23 June 1987.

Advisory Committee's recommendations

4.786 The Rights Committee expressed the view that the appropriate qualification for participation in the processes of Australian democracy is the status of 'Australian citizen', and that there should be no separate requirement of residency. It recommended the removal of existing disqualifications for entitlement to vote at elections that are inconsistent with the qualifications for candidature. It therefore supported the retention of the link between qualifications for candidates and voting rights since it considered it essential that a person must be on the electoral roll in order to nominate and be elected.[621]

4.787 The Rights Committee agreed with the Senate Committee, and the Brisbane (1985) session of the Constitutional Convention, that a person should not be disqualified from becoming a member of Parliament because of unsought dual nationality. The Committee therefore recommended that section 44(i.) should be repealed. It noted that it would remain open to the legislature to enact safeguards which would require a prospective candidate to declare that he or she has taken every reasonable step to divest themselves of non-Australian nationality.[622]

Reasons for recommendations

4.788 ***Subject-status and citizenship.*** At the time the Constitution was framed the phrase 'subject of the Queen' meant that a person was required to be a 'British subject'. The constitutional provision embraced most inhabitants of the British Empire. Today Australia has close commercial, cultural and ethnic links with many countries outside Britain and the Commonwealth of Nations. The Australian Constitution should not imply that British subjects are more suitable to be members of the Parliament than non-British subjects. The status of an Australian citizen (gained by birth within Australia, adoption, descent or grant) is a more appropriate test for determining eligibility to be a member of Parliament. That test also has the advantage that its application is clear. Subject to what we say about specific disqualifications below, Australian citizens should be eligible to stand for the Parliament. Others should not be.

4.789 ***Residence.*** Because of the width of the concept of British subject status to which the Constitution refers, it was no doubt felt necessary that a member of the Parliament should be able to demonstrate some physical connection with Australia. Accordingly the Constitution required three years residence in the Commonwealth. That requirement was continued by the *Commonwealth Electoral Act* until 1984.

4.790 As the constitutional residency qualification could be acquired at any time in a person's life, the provision by itself did not offer any real protection to the institution of Parliament, nor did it give any indication as to the prospective member's commitment to his country. Acquisition of citizenship is likely to indicate not only a strong intention of permanent residency but is also likely to be a more accurate gauge of a person's commitment to a country than any set period of residency.

4.791 With the inclusion in 1981 in the *Commonwealth Electoral Act* of the Australian citizenship requirement, in place of a British subject requirement, the residency qualification became much less important. Most Australian citizens would already satisfy this qualification, including naturalized citizens who have to satisfy residency qualifications before obtaining a grant of citizenship.

621 Rights Report, 89.
622 Rights Report, 90.

To qualify for a grant of citizenship a person must usually satisfy the relevant Minister that he or she:

(a) is a permanent resident;

(b) has been present in Australia as a permanent resident for not less than:

(i) one of the two years immediately preceding the application; and

(ii) two of the five years immediately preceding the application; and

(c) is likely to reside, or continue to reside, in Australia, or to maintain a close and continuing association with Australia.

4.792 Nevertheless, it is possible that an Australian citizen might not have strong links of residence with Australia. For example, a person acquiring Australian citizenship by birth in Australia[623] might never have been to Australia since infancy. A person acquiring Australian citizenship by descent might never have been to Australia.[624] Citizenship requirements can also be changed by the Parliament. But it is, in our view, appropriate also to enable the Parliament to make laws if it decides they are appropriate which could, as a qualification for membership of the Parliament, require a person to comply with reasonable conditions as to residence in Australia.

4.793 ***Allegiance.*** Unlike the provisions in the Constitution about being a 'subject of the Queen' and about length of residence, the foreign allegiance disqualification is not one that the Parliament can override. It is in section 44.[625] Unlike section 34, section 44 is not one which applies 'until the Parliament otherwise provides'. Section 44 is unqualified. It is absolute.

4.794 The disqualification of any member who owes allegiance to, or is a subject or a citizen of, a foreign power is intended to ensure that members of Parliament do not have a dual allegiance, and are not subject to any improper influence from foreign governments.

4.795 In some cases, Australian citizenship alone would not prevent the possibility of dual allegiance. It is an internationally accepted principle that each country has the right to determine for itself whom it will regard as nationals, and under what conditions nationality can be acquired or lost. Some countries do not recognise the renunciation of nationality. Others permit renunciation only upon compliance with conditions which may be difficult or impossible to fulfil. The Joint Committee on Foreign Affairs and Defence in its 1976 report, *Dual Nationality,* said:

> Rules governing nationality generally range from the automatic loss of a former nationality on acquisition of another, to making it impossible to surrender a former nationality. Some countries confer their citizenship on successive generations regardless of the country of birth. A consequence of this latter situation is that many Australians are unknowingly dual nationals and there is no way of determining with certainty who or how many are in this category . . . the large migration programme followed by Australia since the end of World War II has resulted in a large proportion of the 1,069,500 people granted Australian citizenship also being classified as dual nationals by virtue of the domestic legislation of their former homelands.[626]

4.796 Even though a person who is granted Australian citizenship may have taken all appropriate steps to relinquish the non-Australian nationality so far as he or she is able, that person may have retained the status of a subject or citizen because of the laws

623 See *Appendix L* 'Citizenship'.
624 ibid.
625 See also section 45.
626 PP 255/1976, 2, 8.

operating in that country. In that case a person may at present be incapable of being chosen or of sitting as a member of Parliament. The person's right to take the fullest part in our representative democracy could be impaired by being ascribed a status by a foreign system of law that does not permit voluntary relinquishment of that status.

4.797 Any Australian citizen, including a person with dual citizenship, should be able to stand for Parliament. Accordingly section 44(i.) should be deleted.

4.798 ***Entitlement to vote.*** We have decided to follow the approach of the Senate Standing Committee on Constitutional and Legal Affairs and the Brisbane (1985) session of the Constitutional Convention, and recommend that the qualifications to be a member of the Parliament not be predicated on entitlement to be an elector.

4.799 Earlier in this Chapter we recommend that the right to vote should be guaranteed in the Constitution.[627] A proposed alteration on that question and on the issue of one vote, one value is going to referendum on 3 September 1988. Without that guarantee, it would, in our view, be all the more important to remove the right to vote as a qualification for membership of the Parliament because it creates a means which could be used to disqualify particular persons or groups from eligibility to stand for federal election. But even if the right to vote is guaranteed, as we recommend, eligibility to vote is unnecessary as an additional qualification to membership of the Parliament. The formulation we recommend for the right to vote is very similar to the formulation we recommend in relation to entitlement to be a member of the Parliament. But there are minor discrepancies. For example we recommend that, in the case of the right to vote, the Parliament may make laws which prescribe reasonable conditions 'as to residence in Australia or in part of Australia or in a Territory and as to enrolment'. Such laws may very well be necessary for practical reasons to enable the Australian Electoral Commission to compile and maintain the roll of electors so that elections can be properly conducted. In relation to the qualification for membership of the Parliament we recommend a power to make laws 'requiring a person to comply with reasonable conditions as to residence in Australia'. But the laws which define the qualification to stand for election or to be a member of the Parliament could not prescribe, as a condition, that a person reside in a particular part of Australia and as to enrolment.

Treason or criminal conviction

Recommendations

4.800 We *recommend* that the Constitution be altered to provide that any person who has been convicted of treason under a law of the Commonwealth, and not subsequently pardoned, should be disqualified from being a senator or a member of the House of Representatives. Other criminal convictions would not be prescribed in the Constitution as an automatic disqualification. However, we *recommend* that the Parliament also have power to make laws which could disqualify a person whilst he or she is undergoing imprisonment for an offence against a law of the Commonwealth or a State or Territory of the Commonwealth.

Current position

4.801 The Constitution provides that a person is incapable of being chosen or of sitting as a member of Parliament if he or she:

(a) is 'attainted of treason', or

627 para 4.16.

(b) has been convicted and sentenced (or is subject to be sentenced) for any offence punishable under a law of the Commonwealth or of a State by imprisonment for one year or longer.[628]

If a member becomes disqualified in one of these ways, his or her place will become vacant.[629]

4.802 In the *Wood Case No 1* the High Court sitting as a Court of Disputed Returns said:

> It is not conviction of an offence *per se* of which s 44(ii) of the Constitution speaks. The disqualification operates on a person who has been convicted of an offence punishable by imprisonment for one year or more *and* is under sentence or subject to be sentenced for that offence. The references to conviction and sentence are clearly conjunctive . . . This is so as a matter of construction of the language used in s 44(ii). And it is apparent that it was the intention of the framers of the Constitution that the disqualification under this paragraph should operate only while the person was under sentence.[630]

Previous proposals for reform

4.803 ***Treason.*** The Senate Standing Committee on Constitutional and Legal Affairs in its 1981 report *The Constitutional Qualifications of Members of Parliament*[631] rejected abolishing the special ground of disqualification based on treason because:

> The nature of treason and the abhorrence which it, not unnaturally, arouses are such as to justify its retention as a ground of permanent disqualification. It is . . . the most serious offence which a citizen can commit against his fellow countrymen, striking at the very roots of the nation's security. As such, it is fitting that it should permanently bar a convicted person from national parliamentary office.[632]

However the Committee thought that the expression 'attainted of treason' is obscure, and recommended that it be reworded, to provide for disqualification if a person has been convicted under the law of the Commonwealth, and not subsequently pardoned, of the offence of treason.[633]

4.804 The Brisbane (1985) session of the Australian Constitutional Convention considered a report from its Structure of Government Sub-Committee. The Sub-Committee was unable to reach a conclusion on this matter, but noted that substantial problems derive from the use of the word 'treason' without definition. The Sub-Committee said:

> Then there is a real question raised by the [Senate Standing Committee] Recommendation that treason should be restricted to Commonwealth law. In the view of the Sub-Committee, certain offences against a State of the Commonwealth (or simply governed by State law) should be regarded as equal in gravity to some Commonwealth offences for the purpose of disqualifying persons from membership of Parliament. The Sub-Committee considers that a generic description of the offences rather than the term "treason" might be more appropriate for a Constitution likely to outlast many common law and statutory conceptions and definitions.[634]

The Brisbane (1985) session made the following resolution:

628 Section 44(ii.).
629 Section 45(i.).
630 (1987) 76 ALR 91, 95.
631 op cit.
632 id, 17, para 3.5.
633 id, 17, para 3.6; 18, para 3.11.
634 ACC Proc, Brisbane 1985, vol II, 2.

That this Convention ... supports in principle the enactment of a constitutional amendment to revise and modernise the provisions governing the qualifications of members of Parliament having regard to the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs and the Structure of Government Sub-Committee ...[635].

4.805 ***Other criminal offences.*** The Senate Standing Committee on Constitutional and Legal Affairs believed that the electorate is the forum in which decisions about the suitability of a person to be a member can best be made. It recommended that the words of the Constitution in section 44(ii.) relating to criminal convictions be deleted.[636]

4.806 The Brisbane (1985) session considered the report on this subject from its Structure of Government Sub-Committee. The Sub-Committee did not agree that deletion of those words from the Constitution was a satisfactory answer to its many defects. It recommended a new provision which would disqualify a member if he or she has been convicted and is under sentence of imprisonment for an offence punishable under the law of the Commonwealth or of a State or Territory by imprisonment for five years or longer. There were different views about whether conviction should disqualify a person from being a member of Parliament:

(a) permanently;

(b) only while the offender is serving a term of imprisonment; or

(c) throughout the term of imprisonment and the term of any parole period.[637]

4.807 Most members of the Sub-Committee also supported insertion of the words 'until the Parliament otherwise provides' to allow flexibility to alter the constitutional standard as community perceptions changed.[638]

4.808 The Brisbane (1985) session supported in principle the enactment of a constitutional amendment to revise and modernise the provisions governing the qualifications of members of Parliament having regard to the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs and the Structure of Government Sub-Committee.[639]

Advisory Committee's recommendations

4.809 The Rights Committee recommended that the disqualification in section 44(ii.) relating to treason should apply to any person who 'is convicted of treason unless subsequently pardoned'.[640]

4.810 The Rights Committee recommended that the words in section 44(ii.) relating to criminal offences other than treason be deleted. It agreed with the Senate Committee that the electorate is the forum in which decisions about the suitability of a person to be a member can best be made.[641]

Reasons for recommendations

4.811 ***Treason.*** The expression 'attainted of treason' dates far back into English legal history but its precise meaning is not clear. Different treason provisions in federal and

635 Report on Constitutional Qualifications of Members of Parliament (1985) 2, ACC Proc, Brisbane 1985, vol 11.
636 op cit, 25, para 3.38-3.39.
637 ACC Proc, Brisbane 1985, vol II, 2-3.
638 id, 3.
639 ACC Proc, Brisbane 1985, vol I, 423.
640 Rights Report, 91.
641 Rights Report, 91.

State legislation (and perhaps the common law) make the basis on which disqualification could rest unclear. The words may not require that the person has been convicted of treason. Disqualification is permanent, a clear indication that the authors of the Constitution regarded treason as the most serious crime, which would preclude a person from membership of Parliament. Circumstances may change and a person may be pardoned for an offence of treason, yet that pardon would not remove the permanent disqualification from membership of Parliament.

4.812 ***Other criminal offences.*** Disability on the basis of other criminal offences only applies while a person is under sentence, or subject to be sentenced, for an offence which carries a minimum penalty of one year's imprisonment. Once that sentence has been served a person may sit as a member of Parliament.

4.813 Because of changes in sentencing systems, and variations in penalties, it may be inappropriate to use the sentence provision as the criterion of Parliamentary disqualification. For example:

(a) there are inconsistencies in the setting of maximum terms of imprisonment for similar offences (between laws in the same jurisdiction, and between federal, State and Territorial laws) so that conviction in one place might result in disqualification while conviction for the same offence in another would not;

(b) conviction of some offences, although carrying a penalty of one year or more, may not seem to warrant disqualification from Parliament;

(c) some serious offences (for example, in trade practices and tax areas of the law) are only punishable by fine, and so conviction would not disqualify a person from Parliament; and

(d) where an order for a suspended sentence or conditional discharge is made, it may be that a person will be 'subject to be sentenced', and so disqualified from Parliament, for a period beyond that to which the offender would have been liable if actually sent to gaol.

4.814 We also considered what principle should guide the decision about what should happen to a person who has been convicted and who wants to stand for Parliament or to a person who, having been elected and later convicted, wants to continue as a member of Parliament. In our view, the main consideration is the person's capacity to serve as a representative, of which quality the electors are the most suitable judges.

4.815 A person's capacity to serve could be affected by the operation of section 38 of the Constitution and the exercise of the Parliament's powers and privileges under section 49. Section 38 says:

> 38. The place of a member shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the House, fails to attend the House.

If a person is unable to attend Parliament because of being imprisoned that section could come into play.

4.816 Section 49 says:

> The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.[642]

642 We deal earlier in this Chapter (para 4.692-4.732) with the alterations which should be made to section 49.

4.817 In our view, it is for the Parliament to deal with the cases of persons convicted of criminal offences once they are members of the Parliament. There is such a variety of cases which might arise that they cannot be anticipated for the purpose of drafting a constitutional provision. Accordingly the provision in section 44(ii.) about criminal conviction should be deleted.

4.818 Section 34 should make clear that the Parliament can set time limits, for example imprisonment for longer than a nominated period. The Parliament should be given more flexibility, especially with the removal of disqualifications based on bankruptcy and criminality. There should be some power in the Parliament to make laws for disqualification based on criminal conviction, etc. This could be conferred directly in the Constitution. The Parliament has not acted irresponsibly in the past on such matters.

Bankruptcy and insolvency

Recommendation

4.819 We *recommend* that sections 44(iii.) and 45(ii.) be omitted and not replaced, so that bankruptcy and insolvency would no longer disqualify a person from being a member of Parliament.

Current position

4.820 The Constitution provides that a person who is an undischarged bankrupt or insolvent cannot be chosen or sit as a member of Parliament.[643] If a member later becomes bankrupt or insolvent that member's place becomes vacant.[644] A member's place in the Parliament also becomes vacant if he or she takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors.[645]

In the *Wood Case No 1* the High Court sitting as a Court of Disputed Returns ruled on the ground of disqualification in section 44(iii.). The Court said:

> ... the adjective "undischarged" in para (iii) attaches both to "bankrupt" and to "insolvent". In other words, insolvent is not adjectival and merely describing a person who cannot pay his debts as they fall due. It is ... part of a composite reference to the status of a person who has been declared bankrupt or insolvent and who has not been discharged from that condition.[646]

Previous proposals for reform

4.821 ***Senate Standing Committee on Constitutional and Legal Affairs.*** In its 1981 report, *The Constitutional Qualifications of Members of Parliament,* the Senate Standing Committee on Constitutional and Legal Affairs recommended that the relevant provisions of the Constitution be deleted. While the Committee acknowledged the argument that an insolvent candidate or member could be seen to be open to financial persuasion or other pressure, it thought that the decision about a person's suitability to be a member should be made by electors. Such a person is not necessarily tainted as morally reprehensible or delinquent, nor is he or she prima facie unsuitable as a candidate or member of Parliament.[647]

643 Section 44(iii.).
644 Section 45(i.).
645 Section 45(ii.).
646 (1987) 76 ALR 91, 95.
647 op cit, 34-7, para 4.32-4.45.

4.822 ***Australian Constitutional Convention.*** This recommendation was referred to the Structure of Government Sub-Committee by the Adelaide (1983) session of the Australian Constitutional Convention. The Sub-Committee generally agreed with the recommendation. It noted that legislation concerning companies and statutory authorities prevent office holders from continuing to hold office should they become bankrupt or take advantage of any benefit of any bankruptcy or insolvency laws. However, the Sub-Committee thought that a distinction can be made between company directors, over whom the public has no control, and candidates or members who the public elects to office. The Sub-Committee recommended that, at the very least, the words 'or insolvent' should be deleted from the disqualification from being chosen or sitting as a member.[648]

4.823 The Brisbane (1985) session of the Australian Constitutional Convention supported constitutional alteration, in principle, to revise and modernise the provisions governing the qualifications of members of Parliament having regard to the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs and the Structure of Government Sub-Committee.[649]

Submissions

4.824 Botany Multicultural Resource Centre[650] submitted that section 44(iii.) should be deleted because it is 'irrelevant'. C Taylor[651] submitted that all members of Parliament should give a clear statement of their financial position, including that of their immediate family.

Reasons for recommendation

4.825 Section 45(ii.), which disqualifies members who take the benefit of laws relating to bankrupt or insolvent debtors, appears to have been inserted to prevent members of Parliament avoiding bankruptcy or insolvency proceedings (and hence disqualification) by entering into an arrangement with creditors which was given legal effect by a court. However, it may go further than intended to include cases where a person has assets to cover all his liabilities and chooses not to sell assets but to enter into an arrangement with creditors, thus taking benefit of a law relating to bankrupt or insolvent debtors. It also literally applies where a person is a creditor or trustee in bankruptcy who takes such a benefit (though there is no suggestion that the authors of the Constitution intended it to apply to non-debtors). This provision is anomalous because a person who is currently involved in an arrangement with creditors could be elected and sit as a member, whereas entering into such an arrangement later would cause that member's seat to be vacated.

4.826 At the time the Constitution was drafted there was still a strong presumption that bankruptcy involved moral turpitude. Insolvency laws of earlier centuries were based on moral and criminal precepts. In modern economic and social conditions, with the growth of consumer credit and the risks that go with it, community attitudes to debt, including bankruptcy and insolvency, may have changed. The number of bankruptcies and schemes of arrangement has increased. Honest and reliable persons can get into debt because of circumstances over which they have no control. In our view, constitutional disqualification is not justified today.

648 ACC Proc, Brisbane 1985, vol II, 3-4.
649 ACC Proc, Brisbane 1985, vol I, 423.
650 S961, 16 February 1987.
651 S472, 8 November 1986.

Unsoundness of mind and insanity

Recommendations

4.827 We *recommend* that the Constitution be altered to make unsoundness of mind a disqualification for membership of the Parliament.

4.828 We *recommend* that the Parliament also have power to make laws to lay down procedures for determining whether a person is of unsound mind.

Current position

4.829 The Constitution itself does not make unsoundness of mind or insanity a disqualification for membership of the Parliament. However, Parliament has legislated pursuant to sections 34 and 51(xxxvi.) of the Constitution to prescribe qualifications which supersede those laid down in section 34.[652]

4.830 Section 34 lays down qualifications of members of the House of Representatives 'until the Parliament otherwise provides'. Section 51(xxxvi.) gives the Parliament power to make laws with respect to 'Matters in respect of which this Constitution makes provision until the Parliament otherwise provides'.

4.831 Section 163 of the *Commonwealth Electoral Act* says, in effect, that to be qualified to be a member of the House of Representatives, a person must be qualified to be an elector for that House. Section 93(8)(a) says that a person is not qualified to be such an elector, a person if that person, 'by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting'. Section 16 of the Constitution says that the qualifications of a senator shall be the same as those of a member of the House of Representatives.

Previous proposals for reform

4.832 ***Senate Standing Committee on Legal and Constitutional Affairs. (1981)*** The Committee regarded the provision in the *Commonwealth Electoral Act (1918)* dealing with the unsound mind qualification as unnecessary, and hence recommended that it should be omitted. The Committee reasoned that a person who was in this category would, in most cases, not even be able to succeed in either attracting sufficient support for nomination nor to fill out all the relevant forms.[653]

Submissions

4.833 Another qualification which many persons were concerned to see included was that of soundness of mind.[654] The Australian Electoral Commission concluded that there should be an unsoundness of mind disqualification in the Constitution applying both to electors and to Parliamentarians. The Electoral Commission argued that it should be possible to remove a member who had, for example, suffered a debilitating stroke and who was thereby unable to fulfill his or her role as an elected representative.[655]

652 *Commonwealth Electoral Act* section 163.

653 op cit, 13-14, para 2.25.

654 Australian Electoral Commission S1200, 28 August 1986.

655 Other submissions supporting the inclusion of a provision for 'sound mind' included WT Gibbs S2504, 15 February 1986; F Arena S2505, 15 December 1986; NSW ALP Immigration and Ethnic Affairs Committee S1253, 17 March 1987; P Desmond S3333, 9 March 1988; Dr PH Springell S1391, 30 March 1987.

Reasons for recommendations

4.834 We agree with the submission from the Australian Electoral Commission that unsoundness of mind should disqualify a person from being a member of the Parliament and accordingly we *recommend* that a qualification for membership of the Parliament be that a person not be of unsound mind. The substantial concern in this area is that a member of Parliament could suffer some episode such as the debilitating stroke referred to by the Electoral Commission in its submission, and that that person's electors would thereby be deprived of representation in the Parliament.

4.835 As a matter of drafting we regard the phrase 'unsound mind' as sufficient to capture the principle at stake. The additional phrases in section 93(8)(a) of the *Commonwealth Electoral Act* are simply unnecessary and provide for undue complications.

4.836 We are also of the view that this aspect of the qualifications of members of Parliament should be clearly and fully stated in the Constitution. The Parliament should be able to make laws with respect to the procedures for determining whether a person is of unsound mind for this purpose.

Employment by the Crown

Recommendations

4.837 We *recommend* that the Constitution be altered to provide that a member of the Parliament who becomes:

(i) a judge and holds any other judicial office;

(ii) a member or employee of the federal, a State or Territorial public service;

(iii) a member of the Defence Force;

(iv) a member of other Australian Parliament or legislature; or

(v) a member, officer or employee of certain public authorities

should also be disqualified.

4.838 On the other hand, a person in such a position who subsequently becomes a member of the Parliament would be deemed to have ceased to be so employed or to hold that office on the day immediately before becoming a member of the Parliament and so would be qualified to be a member.

Current position

4.839 The Constitution provides that a person cannot be chosen or sit as a member of Parliament if he or she holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth. So, for example, a judge or a public servant cannot also be a member of the Parliament.

4.840 This disqualification does not apply to:

(a) the office of any of the Queen's Ministers of State for the Commonwealth;

(b) the office of any of the Queen's Ministers for a State;

(c) the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army; or

(d) the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.[656]

4.841 A member of one House of the Parliament cannot be chosen or sit as a member of the other House.

Previous proposals for reform

4.842 ***Royal Commission on the Constitution.*** In 1929, two members of the Royal Commission on the Constitution supported the right of public servants to stand for Parliament without resigning their positions in the public service. They proposed that the resignation of public servants, once elected, should take effect from the date of declaration of the election. However, the majority of members of the Royal Commission expressly did not recommend that section 44 be altered in this way.[657]

4.843 ***Referendum proposal (1978).*** In 1978, Senator Colston (ALP Queensland) introduced into the Senate the *Constitution Alteration (Holders of Office of Profit)* Bill. The purpose of this Bill was to enable Government employees to stand for Parliament without risking their jobs. The Bill lapsed at the dissolution of the House of Representatives in September 1980 but was reintroduced in 1981 in the same form.

4.844 ***Senate Standing Committee on Constitutional and Legal Affairs.*** The Colston Bill provided the impetus for the inquiry by the Senate Standing Committee on Constitutional and Legal Affairs, which reported in May 1981.[658]

4.845 The Committee concluded that the two important principles to be upheld are:

(a) to ensure that a member or senator is not simultaneously a member of the Parliament and a 'Commonwealth public servant' and in receipt to two salaries as a result; and

(b) to ensure that 'Commonwealth public servants' are not effectively discouraged from standing for the Parliament.[659]

4.846 The Committee recommended that the existing provisions be replaced with provisions to the effect that:

(a) a person who is employed by, or holds any position in, certain organisations (for example, the public service or a public authority) or membership of a State Parliament would be deemed to have ceased such employment or resigned such membership at the date he or she became entitled to an allowance as a member of the Parliament;

(b) a member's place would become vacant if he or she became employed in the public service, or the permanent defence force, or became a member of a State Parliament or Territorial legislature, or accepted certain other positions; and

(c) a member of either House of the Parliament who is elected to the other House would be deemed to have vacated his or her place in the first House upon the declaration of the poll in respect of that person's election to the second House.[660]

656 Section 43.
657 1929 Report, 269, 303.
658 op cit, 49, para 5.39.
659 id, 45, para 5.23.
660 id, 60-61, para 5.83.

4.847 If these recommendations were adopted it would also become possible to appoint members as assistant Ministers and to similar offices, with appropriate remuneration, without having to list exceptions to the general 'office of profit' disqualification that now exists. Alternatively, such offices could be referred to in the Constitution.[661]

4.848 ***Australian Constitutional Convention.*** The Brisbane (1985) Australian Constitutional Convention supported in principle constitutional alteration to revise and modernise the provisions governing the qualifications of members of Parliament having regard to the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs and the Structure of Government Sub-Committee.[662]

4.849 The Structure of Government Sub-Committee agreed with the view of the Senate Standing Committee that holders of office of profit under the Crown should not be placed at a disadvantage by virtue of their employment when seeking a position in the Parliament.

4.850 The Sub-Committee, whilst supporting the recommendation that section 44(iv.), the proviso to section 44, and section 45 be replaced by the new provision recommended by the Senate Committee noted the following matters as requiring further consideration:

(1) the candidature of holders of offices of profit under the Crown, in particular, public servants, could raise management problems for the employer body . . .

(2) the precise specification of office holders in the new s.44A needs further consideration as certain persons, e.g. judges, employees of non-statutory authorities are not included.

(3) the different ways in which the draft sections 44A and 45 refer to employees of Commonwealth public authorities and employees of State and Territory authorities.

(4) the argument that s.44A guarantees the continuation in office or employment of the office holders despite circumstances (misbehaviour, illness) which could result in the termination of their position or office. If, as seems more likely, the provision is not read in this way, it might leave it open to the Commonwealth and State Parliaments to reimpose the requirement to resign once an office-holder decided to nominate for election — a possibility which runs counter to the [Senate Standing Committee's] Recommendation.

(5) the proposed s.44A refers to an allowance under s.48 of the Constitution. Parliamentary allowances are paid under the *Parliamentary Allowances Act* and not, strictly speaking, under s.48. The Sub-Committee considers that the drafting of s.44A could be expressed in more precise terms and *recommends* —

  (i) the deletion of 'an allowance under s.48 of the Constitution', and

  (ii) the insertion of '. . . any payment as a Senator or Member of the House of Representatives under a law of the Commonwealth.'

(6) s.44A could allow the theoretical possibility of a public servant or office-holder retaining his office or employment after election in the event of the Parliament being prepared to take away or postpone the right of such a person to receive the Parliamentary allowance. However, the Sub-Committee considers the possibility of this happening as remote and fraught with political difficulties.[663]

4.851 ***Referendum proposal (1985).*** On 28 March 1985 the Senate gave a second reading to Senator Mason's Bill, *Constitution Alteration (Disqualification of Members and Candidates) 1985.* This Bill was designed to give effect to the recommendation of the Senate Standing Committee that section 44(iv.) of the Constitution disqualifying

661 id, 72-3, para 6.29-6.34.

662 ACC Proc, Brisbane 1985, vol I, 423.

663 Report on Constitutional Qualifications of Members of Parliament (1985) 4-5, ACC Proc, Brisbane 1985, vol II. ACC Proc, Brisbane 1985, vol II.

members who hold offices of profit under the Crown should be replaced by new provisions which give a more precise description of the offices in question and which allow their holders to become candidates without being required to resign.

Advisory Committee's recommendation

4.852 The Rights Committee recommended the deletion of section 44(iii.) and section 45(ii.) from the Constitution, and quoted, with apparent approval, the reasons given by the Senate Select Committee.[664]

Submissions

4.853 JD Hammond[665] and PL Brown[666] submitted generally that the disqualification provisions of the Constitution needed redrafting. S Souter[667] submitted that section 44(iv.) should be amended to include (a) holder of any office, not necessarily of profit, be it federal, State or Territory, (b) a sitting member of any State or Territorial Parliament and (c) a person receiving a pension of any kind during the course of that persons term in Parliament. On the other hand JM Groadly[668] submitted that section 44(iv.) should be removed. One submission offered the opinion that provision should be made to disqualify members of Parliament for obtaining employment outside their Parliamentary duties.[669]

Reasons for recommendations

4.854 There is uncertainty about the scope and application of the expression 'office of profit under the Crown'.[670] It originates from British statutes, dating back to the early eighteenth century, which sought to prevent the use of Crown patronage to win the support of members of the House of Commons.

4.855 The expression clearly includes public servants and ambassadors, and may include persons holding other offices (such as employment by a public authority, for example CSIRO). Because of this uncertainty, and because it may be that a person is 'chosen' as a member of Parliament upon nomination as a candidate, candidates who regard themselves as possible holders of an office of profit have tended to resign from their positions before nominating. If they are not elected they may suffer severe personal disadvantage, especially if they do not have a right to re-employment. One concern is that, as a consequence of this interpretation of the provision, public servants do not have equal rights with other citizens to seek election to Parliament.

4.856 In the case of a senator-elect, the practice has been that, in the period (possibly up to 12 months) between election and the senator taking his or her place in the Senate , that person has not taken employment by the Crown (for example as a public servant or Ministerial research assistant) in case the place in the Senate is put in jeopardy.

4.857 Due to the interpretation of 'chosen', members of one House who decide to seek election to the other have generally been advised to resign from their place in the first House before nominating for election to the other House. If they are unsuccessful they lose their seats in the first House, and further by-elections are necessary or casual vacancies in the Senate have to be filled.

664 Rights Report, 92.
665 S100, 3 June 1986.
666 S161, 11 July 1986.
667 S2326, 22 July 1987.
668 S496, 9 November 1986.
669 V Guest S3313, 1 March 1988.
670 op cit, 39-41, para 5.2-5.7.

4.858 Although persons who receive payment as Ministers in the Government are not disqualified as holding an office of profit, problems arise for Governments wishing to appoint members as Assistant Ministers and Parliamentary Secretaries. The Constitution provides that Ministers are appointed to 'administer departments of State'. This description does not seem to include Assistant Ministers, Parliamentary Secretaries, Ministers without portfolio and other office bearers of this kind who do not administer departments in their own right. Members may be appointed to such positions. However, if they are paid over and above their Parliamentary allowance for that work, they may then hold an 'office of profit under the Crown' and risk having their places become vacant. Both Coalition and Labor Governments have seen the need for greater flexibility in Ministerial arrangements than is envisaged by the Constitution. If persons are to be appointed to do the work of Ministers they should be properly remunerated.

4.859 Some provisions now appear to be anomalous or outmoded. For example:

(a) it is constitutionally possible for a person to be a Minister in a State Government and a member of the Parliament at the same time (although the *Commonwealth Electoral Act* now prohibits a member of a State Parliament or Territory Assembly from nominating as a member of the Parliament);

(b) members of the British armed forces, who otherwise qualify, may become members of Parliament, although full-time members of the naval or military forces of the Commonwealth are excluded;

(c) a person can be disqualified for holding a pension payable entirely at regal or vice regal pleasure, yet such pensions are now largely defunct and pensions payable upon conditions set out in legislation (for example, social security benefits) do not disqualify a person from being a member of Parliament.

4.860 The principle on which any amendment should be based is that, apart from the member's salary and reimbursement of reasonable expenses, a member of Parliament should not receive remuneration from the Crown in right of the Commonwealth, a State or a Territory. The prohibition is to avoid 'double-dipping', and the possibility or appearance of divided loyalty. A person who is a member of or employed by such an authority, body, office or corporation should be disqualified from being a member of Parliament.

4.861 The alterations we recommend are presented in the form of legislative drafts at Bill No 8 of *Appendix K*. In our view they would overcome the problems that have been identified in this aspect of the Constitution. We have been influenced by the work done by the Senate Standing Committee on Constitutional and Legal Affairs on this issue. But there were, in our view, a number of difficulties, which we have sought to overcome, with the draft of the alterations that it recommended. We were concerned, for example, that some provisions in the draft sections 44A and 45 proposed by the Senate Standing Committee on Constitutional and Legal Affairs made inappropriate distinctions between federal and State bodies and were unclear on the what is an 'authority' for that purpose. Reference to judicial officers should also be added to the proposed alteration made by Senate Select Committee.

4.862 Although our proposed alterations (sections 45(c) and 46(1)(d)) would, for example, extend to aldermen in local councils, the Parliament could create classes of exemptions under the proposed section 46(2). That provision is intended to apply not only to individual exemptions but also to class exemptions.

4.863 ***Section 43.*** Section 43, which prevents a member of either House of the Parliament being chosen or of sitting as a member of the other House, should be retained. If a member of Parliament stands for a seat in the other House of the Parliament, he or she should take the risk of losing the election, and of losing membership of the House from which he or she has come.

Pecuniary interests

Recommendation

4.864 We *recommend* that the Parliament have power, subject to the Constitution, to make laws to disqualify members of the Parliament who hold interests which might constitute a material risk of conflict between their public duty and private interests, and to disqualify any person convicted of an offence relating to corrupt practices or improper influence. Subject to any such law, the existing constitutional disqualification provisions should apply to any person who has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than 25 persons. Candidates for or members of the Senate or the House of Representatives should no longer be disqualified under section 44(iv.) for holding any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth. The place or a senator or member of the House of Representatives should no longer become vacant under 45(iii.) if he or she directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State.

Current position

4.865 The Constitution provides that a person cannot be chosen or sit as a member of Parliament if that person has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth other than as a member of an incorporated company consisting of more than 25 persons.[671]

4.866 A member's place in the Parliament becomes vacant if the member has such a pecuniary interest, or directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State.[672]

Previous proposals for reform

4.867 ***Joint Parliamentary Committee (1975).*** The Joint Committee on Pecuniary Interests of Members of Parliament, in its report tabled on 30 September 1975, observed that 'the apparent prevention of conflict of interest situations to be derived from section 44(v.) may prove to be illusory'. It did not recommend changes to the Constitution, but recommended the establishment of a register of pecuniary interests of members of Parliament.

4.868 ***Bowen Committee (1979).*** A Committee of Inquiry, chaired by the Hon Sir Nigel Bowen, in its report *Public Duty and Private Interest* tabled on 22 November 1979,[673] concluded that the constitutional provisions are inadequate to cope with the many conflict of interest situations which arise in the Federal Government. The Committee recommended that the relevant sections of the Constitution be reviewed.

671 Section 44(v.).
672 Section 45(i.) and (iii.).
673 PP 353/1979, 59, para 7.14; see also 134.

4.869 ***Senate Standing Committee on Constitutional and Legal Affairs (1981).*** In its 1981 report *The Constitutional Qualifications of Members of Parliament,* the Senate Standing Committee on Constitutional and Legal Affairs expressed the opinion that the pecuniary interests disqualification provision has a wide area of potential application to a variety of transactions. The Committee thought that a court would seek ways to confine the operation of the provision to cases where the character of the agreement is such as to raise prima facie questions in the public mind about the exercise of improper influence on the part of the Government or the contractor. However, its view was that the whole question of members' pecuniary interests remains in need of systematic clarification by a formal constitutional amendment or, at least, by Parliamentary guidelines. Although there may be varying degrees of seriousness of a conflict, and the intent of the office holder may vary from case to case, the Committee saw a need for adequate constitutional provisions disqualifying members of Parliament involved in situations where their pecuniary interests manifestly conflict with their public duties.[674]

4.870 The Committee favoured replacing the present provisions with a general power enabling Parliament to prescribe details as it sees fit. This would allow Parliament to legislate without restriction over the whole area of conflict of interest and ensure that the standards set would remain relevant to prevailing social and economic conditions. It recommended that the existing provisions be deleted and a new provision be inserted to the effect that the Parliament may make laws with respect to:

(a) the interests, direct or indirect, pecuniary or otherwise, which shall not be held by a senator or member of the House of Representatives;

(b) the circumstances which constitute the exercise of improper influence by or in relation to a senator or member of the House of Representatives and the action which shall be taken with respect to such an exercise; and

(c) the procedures by which any matters arising under such laws may be resolved.[675]

4.871 ***Australian Constitutional Convention.*** This recommendation was referred to the Structure of Government Sub-Committee by the Adelaide (1983) session of the Australian Constitutional Convention. The Sub-Committee agreed with the recommendation and also recommended that the repeal of the relevant provisions should not come into effect until Parliament had legislated on pecuniary interests pursuant to the proposed new section of the Constitution.[676]

4.872 The Brisbane (1985) session of the Australian Constitutional Convention supported in principle constitutional alterations to revise and modernise the provisions governing the qualifications of members of Parliament, having regard to the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs and the Structure of Government Sub-Committee.[677]

Advisory Committee's recommendation

4.873 The Rights Committee said that the sections 44(iv.) and 44(v.) ensures that senators and members are not placed in a position of conflict of interest, and that they should not be amended.[678]

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674 op cit, 82-8, 7.24-7.45.
675 id, 86, para 7.37.
676 Report on Constitutional Qualification of Members of Parliament (1985) 7, ACC Proc, Brisbane 1985, vol 11.
677 ACC Proc, Brisbane 1985, vol I, 423.
678 Rights Report, 92.

Reasons for recommendations

4.874 ***Pecuniary interests.*** The origin of this provision can be traced back at least as far as a 1782 English statute aimed at securing the independence of the Parliament from the Crown and its influence. It was thought that a person who had a contract with the Government might be corruptly influenced by the Crown in matters relevant to the performance of obligations as a member of Parliament.

4.875 The provision may also have the wider purpose of removing the possibility of conflict (or the appearance of a conflict) between the advancement of a person's own interests and his or her duty as a member of Parliament.

4.876 The criteria for disqualification have been interpreted narrowly, to apply only where contracts are of a more permanent or continuing and lasting character and the Crown could conceivably influence the contractor in relation to Parliamentary affairs by the very existence of the agreement.[679]

4.877 However, the scope of the provision is unclear. It may apply to short term agreements of a similar nature. It may be meant to apply not only where the person will receive direct financial gain, but also where the person benefits indirectly as a shareholder from an agreement with a company.

4.878 There is uncertainty about whether the disqualification could apply to a variety of transactions between members and the Crown, including many where goods, services and other benefits are provided by the Commonwealth on the same terms and conditions as they are made available to the public (for example, government insurance, leasing of residential premises or small plots of land, compensation settlements including payments for property compulsorily acquired, loans made to the Commonwealth and by the Commonwealth). The uncertainty is a cause for concern, especially as disqualification is automatic.

4.879 ***Fees and honoraria.*** This provision has a wide ambit, though its extent is uncertain. It covers cases where a member receives fees for professional services rendered to the Federal Government (for example, by barristers in Parliament accepting fees or retainers to do Crown work) and prevents a member from receiving payments for lobbying in Parliament on behalf of a person or a State. On the other hand, reimbursement for out-of pocket expenses and payments of a legitimate standard of allowances for such expenses have been regarded as permitted.

4.880 Questions have arisen about some other more routine types of payments by the Commonwealth to members of Parliament which, on a strict interpretation of the provision, may cause those members' places in the Parliament to become vacant. Examples include the position of members:

(a) who are pharmaceutical chemists or medical practitioners and who receive payments from the Commonwealth under the *National Health Act* 1953 (Cth);

(b) who have received payments from the Australian Broadcasting Corporation after being interviewed on radio or television; or

(c) who are solicitors who have accepted matters referred to them by a State or Territorial legal aid commission.

679 See *In Re Webster* (1975) 132 CLR 270 (Barwick CJ). See the commentary on Barwick CJ's decision in the Report of the Senate Select Committee on Constitutional and Legal Affairs: 'The Constitutional Qualifications of Members of Parliament', op cit, 76-80, para 7.4-7.18.

4.881 This provision fails to cover gifts and sponsored travel, which might be more serious than the payment of fees or honoraria. The provisions we recommend in Bill No 8 at *Appendix K* seek to overcome these problems.

Other qualifications and disqualifications

Submissions

4.882 Some submissions argued that there should be some special requirement as to intelligence[680] or educational qualifications for members of the Parliament.[681]

4.883 Other requirements mooted included that all Parliamentarians should be persons of 'superior quality',[682] and that they should have had an active involvement with community associations in the electorate for which they are standing.[683] PP Rona[684] submitted that a member who misleads Parliament should also resign and in fact be ineligible to hold office again.

4.884 We also considered submissions which argued that where a person is elected as a candidate for one political party and, once elected, changes party membership, that person should be obliged to stand for re-election. A number of persons submitted that a member should immediately resign from Parliament on ceasing to be a member of the party of which he or she was a member at the last election.[685]

Reasons for recommendation

4.885 These and other submissions on other qualifications and grounds of disqualification of members of Parliament were considered, but we have not seen the need to recommend any other alterations to the Constitution.

4.886 We think it would be impossible to find agreement on educational or similar qualifications which would be appropriate. It is for the electors to decide who should represent them and potential candidates should not be disqualified on educational or similar grounds.

4.887 We cannot speculate whether electors would continue to support a person who left a party or was expelled from it. For many electors, no doubt, that would depend on the circumstances. In some cases it would be difficult to decide which of two or more groups were still members of the party in question. In any case, we do not think it is now appropriate to deal with these matters in the Constitution.

Adjudication and enforcement

Recommendation

4.888 We *recommend* that the House in which the question arises should continue to be able to determine any question respecting the qualification of a member of that House, or respecting a vacancy in that House, and any question of a disputed election to that

680 WT Gibbs S2504, 15 February 1986.

681 H Stanley S1982, 25 April 1987, submitted that all members of Parliament should be required to have a degree in political science.

682 NH Barnfield S2907, 29 October 1987.

683 BOP Mansfield S2570, 30 October 1987.

684 S3200, 3 February 1988.

685 RM Higginson S643, 26 November 1986; F Domincile S804, 14 December 1986; ALP Apollo Bay Branch S1213, 10 March 1987. By contrast, in some telephone submissions it was said that a member of the Parliament should *not* be able to resign early.

House; but that any elector in the electorate of the person whose qualification or whose membership is in question should be able to apply to the High Court for a declaration as to the person's qualification or membership, and that a declaration of the High Court should have full force and effect notwithstanding any determination of the respective Houses of Parliament.

4.889 We *recommend* that any person who sits as a member of the Parliament while disqualified should be liable to such pecuniary penalties payable to the Commonwealth as are prescribed by the Parliament.

Current position

4.890 The Constitution prescribes methods for adjudication of disputes over a member of Parliament's qualifications to be a member and over disqualifications, but those methods may be changed by the Parliament. Section 46 provides for common informer actions in the courts, and section 47 for adjudication by the House of which a person claims to be a member.

4.891 Section 46 has been displaced by the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth). The *Common Informers (Parliamentary Disqualifications) Act 1975* abolished actions brought directly under section 46 of the Constitution. Instead the Act provided for a penalty of $200 for a past breach and a further penalty of $200 per day for every subsequent day on which the member sat while disqualified after service of the originating process.[686] Section 46 of the Constitution had specified that, until the Parliament otherwise provides, the penalty should be 100 pounds per day. That was presumably payable for *every* day the person sat while disqualified. As the Senate Standing Committee remarked, the total penalty incurred under section 46 would be enormous if an infringement only became apparent years after it had occurred.[687]

4.892 The *Common Informers (Parliamentary Disqualifications) Act 1975* limited actions for penalties to sittings during the period of 12 months prior to the action being brought[688] It also ensures that no member can be penalised more than once in respect of any particular sitting-period,[689] and vests jurisdiction in the High Court exclusively in common informer actions.[690]

4.893 Section 376 of the *Commonwealth Electoral Act* enables the Houses to refer questions about qualifications to the Court of Disputed Returns, but it does not expressly deny to the Houses the jurisdiction conferred on them by section 47 of the Constitution. Section 376 says:

> Any question respecting the qualifications of a Senator or of a Member of the House of Representatives or respecting a vacancy in either House of the Parliament may be referred by resolution to the Court of Disputed Returns by the House in which the question arises and the Court of Disputed Returns shall thereupon have jurisdiction to hear and determine the question.

686 Section 3(1).
687 op cit, 92, para 8.4.
688 Section 3(2).
689 Section 3(3).
690 Section 5. Penalties recovered under common informer actions are payable to the person who brings the action, that is the common informer.

4.894 The jurisdiction conferred on the Houses by section 47 is a jurisdiction which, in the United Kingdom, has traditionally been regarded as part of the privileges jurisdiction of the Houses of Parliament.[691]

4.895 In the *Wood Case No 2*[692] the High Court sitting as a Court of Disputed Returns considered the extent of its jurisdiction to answer questions put to it by the Senate. The Senate had referred these three questions:

(a) whether there is a vacancy in the representation of New South Wales in the Senate for the place for which Senator Wood was returned;

(b) if so, whether such vacancy may be filled by the further counting or recounting of ballot papers cast for candidates for election for Senators for New South Wales at the elections; and

(c) alternatively, whether in the circumstances there is a casual vacancy for one Senator for the State of New South Wales within the meaning of section 15 of the Constitution.

4.896 The Court held it was not justified in reading down its jurisdiction as the Parliament, by virtue of the *Commonwealth Electoral Act,*[693] had provided otherwise than section 47 of the Constitution. It had done so by granting the Court of Disputed Returns a general jurisdiction to determine questions respecting qualifications and vacancies.

Previous proposals for reform

4.897 The Senate Committee has recommended that the *Commonwealth Electoral Act* be amended to make it clear that questions respecting qualifications etc may be decided by the House itself, or referred to the Court.[694] The Committee further suggested that if a question is so referred the Court's jurisdiction be exclusive.[695] The Committee recommended that common informer provisions remain, but only in the form of an action for a declaration. Penalties should be abolished from that Act, said the Committee.[696]

Reasons for recommendations

4.898 In our view, it should be open to any elector in the electorate of the person whose qualification or whose membership is in question to apply to the High Court for a declaration respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House, and any question of a disputed election to either House.[697] This should be guaranteed in the Constitution. In this way, the integrity of the electoral system would be safeguarded.

4.899 The House in which the question arises should continue to have jurisdiction to decide the question. Nevertheless, it should also be possible for the High Court to determine the question even if the relevant House has considered it. In our view, it is appropriate that the determination of the highest Australian court on such matters should prevail. So if the High Court makes a declaration, its declaration should have full force and effect notwithstanding any determination of the respective House of the Parliament.

691 para 4.692-4.732.
692 (1988) 78 ALR 257.
693 Section 376.
694 op cit, 94, para 8.11-8.12.
695 id, 94, para 8.12.
696 id, xi para 18; 95 para 8.18.
697 In the case of the Senate, when the State has voted as one electorate, any elector from that State would have standing.

4.900 Provision should be made for penalties for a member sitting when disqualified. It should be for Parliament to decide the appropriate penalty. But we do not think the common informer's action for penalties is now an appropriate mode of challenge.

CHAPTER 5

THE EXECUTIVE GOVERNMENT OF THE COMMONWEALTH

INTRODUCTION

5.1 In Chapter 2[1] we have provided a general account of the provisions of the Constitution which govern the executive branch of the government of the Commonwealth and the relationship between the executive branch and the Parliament. In this Chapter we consider whether the provisions of the Constitution relating to the executive branch are in need of revision.

5.2 Most of these provisions appear in Chapter II of the Constitution under the heading 'Executive Government'. Provisions in other parts of the Constitution which will be dealt with in this Chapter of the Report are sections 2-4, which relate to the offices of Governor-General and Administrator of the Commonwealth, and section 126 which provides for the appointment of deputies of the Governor-General.

5.3 All but one of the matters considered in this Chapter have been considered and reported on by the Advisory Committee on Executive Government.[2] We have endorsed most of the Committee's recommendations and we deal with them usually in the order in which they appear in the Committee's Report. A number of the matters reported on by the Committee are not dealt with in this Chapter of our Report but are considered in other Chapters. For example, covering clause 2, succession to the throne, assent to and reservation of Bills and disallowance of legislation are dealt with in Chapter 2[3]; the preamble to the *Commonwealth of Australia Constitution Act 1900* is dealt with in Chapter 3[4]; the Senate and supply and the funding of Parliament in Chapter 4.[5] Advisory opinions by the High Court are dealt with in Chapter 6.[6]

5.4 The one matter dealt with in this Chapter of the Report which was not considered by the Advisory Committee on Executive Government is the transfer of State departments to the Executive Government of the Commonwealth and federal power to legislate on departments so transferred. The federal legislative power was considered in Chapter 19 of Report of the Advisory Committee on Distribution of Powers.

Principal issues

5.5 The principal issues considered in this Chapter are:

(a) Do we need a Head of State, as distinct from a Head of Government, as part of our system of federal government?

(b) Should the powers exercisable by the Queen of Australia be altered or retained?

(c) Should the Westminster-style of government be preserved and, if so, should it be further written into the Constitution?

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1 para 2.175-2.240.
2 The Terms of Reference of that Committee are set out in *Appendix C.*
3 para 2.150-2.174.
4 para 3.2-3.46.
5 para 4.475-4.588.
6 para 6.237-6.271.

(d) Who should be the Queen's Ministers of State for the Commonwealth? Should they continue to be persons who are members of the Parliament? Should it continue to be possible to appoint senators as Ministers?

(e) Should the Constitution be altered to make express provision for the appointment of the Prime Minister and to define the circumstances in which his or her appointment may be terminated?

(f) Should the provisions of the Constitution relating to the appointment and terms of office of Ministers be altered? In particular, should it be made clear that Ministers are appointed and are removable by the Governor-General only on the advice of Prime Minister? Should there be express provision for appointment of Assistant Ministers?

(g) Should the Parliament retain power to fix the maximum number of Ministers who may be appointed?

(h) Should the power to establish and disestablish departments of State of the Commonwealth remain with the Governor-General in Council, that is, the Governor-General acting on the advice of the Federal Executive Council?

(i) Should there continue to be a constitutional requirement that a Minister be appointed to administer each department of State of the Commonwealth?

(j) Should the Constitution be altered to make it clear that Ministers without portfolio may be appointed?

(k) Should the provisions of the Constitution dealing with the Federal Executive Council be altered? For example, should the membership of the Council be confined to the Queen's Ministers of State for the time being?

(l) Should the Constitution be altered to include more detailed provisions on the appointment and terms of office of the Governor-General?

(m) Should the provisions of the Constitution relating to Administrators of the Commonwealth and deputies of the Governor-General be altered?

(n) Should the provisions of the Constitution relating to the powers of the Governor-General and the Governor-General in Council be altered? In particular should there continue to be provision, as in section 2, for assignment of specific powers to the Governor-General by the Queen? Should there be provisions to regulate the exercise of 'the reserve powers' of the Governor-General?

(o) Should the Governor-General continue to have the command in chief of the defence forces, and, if so, should the nature of the office be more clearly defined?

(p) Should section 61 of the Constitution be altered to clarify the content and scope of the executive power of the Commonwealth? Should the section also be altered to vest the executive power of the Commonwealth directly in the Governor-General?

(q) Should the Constitution be altered to make it clear that the executive power of the Commonwealth is subordinate to the legislative powers of the Federal Parliament? In particular, should the Constitution be altered to confer on the Federal Parliament an express power to make laws regulating the exercise of powers vested in the Governor-General and the Governor-General in Council?

(r) Should the provisions of the Constitution relating to the transfer of State departments to the Executive Government of the Commonwealth be retained or altered?

HEAD OF STATE

Recommendations

5.6 In Chapter 2 of this Report[7] we have *recommended* that:

(i) covering clause 2 of the *Commonwealth of Australia Constitution Act 1900* be altered to read:

> The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of Australia.

(ii) section 59 of the Constitution be repealed so as to abolish the power of the Queen to disallow Acts of the Federal Parliament; and

(iii) section 60 of the Constitution be repealed and section 58 altered to abolish the power of the Governor-General to reserve Bills passed by the Houses of the Federal Parliament for the Queen's personal assent.

5.7 In Chapter 6 of this Report[8] we will recommend that the Constitution be altered to repeal the surviving provisions for appeals to the Queen in Council.

5.8 Later in this Chapter[9] we recommend alteration of section 126 of the Constitution to empower the Governor-General to appoint deputies on the advice of the Prime Minister, without having to obtain the Queen's authority to do so.[10]

5.9 Apart from these changes we *recommend* no alterations of the Constitution which would affect the position of the Queen as the Head of State of Australia.

Current position

5.10 In the Commonwealth of Australia, the Head of State is, and always has been, the person who, for the time being, is also the King or Queen of the United Kingdom – though since 1953 that person has been separately styled and titled Queen of Australia.[11] Neither the Constitution nor the *Commonwealth of Australia Constitution Act* actually refers to the Queen as Head of State. It is nevertheless proper to regard her as Head of State because of the role in government these instruments assign to her.

5.11 She is a constituent part of the Federal Parliament (section 1) and the Governor-General assents to Bills passed by the two Houses of Parliament in her name (section 58). She appoints the Governor-General to be her representative in the Commonwealth and she alone may remove the Governor-General from office (section 2). The executive power of the Commonwealth is formally vested in the Queen, but is declared to be exercisable by the Governor-General (section 61). The persons appointed to administer federal departments are declared to be 'the Queen's Ministers of State for the Commonwealth' (section 64). The salaries payable from the Consolidated Revenue Fund to the Governor-General and the Ministers are formally payable to the Queen (sections 3 and 66).

5.12 Many of the constitutional powers which might have been given to the Queen were, under Australia's Constitution, given rather to the Governor-General or the Governor-General in Council, that is to say, the Governor-General acting on the advice of the

7 para 2.150-2.174.
8 para 6.108-6.114.
9 para 5.192.
10 Under the heading 'Administrator of the Commonwealth and deputies of the Governor-General' – 'Reasons for recommendation'.
11 Chapter 2 under the heading 'Effect of independent nationhood', para 2.137.

Federal Executive Council.[12] These powers cannot be exercised by the Queen at any time or on any occasion. Under the Constitution, the only powers which the Queen may exercise are those expressly vested in her. The *Royal Powers Act 1953* (Cth), it is true, permits the Queen to exercise certain powers of the Governor-General when she is in Australia, but these powers are limited to the powers conferred on the Governor-General by federal statutes. They do not include the powers conferred on the Governor-General by the Constitution.

5.13 At the present time the only constitutional powers of significance which the Queen exercises in relation to the Commonwealth of Australia are:

(a) the power to appoint and dismiss the Governor-General (section 2);

(b) the power to appoint and dismiss administrators[13] of the Commonwealth (section 4); and

(c) the power to authorise the Governor-General to appoint deputies (section 126).

These powers are now exercised only on the advice of the Prime Minister of Australia.

5.14 At the Adelaide session of the Australian Constitutional Convention in 1983, it was resolved that certain practices be recognised as conventions in Australia. Certain of these practices relate to the exercise of powers which the Constitution grants to the Queen. They were recognised and declared as follows:[14]

Powers vested in the Queen by the Commonwealth Constitution

(1) Powers vested in the Queen by the Commonwealth Constitution are exercisable by Her on the advice of Commonwealth Ministers and not on the advice of United Kingdom Ministers.

(2) The Queen receives advice from Commonwealth Ministers directly.

Appointment of the Governor-General

(3) The Governor-General is appointed by the Queen on the formal advice of the Prime Minister of Australia after informal consultation on the appointment between the Queen and the Prime Minister. United Kingdom Ministers are not concerned in the appointment.

(4) Assignments by the Queen of powers or functions to the Governor-General under section 2 of the Constitution are made on the advice of the Prime Minister of Australia. Any assignment in a matter of exclusively State concern is not advised or made except at the request of the States concerned.

. . .

(6) Commissions to administrators under section 4 of the Constitution are issued and withdrawn on the advice of the Prime Minister of Australia and are issued only to State Governors. Where it is necessary for an administrator to act under his commission, the most senior available holder of a dormant commission assumes duty, seniority amongst State Governors being determined according to the dates of their appointment as State Governors.

(7) The power of the Queen under section 126 of the Constitution to authorise the Governor-General to appoint a deputy is exercised on the advice of the Prime Minister of Australia.

. . .

Respective Position of the Queen and the Governor-General in Australia

. . .

12 See discussion under the heading 'Federal Executive Council', para 5.104-5.127.

13 The appointment of administrators is dealt with under 'Current position – Administrator', para 5.193-5.197.

14 ACC Proc, Adelaide 1983, vol I, 319-20.

(11) The Queen does not intervene in the exercise by the Governor-General of powers vested in him by the Constitution and does not Herself exercise those powers.

5.15 When in Australia, the Queen may assent to Bills passed by the Federal Parliament. She may also open the Parliament and preside at meetings of the Federal Executive Council. The latest occasion on which the Queen presided at a meeting of the Council was for the signing of the proclamation of the *Australia Act 1986* (Cth).

5.16 As will be explained later in this Chapter, there was a time when it was thought that there were some executive powers in relation to Australia which could be exercised only by the Queen or by the Governor-General, acting in pursuance of an express assignment of authority to the Governor-General by the Queen under section 2 of the Constitution.[15] It is now clear that this is no longer the case and in recognition of this fact the Queen, on 1 December 1987, revoked the remaining assignments of power under section 2, except in relation to supplement Royal Charter.[16]

5.17 Although the Governor-General is the Queen's representative in Australia, the Governor-General is in no sense a delegate of the Queen. The independence of the office is highlighted by changes which have been made in recent years to the Royal instruments relating to it.

5.18 On 17 September 1900 Queen Victoria in Council declared by proclamation that on and after 1 January 1901 the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, and also Western Australia should be united in a Federal Commonwealth under the name of the Commonwealth of Australia. On 29 October 1900 the Queen issued (a) Letters Patent constituting the Office of Governor-General and Commander-in-Chief of the Commonwealth of Australia, (b) Instructions to the Governor-General and Commander-in-Chief and (c) a Commission appointing the first Governor-General and Commander-in-Chief.[17] The Letters Patent of 1900 duplicated a number of provisions in the Constitution and were to that extent unnecessary.

5.19 On 21 August 1984, the Queen, acting on the advice of the Prime Minister, revoked the Letters Patent of 29 October 1900, as amended, and the Royal Instructions. No fresh Instructions were issued and the new Letters Patent dealt only with a limited range of matters. They were:

(a) the mode by which persons are to be appointed to the offices of Governor-General and administrator of the Commonwealth;

(b) the oaths or affirmations to be sworn before the offices of Governor-General and administrator of the Commonwealth are assumed;

(c) the circumstances in which the powers and functions of the Governor-General can be exercised by the administrator; and

(d) the appointment of deputies to the Governor-General.

These Letters Patent represent the full extent to which any Royal instrument having legal effect, other than an instrument authorised by a Federal Act,[18] now controls any aspect of the government of the Commonwealth of Australia.

15 See below under the heading 'Powers of the Governor General' – 'Current position', para 5.153.

16 This latest assignment, which is described more fully at para 5.155, appears to have been made out of an abundance of caution. If the corporations power were altered in the way we recommend in para 11.86, there would be no room for doubt and no need for such an assignment.

17 *Commonwealth Statutory Rules* 1901-1956, Vol V, 5300, 5301 and 5310; see also Letters Patent of 30 October 1958, *Commonwealth Statutory Rules* (1958) 494.

18 See *Royal Powers Act 1953* (Cth).

Advisory Committee's recommendations

5.20 In Chapter 1 of its report the Advisory Committee on Executive Government considered a number of general questions concerning the Head of State of the Australian federation. They included:

(a) Do we need a Head of State as part of our system of government?

(b) Should Australia be a Monarchy or republic?

(c) If a Monarchy is to be retained, should the Constitution make procedural provision for the possibility of a transition to a republic at some future time?[19]

The Committee's recommendations in relation to these questions were:

(a) that a Head of State be maintained in our system of government, whether Monarchical or republican;[20]

(b) that a referendum for a republic should not be held at this time;[21] and

(c) that there should not be an alteration to the Constitution to allow for the possibility of transition to a republic at some future time.[22]

The Committee concluded 'that a head of state, as a symbol of national identity, is an appropriate and desirable element in our system of government.'[23] It noted that most of the submissions made to it on this question supported that conclusion. It did, however, emphasise that the question of what powers and functions are appropriate for a Head of State is a separate issue.[24]

5.21 In considering the question of whether Australia should remain a constitutional Monarchy or become a republic, the Committee proceeded on the basis that the only type of republican government which could reasonably be contemplated was one which preserved the elements of a democratic political system. 'In the case of republics', the Committee reported:

> we are considering only 'constitutional republics' in which either the position of head of state is separate from that of head of government in much the same way as occurs in the present system or, if the two positions are combined, there are considerable restraints upon power, many of these designed to ensure that the government remains answerable to the people.[25]

The Committee heard evidence and considered many submissions on the Monarchy/republic issue, and also had regard to published works dealing with it. After considering the arguments on both sides, the Committee decided not to recommend that any alterations of the Constitution be put to a referendum at this time. The Committee reached that conclusion because, on the evidence available to it, and regardless of the merits of the arguments, there was 'no prospect . . . of a change in public opinion in the near future which would result in there being majority support for a republic.'[26] 'In view

19 Other matters dealt with by the Committee in Chapter 1 of its Report are considered elsewhere in this Report.
20 Executive Report, 3.
21 id, 7.
22 ibid.
23 id, 2.
24 id, 2-3.
25 id, 3.
26 id, 6.

of this', the Committee added, 'and the fact that for many people the issue is an emotionally charged one, we believe that a recommendation to hold a referendum on this question at the present time would detract from other aspects of this report.'[27]

Submissions

5.22 In Chapter 1 of its Report, the Advisory Committee on Executive Government considered a number of submissions on the subject of a Head of State. We received a number of submissions on the topic after that Committee had published its Report.

5.23 In none of these later submissions was the need for a Head of State questioned, but, as with the earlier submissions, there were considerable differences of opinion about what the constitutional arrangements for the Head of State should be.

5.24 A number of the later submissions supported retention of existing arrangements.[28] Some even suggested that an important reason why the Queen should continue to be the Head of State is that, as Head of State, she has the ultimate power to protect Australians against irresponsible Governments.[29] This view is clearly based on a misconception of the present constitutional position.

5.25 There were other submissions favouring fundamental changes. Some suggested that Australia should become a republic,[30] or should adopt a presidential system like that in the United States of America.[31] Some suggested simply that the Head of State should be elected[32] or should be an Australian citizen.[33]

Reasons for recommendations

5.26 We are in broad agreement with the views of the Advisory Committee on the desirability of preserving the office of Head of State and on the question of whether the electors should, at this time, be asked to vote on the issue of constitutional Monarchy versus a republic. We also agree with the Committee that for Australia to become a republic would not require anything more than certain alterations to the Constitution, in accordance with the procedure laid down in section 128.

5.27 Alterations of the Constitution to this end would not, it should be stressed, automatically entail Australia's withdrawal from the Commonwealth of Nations. There are now twice as many republics in the Commonwealth of Nations as there are realms of the Queen. But all the member nations recognise the Queen as head of that Commonwealth.

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27 id, 6-7.

28 eg Country Women's Association of Australia S3090, 20 November 1987; Tasmanian Government S3373, 9 March 1988; Queensland Government S3290, 4 February 1988; J Bradbury S2869, 2 November 1987; N Barnfield S2907, 29 October 1987; A Richardson S2915, 29 October 1987; F Porche S2879, 28 October 1987; B Edwards S2690, 15 October 1987; B Monks S2665, 2 October 1987; S Holme S2569, 29 November 1987; W Phillips S3031, 5 November 1987; B Joyce S2553, 18 December 1987.

29 eg J Bradbury S2869, 2 November 1987; L Kelly, United Political Association S2851, 29 October 1987; C den Ronden S3084, 20 November 1987.

30 eg P Schrader S2825, 26 October 1987; D Beasant S2740, 24 October 1987; L Foley S2887, 28 October 1987; W Ryan S2903, 28 October 1987; G Murray S2266, 29 June 1987; N Cameron S2539, 1 September 1987; W Forbes S2591, 20 November 1987; A Story S3160, 13 January 1988; New Australian Republican Party S2226, 10 June 1987 and S2469, 9 September 1987; M O'Rourke S2415, 31 August 1987; Citizens for Democracy S3051, 13 November 1987.

31 eg W Ryan S2903, 28 October 1987; G Murray S2266, 29 June 1987; A Alcock S2723, 14 October 1987; A Story S3160, 13 January 1988.

32 eg G Hollebone S2785, 27 October 1987; E Lyneham S2298, 10 July 1987; W Sullivan S2342, 28 July 1987.

33 eg O'Rourke S2415, 31 August 1987; Federation of Ethnic Communities Council of Australia S2561 and S2829, 31 October 1987; New Australian Republican Party S2469, 9 September 1987.

5.28 The constitutional powers vested in the Monarch as Head of State of the Commonwealth of Australia, and exercised by her personally, are now few and in every case are exercised only on the advice of the Prime Minister of Australia. This convention is so well established that it is not, in our opinion, necessary for it to be formally enacted in the Constitution. We do not therefore *recommend* alteration of the Constitution to include a provision along the lines of section 7(5) of the *Australia Act 1986* (Cth).[34]

5.29 Equally we do not think it is necessary for the Constitution to be altered to incorporate the principle, agreed on at the Adelaide session of the Australian Constitutional Convention in 1983, that:

> The Queen does not intervene in the exercise by the Governor-General of powers vested in him by the Constitution and does not herself exercise those powers.[35]

MINISTERS AND DEPARTMENTS

Recommendations

5.30 We *recommend* that the Constitution be altered by omitting sections 62, 63, 64, 65 and 66 and by substituting sections to include the following:

> **Prime Minister, Ministers and Departments of State.**
>
> 62. (1) The Governor-General shall appoint a person, to be known as the Prime Minister, to be the Head of the Government of the Commonwealth.
>
> (2) The Prime Minister shall not hold office for a longer period than ninety days unless he is or becomes a member of the House of Representatives.
>
> (3) The Prime Minister shall hold office, subject to this Constitution, until he resigns or, following a resolution passed by the House of Representatives that the Government does not have the confidence of the House, the Governor-General terminates his appointment on that ground.
>
> **Ministers and Assistant Ministers.**
>
> 63. (1) The Governor-General may, with the advice of the Prime Minister, appoint Ministers and Assistant Ministers.
>
> (2) No Minister or Assistant Minister shall hold office for a longer period than ninety days unless he is or becomes a senator or a member of the House of Representatives.
>
> (3) The Governor-General may, with the advice of the Prime Minister, terminate the appointment of a Minister or an Assistant Minister.
>
> **Queen's Ministers of State.**
>
> 64. (1) The Prime Minister, Ministers and Assistant Ministers appointed under section sixty-two or section sixty-three of this Constitution shall be the Queen's Ministers of State for the Commonwealth.
>
> (2) The number of Ministers and Assistant Ministers shall not exceed the number prescribed by the Parliament.
>
> **Departments of State.**
>
> 65A. (1) The Governor-General in Council may establish departments of State of the Commonwealth.
>
> (2) The Governor-General may, with the advice of the Prime Minister, appoint any of the Queen's Ministers of State to administer each of those departments.

34 This provides that 'The advice to Her Majesty in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of the State.' This provision was included because, before the Act, the advice was tendered by a British Minister.

35 ACC Proc, Adelaide 1983, vol I, 320.

Remuneration of Ministers of State.

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the remuneration of the Ministers of State, an annual sum the amount of which shall be as fixed by the Parliament.

Section 65 would deal with the Federal Executive Council. It is dealt with later in this Chapter.[36]

Current position

5.31 The provisions of the Constitution relating to the appointment and terms of office of the Queen's Ministers of State for the Commonwealth, to the establishment of departments of State of the Commonwealth and to the appointment of Ministers to administer them have already been outlined in Chapter 2 of this Report.[37] These provisions are examined in more detail later in this Chapter.[38]

5.32 Broadly, the Constitution provides for appointment of Ministers by the Governor-General. Those appointed as Ministers must be members of the Parliament or become members of Parliament within a certain time after their appointment. Ministers hold office at the pleasure of the Governor-General, that is to say, may be dismissed by the Governor-General at any time and for any cause.

5.33 The power to establish and, by implication, disestablish departments of State of the Commonwealth is vested in the Governor-General in Council. Appointments of Ministers to administer those departments are, however, made by the Governor General. In practice those appointments are made according to the advice of the Prime Minister.

5.34 Apart from the requirement that the Ministers shall be or become members of Parliament, there is nothing in the Constitution which regulates the exercise of the Governor-General's power to appoint and dismiss Ministers. Regulation of the Governor-General's discretion has been left entirely to constitutional convention. Practices which should be observed as conventions were enunciated by a resolution of the Australian Constitutional Convention in 1985.[39]

5.35 Nowhere in the Constitution is there any mention of the office of Prime Minister. That of the Premier of a State is, however, referred to in the *Australia Act 1986* (Cth). Nor does the Constitution include any reference to the Cabinet. It does, however, provide for a Federal Executive Council of which the Ministers for the time being are *ex officio* members. But constitutionally, this body is separate and distinct from the Cabinet.

Advisory Committee's recommendations

5.36 In Chapter 2 of its report, the Advisory Committee on Executive Government considered the following general questions:

1. Should the 'Westminster' system of government be preserved in Australia?
2. Should the system of government be further written into the Constitution?
3. Who should be the ministers?
4. What checks should there be on executive government? [40]

36 para 5.104-5.127.
37 para 2.187-2.199.
38 para 5.47-5.72, 5.97-5.99.
39 The terms of that resolution are set out in Chapter 2 under the heading 'Resolutions of the Australian Constitutional Convention', para 2.224.
40 Executive Report, 11.

The Committee recommended 'that there should be no change from the present system based as it is on the principle of a parliamentary executive . . .'.[41] As we have explained in Chapter 2, we have construed our Terms of Reference as requiring that this principle be preserved.[42] The Committee also concluded that the present constitutional requirement that the Queen's Ministers of State for the Commonwealth be, or become, members of the Parliament, should be retained.[43] It did, however, recommend that several alterations should be made to Chapter II – The Executive Government – of the Commonwealth, principally to give constitutional force and expression to well-established principles which already govern the way in which the provisions of Chapter II operate.

5.37 The Committee pointed out that:

> At present, Chapter II . . . reads as if the Governor-General is personally in charge of the executive government of Australia. Section 61 provides that the Governor-General exercises 'the executive power of the Commonwealth'; section 62 provides that the Governor-General is advised by a Federal Executive Council whose members hold office 'during his pleasure'; and, if read literally, section 64 provides that the Governor-General may appoint *anyone* as a minister so long as that person becomes a member of parliament within three months, regardless of whether or not the House of Representatives has confidence in him or her. If the words of Chapter II are read literally, they provide a misleading picture of the way in which the present system of government in Australia actually operates. This confusion is compounded by the fact that there is no mention of the existence of cabinet (as a body different from the executive council), or of the office of prime minister, or any explicit statement of the need for a government to maintain the confidence of the House of Representatives.[44]

5.38 The constitutional alterations recommended by the Committee were:

(a) Alteration of section 64 to make it clear that the head of government is the Prime Minister. It was suggested that this alteration 'might take the form of adding to section 64 a statement to the effect that the Governor-General shall appoint an officer to head the government, to be known as the prime minister.'[45]

(b) Alteration of section 64 to include a requirement 'that when the Governor-General appoints or dismisses ministers, he should do so on the advice of the prime minister, except on those occasions . . . when the prime minister is also dismissed.'[46]

(c) Alteration of section 64 'to write into the Constitution the principle of a parliamentary executive, viz that a government holds power by "maintaining the confidence" of the House of Representatives'.[47]

(d) An express provision 'allowing for the appointment of assistant ministers.'[48]

5.39 In addition the Committee, with two members dissenting, recommended 'that detailed rules requiring the Governor-General to exercise his "reserve powers" in conformity with the principles of the parliamentary executive should be included either in the Constitution or in a law approved by the Parliament.'[49] Three of the seven members of the Committee thought that the rules should be incorporated in the Constitution. The

41 id, 13.
42 See Chapter 2 under the heading 'Parliamentary Government in Australia', para 2.175-2.240.
43 Executive Report, 18.
44 id, 13.
45 id, 15.
46 ibid.
47 id, 16.
48 id, 18.
49 id, 16.

detailed rules recommended related to matters such as the appointment and dismissal of a Prime Minister; the dissolution of the House of Representatives and, under section 57, both Houses; and assent to Bills.[50] If the rules were not incorporated in the Constitution, the Constitution should be altered to give the Parliament a power to enact them.[51]

5.40 The Committee recommended that the Constitution be not altered to include an express provision to permit Ministers to appear in both Houses of the Parliament,[52] or to prevent senators from being appointed as Ministers.[53]

Submissions

5.41 In Chapter 2 of its Report, the Advisory Committee on Executive Government considered a number of submissions relating to Ministers and Departments.

5.42 Submissions received since the Committee published its Report included:

(a) several in favour of the present provision that Ministers shall be members of Parliament[54] and several against;[55]

(b) some in favour of the current system of a parliamentary executive;[56]

(c) some in favour of specific mention of the Prime Minister in the Constitution;[57]

(d) several in favour of express provision for dismissal of the Prime Minister;[58] and

(e) two expressly favouring no change to the constitutional arrangements for Executive Government.[59]

5.43 The Commission received a detailed submission from the Queensland Government commenting on the Advisory Committee's Report.[60] Although that Government strongly supported the recommendation that the notion of a parliamentary executive be preserved, it generally disagreed with the Committee's recommendations for alteration of the provisions of the Constitution relating to Ministers. In particular, it expressed strong opposition to constitutional or legislative codification of constitutional conventions. 'Any attempt to entrench constitutional conventions at this time', it was suggested, 'would be both premature and counter-productive.' One of the advantages of leaving certain matters to be regulated by convention, it was argued, was that conventions are adaptable. It was nevertheless pointed out that the Queensland Government had, at the Australian Constitutional Convention in 1983 and 1985, supported the recognition of certain constitutional conventions by that body.

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50 id, 36-44.
51 id, 16.
52 id, 19.
53 id, 28.
54 eg Country Women's Association of Australia S3090, 20 November 1987; Citizens For Democracy S3051, 13 November 1987.
55 eg R Bowey S2912, 29 October 1987; B Edwards S2690, 15 October 1987.
56 eg Queensland Government S3290, 4 February 1988; Tasmanian Government S3373, 15 March 1988; Citizens for Democracy S3051, 13 November 1987; Country Women's Association of Australia S3090, 20 November 1987; T Corley S2999, 11 November 1987; R Kershaw S2805, 24 October 1987.
57 eg J Steward S2952, 16 September 1987; L O'Shea S2998, 8 November 1987.
58 eg K Playford S2746, 25 October 1987; Merewether Residents Group S3236, 8 February 1988; W Phillips S3031, 5 November 1987; J Goldring S2582, 28 December 1987.
59 Tasmanian Government S3373, 15 March 1988; S Holme S2569, 29 November 1987.
60 Queensland Government S3290, 4 February 1988.

Reasons for recommendations

5.44 We agree with the Committee's view that the Constitution should not be altered to effect any major change in the system of Executive Government at the federal level. We also agree that it is desirable that a number of changes should be made to provisions in Chapter II of the Constitution to give constitutional expression to certain accepted principles governing the operation of the present system. We are not, however, persuaded by the arguments of the three members of the Committee who thought that there should be detailed rules in the Constitution regulating the exercise of the Governor-General's so-called 'reserve powers'.

5.45 In our view, it is not appropriate to include in the Constitution rules as detailed as those proposed by the majority of the Committee. We also consider that the preferable way in which to give constitutional expression to the principle that, generally, the Governor-General should not exercise the powers reposed in him or her by the Constitution, except in accordance with the advice of Ministers who are members of the Parliament and who have the confidence of the House of Representatives, is to alter the Constitution so that:

(a) most of the powers presently invested in the Governor-General are invested in the Governor-General in Council, or the Governor-General acting in accordance with the advice of the Prime Minister; and

(b) membership of the Federal Executive Council is confined to the Queen's Ministers of State for the Commonwealth for the time being.[61]

5.46 The question of what powers presently reposed in the Governor-General should be reposed in the Governor-General in Council is considered in other parts of this Report.[62] The question of whether the Parliament has or should be able to make laws to regulate the exercise of the constitutional powers of the Governor-General and Governor-General is dealt with later in this Chapter.[63] In this part of the Report we confine our attention to those provisions in Chapter II of the Constitution which relate to:

(a) the appointment and terms of the Queen's Ministers of State for the Commonwealth;

(b) the powers of the Parliament to prescribe the number of Ministers who may be appointed and the offices they shall hold;

(c) the establishment of departments of State of the Commonwealth and the appointments of Ministers to administer those departments; and

(d) the salaries of Ministers.

Who should be the Ministers?

Current position

5.47 At present, the Constitution effectively limits the class of persons who may be appointed as the Queen's Ministers of State for the Commonwealth to persons who are members of the Parliament. The last paragraph of section 64 states:

> After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

5.48 The three month period of grace which this section allows has several advantages:

61 See discussion under the heading 'Federal Executive Council', para 5.104.
62 See list below under the heading 'Powers of the Governor-General' – 'Introduction', para 5.144-5.146.
63 para 5.207-5.221.

(a) It allows the Ministers of an incoming Government to be sworn in before the new Parliament has met and before they have been sworn in as senators or members of the House of Representatives as section 42 of the Constitution requires.

(b) It enables a Minister who wishes to become a member of the other House to resign the seat in the House of which he or she is presently a member but yet retain Ministerial office while the processes of election to the other House are in train.

(c) It permits Ministers to continue in office for a period even though their membership of the Parliament is formally at an end, for example, in the case of members of the House of Representatives, because the House has been dissolved.

Advisory Committee's recommendations

5.49 The Advisory Committee's Report sets out arguments for and against the rule that the Ministers shall be members of the Parliament.[64] It also deals with question of whether there should be a constitutional provision prohibiting senators being appointed as Ministers.[65] The Committee's reasons for recommending that the present requirement that Ministers be members of Parliament be retained were:

(a) It is very important to preserve the democratic principle that persons holding high office as ministers should be elected by the people. Moreover, at a more practical level, the ballot box remains the surest check on corruption, the abuse of power and inefficiency.

(b) The skills required to administer a government department include not only knowledge of the subject matter of the department's work, but also political skills, such as balancing the interests of different groups in the community in the public interest. These skills are acquired through a life spent in public affairs.

(c) Introducing non-parliamentary ministers into the government would be likely to increase prime ministerial power, unless special provision were made to ensure that they were not appointed by the prime minister, and hence not beholden to him.

(d) Precisely because they have knowledge and experience derived from close involvement in industry or the trade unions, appointment of non-parliamentary ministers creates the risk that the portfolios may be captured by 'special interests'. Even if the non-parliamentary ministers are able completely to divorce themselves from their previous occupations, there is a severe risk that the public may lack confidence that they have been able to do so.

(e) Outsiders already can be used as advisers to governments. In this way the government has full access to their knowledge and experience. Such advisers can be part-time or full-time. Such advice is already being used by our ministers; as is evident in the growth of 'ministerial advisers'.

(f) There is already legislation enabling governments to bring in 'outsiders' as permanent heads of departments on fixed-term contracts. There are schemes available for interchange between public service and outside community leaders. It may be that this sort of interchange is the appropriate place for the introduction of 'new blood' and new ideas rather than in the ministry itself.[66]

64 Executive Report, 16-8.
65 id, 28.
66 id, 17.

The Committee went on to state that generally it considered 'desirable that ministers should serve some kind of parliamentary apprenticeship'. It also suggested 'that the fact that they are members of parliament makes them more aware of the need to be answerable politically for their actions, or inactions.'[67]

Reasons for recommendations

5.50 For the reasons given by the Committee we recommend that the general principle enshrined in the last paragraph of section 64 be retained. The Constitution should continue to require that Ministers of State of the Commonwealth be senators or members of the House of Representatives. The only change in that regard we propose is that the Constitution reflect the established convention that the Prime Minister must be or become a member of the House of Representatives. We deal with the office of Prime Minister later on.[68]

5.51 We further *recommend* that the words appearing at the beginning of last paragraph of section 64 – 'After the first general election' – be omitted on the ground that they fall into the category of provisions which are clearly expended. This small alteration of section 64 was, we note, recommended by the Australian Constitutional Convention in 1975 and 1976.[69] Effect was to be given to the recommendation by clause 9 of the *Constitution Alteration (Removal of Outmoded and Expended Provisions) 1983.* This Bill was passed by both Houses of the Parliament but no writ for a referendum on it was issued.

5.52 In considering the last paragraph of section 64 we have examined the question whether any change should be made to the requirement that a Minister shall not hold office for longer than three months unless he or she is or becomes a senator or member of the House of Representatives. Specifically we have looked at the question of whether the period of three months should be extended or reduced.

5.53 We are satisfied that some period of grace should continue to be allowed, for if there were an inflexible requirement that a Minister holds office only so long as that Minister is a member of Parliament, every Minister who is a member of the House of Representatives would cease to be a Minister once the House's term had expired or once the House had been dissolved. There could also be doubts about the validity of the appointment of a person as a new Minister before that person had actually taken his or her seat in the Parliament, even though it was clear that the person had been elected.[70]

5.54 We have noted that under section 6 of New Zealand's *Constitution Act 1986*[71] the period of grace which is allowed is much shorter than that allowed under section 64 of the Australian Federal Constitution. Under section 6 a person who is not a member of Parliament may be appointed and hold office as a Minister if that person was a candidate for election at the preceding general election for the House of Representatives. But a person so appointed as a Minister vacates office if after 40 days he or she has not become a member of Parliament. The section also provides that if a member of Parliament who is a Minister ceases to be a member of Parliament, he or she cannot continue to hold Ministerial office for longer than 28 days after ceasing to be a member.

67 ibid.
68 Under the heading 'Appointment and terms of office of the Prime Minister and Ministers' at para 5.58-5.72.
69 ACC Proc, Melbourne 1975, 175; ACC Proc, Hobart 1976, 207.
70 On the question of when a member's term of service as a member commences see *Ualesi v Minister of Transport* (1980) NZLR 575, 580. But cf *Electoral Act 1956* (NZ), section 31A, as amended by Act no 116 of 1986.
71 Operative from 1 January 1987.

5.55 We have received no submissions urging an increase or reduction of the period of grace allowed by section 64 of the Constitution and we have received no evidence to suggest that the present rule has occasioned difficulties or been abused.

5.56 As the Advisory Committee has pointed out, the three-month rule does introduce a measure of flexibility into the system of responsible parliamentary government without compromising the basic principle that the Ministry should be drawn the membership of the Parliament. The rule permits a Minister who does not seek re-election or is defeated at general elections to retain Ministerial office until a successor is appointed. It permits a Minister who is a senator, but wishes to move to the House of Representatives, to remain a Minister after resigning his or her seat in the Senate. It also provides scope for the introduction into the Ministry, if a Government thinks it desirable, of persons who have yet to be chosen for parliamentary office.

5.57 Accordingly, we recommend that the present rule be retained but that the period of time be expressed as 90 days rather than three months.

Appointment and terms of office of the Prime Minister and Ministers

Current position

5.58 The provisions of the Constitution dealing with the appointment and terms of office of the Queen's Ministers of State for the Commonwealth are as follows:

> 64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.
>
> Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.[72]

Literally construed these provisions empower the Governor-General to appoint anyone to be a Minister of State, subject only to the qualification contained in the last paragraph of section 64, and to dismiss anyone so appointed, at will. Anyone appointed as a Minister under section 64 has to be appointed to administer a department of State of the Commonwealth which has already been established by the Governor-General acting on the advice of the Federal Executive Council. All Ministers appointed under section 64 are automatically members of the Federal Executive Council, but under section 62, persons other than Ministers can be appointed to the Council. Anyone who becomes a member of the Council remains a member of that body for as long as the Governor-General chooses.

Advisory Committee's recommendations

5.59 The Advisory Committee recommended that section 64 of the Constitution be altered to include explicit statements that:

(a) The Governor-General shall appoint an officer to head the Government, to be known as the Prime Minister.

(b) When the Governor-General appoints or dismisses Ministers, he should do so on the advice of the Prime Minister, except on those occasions when the Prime Minister is also dismissed.

(c) The Government holds power by maintaining the confidence of the House of Representatives.[73]

72 The third paragraph of the section is set out and commented on above.
73 Executive Report, 15-6.

5.60 The Committee reported that a number of the submissions made to the Commission supported the proposition that the Constitution should expressly refer to the office of Prime Minister.[74] It noted that clause 9 of the Bill, *Constitution Alteration (Fixed Term Parliaments) 1983,* contained provisions to that effect. The Committee considered that the Constitution should make it clear that the appointment of Ministers is to be on the advice of the Prime Minister, and likewise their dismissal (except where the Prime Minister is himself dismissed). Such an alteration would merely describe what now happens. But the principle 'should be explicitly stated as a democratic safeguard, and to ensure that the Constitution reflects what actually occurs.'[75]

Previous proposals for reform

5.61 The *Constitution Alteration (Fixed Term Parliaments)* Bills of 1982 and 1983 contained clauses which involved a complete recasting of section 64. These clauses were linked to another clause involving alteration of section 5 of the Constitution to prevent the Governor-General from dissolving the House of Representatives before the expiration of its term except in accordance with section 57, or where the House of Representatives resolved that it had no confidence in the Prime Minister and no other Government having the confidence of the House could be formed.

5.62 The essential features of the proposed new section 64 were:

(a) The power to create departments of State for the Commonwealth would remain with the Governor-General in Council.

(b) Express provision was made for appointment by the Governor-General of the Prime Minister.

(c) The Governor-General's power to appoint other Ministers would be exercisable only on the advice of the Prime Minister.

(d) The Prime Minister would be required to be or become a member of the House of Representatives, but other Ministers could continue to be appointed from both Houses.

(e) All Ministers, including the Prime Minister, would be appointed to administer departments of State.

(f) All Ministers, including the Prime Minister, would be members of the Federal Executive Council, *ex officio,* as at present, and collectively they would be Ministers of State for the Commonwealth. (The reference to Queen's Ministers was to be omitted.)

(g) Except where the Prime Minister was dismissed or resigned from office, in accordance with certain rules, the Governor-General would not be able to dismiss a Minister except on the advice of the Prime Minister. If, however, the Prime Minister was dismissed or resigned in accordance with those rules, the other Ministers would automatically cease to hold office.

(h) The only circumstance in which the Governor-General could dismiss a Prime Minister from office was when the House of Representatives passed a resolution[76] expressing a lack of confidence in the Prime Minister and the other Ministers, and a further resolution declaring that, if another named person were to be appointed as Prime Minister, that person and the other Ministers would have the confidence of the House. Eight days would be allowed for the passing of that further resolution. If the Prime Minister had

74 id, 14-5.
75 id, 15.
76 In pursuance of a motion of which not less than 24 hours' notice had been given.

not resigned before the passing of that resolution, or did not resign forthwith on the passing of it, the Governor-General would be obliged to dismiss the Prime Minister from office.

Reasons for recommendations

5.63 Section 64 clearly does not reflect practice or convention. It makes no reference to the key office of Prime Minister. It contains not so much as a hint of the ground rules which in fact govern the selection of persons to be Ministers and their removal from office. We are of the view that section 64 ought to be omitted and new sections incorporating the following principles ought to be substituted:

(a) the office of Prime Minister is different from that of other Ministers of State;

(b) the principle that, whereas the Governor-General has a discretion in selecting the person to hold the office of Prime Minister,[77] the Governor-General cannot dismiss a Prime Minister unless the House of Representatives resolves that it does not have confidence in the Government;

(c) the Queen's Ministers of State for the Commonwealth, other than the Prime Minister, shall be appointed by the Governor-General, acting on the advice of the Prime Minister, and the Governor-General's power to dismiss those Ministers shall be exercised only on the advice of the Prime Minister;

(d) the Prime Minister shall not hold office for more than 90 days unless he or she is or becomes a member of the House of Representatives; and

(e) the power to establish and disestablish departments of State of the Commonwealth shall reside in the Governor-General acting on the advice of the Federal Executive Council; the Governor-General's power to appoint Ministers to administer those departments shall be exercised only on the advice of the Prime Minister.

The alterations to give effect to these recommendations are contained in proposed sections 62, 63, 64(1) and 65A. We comment separately on proposed 65A later in this Chapter.[78]

5.64 Our proposals on the appointment and terms of office of Ministers differ from those contained in the *Constitution Alteration Fixed Term Parliaments)* Bills of 1982 and 1983 in the following respects:

(a) Our proposals expressly identify the Prime Minister as Head of Government.

(b) Under our proposals, the appointment of a Prime Minister could be terminated on the passing of a resolution by the House of Representatives that the Government does not have the confidence of that House, but it would not be obligatory for the Governor-General to act immediately on the passing of such a resolution. The Governor-General might give the Prime Minister an opportunity to resign. Or if it appeared that the resolution of no confidence was not a genuine expression of the opinion of the House, for example, because of the absence from the House of a number of members of the Government party or parties, the Governor-General might decline to act in order to allow the House an opportunity to rescind its resolution.

77 This discretion is, of course, to be exercised in accordance with the principles of responsible government. See Chapter 2.

78 See below under the heading 'Ministers and departments', para 5.97-5.99.

(c) On the resignation or termination of appointment of a Prime Minister, following a vote of no confidence, the other Ministers would not, as under the 1982 and 1983 proposals, automatically cease to hold office. The expectation would be that if the Prime Minister ceased to hold office in these circumstances, the other Ministers would resign. If they did not, they could be dismissed by the Governor-General acting on the advice of the incoming Prime Minister.

(d) Under our proposals, the appointment and terms of office of the Prime Minister and other Ministers are contained in sections separate from those which deal with membership of the Federal Executive Council, establishment of departments of State and appointment of Ministers to administer them.

5.65 ***Role of the Governor-General.*** We recognise that if our proposals were adopted, the circumstances in which the Governor-General could terminate the appointments of the Prime Minister, Ministers and Assistant Ministers would effectively be limited to cases in which the House of Representatives had passed a vote of no confidence in the Government. There would be no reserve power in the Governor-General to terminate Ministerial appointments, and it would thus not be open to the Governor-General to terminate the appointment of a Prime Minister on grounds such as the failure by the Senate to pass essential appropriation or supply Bills, or serious misconduct in an official capacity.

5.66 The Advisory Committee concluded that Ministerial appointments should continue to be at the pleasure of the Governor-General, but a majority favoured the enactment of legislation by the Federal Parliament to regulate the exercise of the reserve powers and the alteration of the Constitution to authorise the enactment of such legislation. The proposed legislation included the following rule:

> The Governor-General can dismiss the prime minister for persisting in grossly unlawful or illegal conduct, including a serious breach of the Constitution, when the High Court has declared the matter to be justiciable and the conduct to be unlawful, illegal or a breach of the Constitution, or when the High Court has declared the matter is not justiciable, and the Governor-General believes that there is no other method available to prevent the prime minister or the government engaging in such conduct.[79]

A minority of the Committee, however, thought the rule should be that:

> The Governor-General may dismiss the prime minister in cases in which he believes that there is no other method available to prevent the prime minister or his government engaging in substantially unlawful action, including a substantial breach of the Constitution, or other conduct contrary to the principles of democratic government.[80]

5.67 A majority of us (Sir Rupert Hamer dissenting) are of the opinion that the Governor-General should not have power to terminate the appointment of a Prime Minister whose Government still has the confidence of the House of Representatives merely because the Governor-General believes that the Prime Minister or members of his or her Government have violated, are violating, or are about to violate the law or the Constitution. Allegations of illegality can and, in our view, should be adjudicated in courts of law; likewise allegations that the Constitution has been, or is about to be, contravened.

79 Executive Report, 42, rule 10.
80 ibid.

5.68 A majority of us (Sir Rupert Hamer dissenting) are also of the view that, even when the Prime Minister has been adjudged guilty of illegal acts or of breach of the Constitution, the question of whether that conduct is sufficiently serious to warrant removal from office should not be for the Governor-General to decide. That judgment should be left rather to the House of Representatives.

5.69 We would also point out that if the Prime Minister is found guilty of a criminal offence or disobeys an injunction to restrain unconstitutional action, the Prime Minister may be imprisoned. Such imprisonment may result in the Prime Minister ceasing to be a member of the Parliament because, under the Constitution, he or she either becomes disqualified from being a member, or forfeits his or her seat by failure to attend the House for two consecutive months of a session,[81] and thereby ceases to be qualified to be Prime Minister. The proposed new provision on termination of the appointment of a Prime Minister is expressed in terms which are meant to make it clear that the Prime Minister may, by operation of the Constitution, cease to hold office for these reasons.

5.70 ***Dissent.*** Sir Rupert Hamer dissents from the recommendation as expressed in paragraph (b) above, since it appears to oust altogether the reserve powers of the Governor-General in relation to the dismissal of a Prime Minister. He points out that the Advisory Committee on Executive Government devoted considerable attention to this matter, and cited the many authorities who support the power of the Governor-General in an extreme situation to dismiss a Prime Minister.[82]

5.71 The Committee listed the four 'reserve powers', where the Governor-General could act without, or contrary to Ministerial advice, as follows:

1. the appointment of the Prime Minister;
2. the dismissal of the Prime Minister;
3. dissolution of the House of Representatives; and
4. a double dissolution pursuant to section 57 of the Constitution,[83]

and formulated rule 10, quoted above,[84] to encapsulate the accepted convention relating to the dismissal of a Prime Minister.

5.72 Sir Rupert Hamer points out that the Committee was unanimous in recognising the existence of these reserve powers in the Governor-General, and he considers that even if the Commission is not to accept its recommendation that they be laid down in an Act of Parliament, it should certainly not exclude their operation in the way proposed by the majority of the Commission. The paragraph should be redrafted so as expressly to recognise and retain these reserve powers.

Assistant Ministers

Current position

5.73 Although the Constitution provides for the appointment of Ministers to administer the departments of State of the Commonwealth, it makes no express provision for the appointment of Ministers to assist in the administration of these departments. In the past, members of Parliament have been appointed as Assistant Ministers, but it has been recognised that such appointments present some constitutional difficulties.

81 See Constitution, sections 38 and 44.
82 Executive Report, 42.
83 id, 39.
84 para 5.66. Also in Executive Report, 42.

5.74 The main difficulty is that if a Minister receives a Ministerial salary he or she thereby becomes the holder of an office of profit under the Crown within the meaning of section 44 (iv.) of the Constitution. Unless that person comes within the proviso to that section which says that the office of profit rule does not apply to 'the office of any of the Queen's Ministers of State for the Commonwealth', he or she is disqualified from being a member of the Parliament. Whether a salaried Assistant Minister is a Queen's Minister of State for the Commonwealth for the purposes of the proviso is a matter on which there have been differences of opinion.

5.75 Various ways and means have been adopted whereby Assistant Ministers can be appointed and remunerated without jeopardising their membership of the Parliament. One way has been to establish a small department which the Assistant Minister is appointed to administer as the Minister, and then to appoint that person as Minister to assist another Minister in the administration of another department.

Assistant Ministers in other Westminster systems

5.76 In many other parliamentary systems of the Westminster type, it is not uncommon for Ministers to be assisted by junior Ministers who are also members of the legislature. In the United Kingdom, there are three 'grades' of Ministers: those who are members of the Cabinet; departmental Ministers or Ministers outside the Cabinet; and parliamentary secretaries. All are members of the Parliament. There are statutory limits on the number of Ministers who may sit in the House of Commons.[85]

5.77 Assistant Ministers have also been appointed in the Australian States, but only two of the State Constitution Acts make express provision for appointments of this kind.

5.78 In New South Wales, the Premier may appoint members of the Legislative Assembly, other than members who are Ministers or members of the Executive Council, to be parliamentary secretaries, to carry out such functions as the Premier determines. A parliamentary secretary may not, however, be appointed to perform functions which, under an Act or an instrument made thereunder, can only be performed by a particular officer holder.[86]

5.79 In Tasmania, the Governor may appoint as Secretary to Cabinet any member of the Parliament or of the Executive Council. The functions of this officer are similar to those of parliamentary secretaries in New South Wales.[87]

5.80 In none of the States is there any entrenched constitutional provision which inhibits the appointment of members of Parliament as salaried Assistant Ministers. Such inhibitions as are imposed are purely statutory and can be changed by ordinary legislation.

Previous proposals for reform

5.81 The problems associated with appointment of Assistant Ministers were considered by Senate Standing Committee on Constitutional and Legal Affairs in its report on *The Constitutional Qualifications of Members of Parliament.* Those problems would have been resolved under alterations which the Committee recommended should be made to the provisions of the Constitution which deal with qualifications and disqualifications of members of the Parliament. The Committee did, however, make the further

85 *House of Commons Disqualification Act 1975,* Schedule 2; this may be amended by Orders in Council under the *Ministers of the Crown Act 1975.* See also the *Ministerial and other Salaries Act 1975.*
86 *Constitution Act 1902* (NSW), sections 38B-38E.
87 *Constitution Act 1934* (Tas), sections 8E-8H. See also *Constitution Act 1986* (NZ), sections 8-9.

recommendation that if these alterations were not made, the proviso to section 44(iv.) of the Constitution should be altered by inserting after the words 'the Queen's Ministers of State for the Commonwealth' the words 'or any of the Queen's Assistant Ministers of State for the Commonwealth or any person holding a like office.'[88]

Advisory Committee's recommendation

5.82 The Advisory Committee on Executive Government took note of the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs. It concluded that if sections 44 (iv.) and 64 of the Constitution do have the effect of precluding 'a member of parliament from holding a salaried position in the government other than as a minister of state administering a government department', they impose 'an unnecessary inhibition on the organisation of the government.'[89]

5.83 The Committee thought that there are advantages in having Assistant Ministers. The appointment of Assistant Ministers could not only help to relieve Ministers of their workload but could also 'result in a reduction of the number of departments, a cut in excessive interdepartmental communication and committees and bureaucratic delay. It would also provide a training ground for ministers.'[90]

5.84 The Committee accordingly recommended that the Constitution be altered by inclusion of a provision allowing for appointment of Assistant Ministers.[91]

Submissions

5.85 The Advisory Committee on Executive Government considered submissions relating to Assistant Ministers in Chapter 2 of its Report. We received only a few submissions on Assistant Ministers after that Report was published. Three submissions recommended against inclusion of provisions for Assistant Ministers.[92]

5.86 In its submission on the Report of the Advisory Committee on Executive Government[93] the Queensland Government stated that it sees no pressing need for an alteration of the Constitution to permit appointment of Assistant Ministers. It seemed to be of the view that the Constitution already allows the appointment of more than one Minister to administer a department.

Reasons for recommendations

5.87 While we accept that section 64 of the Constitution may not prevent the appointment of more than one Minister to administer a department of State, we are of the view that because of the problems which have arisen in the past about the appointment of salaried Assistant Ministers, it is advisable that the Constitution should make express provision for appointment of Assistant Ministers.

5.88 Our recommendations provide for appointment of Assistant Ministers in the same way and on the same terms as other Ministers. They and the other Ministers would, collectively, be the Queen's Ministers of State for the Commonwealth.[94]

88 *The Constitutional Qualifications of Members of Parliament* (1981) 73.
89 Executive Report, 18.
90 ibid.
91 ibid.
92 Country Women's Association of Australia S3090, 20 November 1987; W Phillips S3031, 5 November 1987; J Bradbury S2869, 2 November 1987.
93 Queensland Government S3290, 4 February 1988.
94 See proposed sections 63 and 64(1).

5.89 Further reference to Assistant Ministers is included in the recommended alterations of the Constitution to do with disqualifications of members of Parliament in Chapter 4 of this Report.

Number of Ministers

Current position

5.90 Section 65 of the Constitution provides:

> Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs.

The effect of this section, read together with section 51(xxxvi.), is that no more than seven persons can be appointed as Ministers of State unless the Parliament enacts legislation to increase the maximum number of Ministers who may be appointed. The Parliament has from time to time so legislated. The current legislation provides that: 'The number of the Ministers shall not exceed thirty.'[95]

5.91 Section 65 also empowers the Parliament to prescribe what offices the Ministers are to hold, but in the absence of such prescription, the Ministers hold such offices as are directed by the Governor-General.

Previous proposals for reform

5.92 The Melbourne (1975) and Hobart (1976) sessions of the Australian Constitutional Convention recommended that the first part of section 65 referring to seven Ministers be omitted, on the ground that it was 'obviously outmoded' and that the section be 'redrafted to enable the Parliament to determine the number of Ministers.'[96] This recommendation was not, however, incorporated in the Bill, *Constitution Alteration (Removal of Outmoded and Expended Provisions) 1983.*

Reasons for recommendations

5.93 The alterations to Chapter II of the Constitution which we *recommend* involve the repeal of the whole of section 65. The proposed section 64(2) does, however, preserve the power of the Parliament to prescribe the maximum number of Ministers and Assistant Ministers who may be appointed. The power is, we believe, integral to the principle that the Parliament enjoys a supremacy over the executive branch of government.

5.94 The alterations we *recommend* do not, however, include any counterpart of the second half of section 65, the part which empowers the Parliament to prescribe or the Governor-General to direct what offices the Ministers are to hold. We *recommend* that there be no such provision because we think it unnecessary. The power to decide what Ministerial offices particular Ministers shall hold is, we think, implicit in the power to appoint Ministers. Although the Parliament has enacted legislation which refers to particular Ministers, for example the Attorney-General and the Treasurer, it has not enacted legislation to constitute specific Ministerial offices. Furthermore, even when legislation invests powers in particular Ministers, for example the Attorney-General, provisions of the *Acts Interpretation Act 1901* (Cth), enable those powers to be exercised by other Ministers.

95 *Ministers of State Act 1952* (Cth), section 4 (as amended by Act No 91 of 1987).
96 ACC Proc, Melbourne 1975, 175; ACC Proc, Hobart 1976, 207.

5.95 The Parliament can, even without section 65, enact legislation to provide that Ministers shall be members of statutory bodies. For example, in exercise of its powers under section 51 the Parliament can establish a board of which one of the members is a Minister. Remuneration of the Minister as a member of that board could, however, raise the question whether the Minister thereby held an office of profit under the Crown and was thus disqualified from being a member of Parliament.

5.96 The appointment of Ministers as deputies to the Governor-General we deal with later in this Chapter.[97]

Power to establish departments

Current position

5.97 Section 64 of the Constitution invests the power to establish departments of State of the Commonwealth in the Governor-General in Council. The power to appoint Ministers to administer the departments is, however, vested in the Governor-General.

5.98 Since 1906, the practice has been for departments to be established and disestablished by Administrative Arrangements Orders. These list what the departments are to be, provide a general description of each department's functions and itemize the Acts of Parliament (or parts thereof) to be administered by the Minister responsible for administering each department. The Administrative Arrangements Orders are published in the *Gazette*.[98]

Reasons for recommendation

5.99 We see no reason to change the present constitutional rule that departments of State of the Commonwealth be created by the Governor-General in Council. We do, however, consider it desirable that the power to establish departments and the power to appoint Ministers and Assistant Ministers to administer departments should, partly for the sake of clarity, be conferred in a section separate from that dealing with the appointment and terms of office of Ministers. While the new section 65A we propose would maintain the present requirement that a Minister, who is also a member of Parliament, head each department, it would be open to the Governor-General, acting on the advice of the Prime Minister, to appoint Ministers without portfolio, that is to say, Ministers who do not have a department to administer. All Ministers would continue to be members of the Federal Executive Council.

Salaries of Ministers

Current position

5.100 Section 66 of the Constitution provides:

> There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year.

The Parliament has otherwise provided.

97 Under the heading 'Current position – deputies', para 5.198-5.201.

98 Departments are also listed in Schedule 2 of the *Public Service Act 1922*. Section 7A of the Act provides for automatic amendment of the Schedule whenever a department therein specified is abolished or a new department established.

Previous proposals for reform

5.101 Section 66 has been considered by the Australian Constitutional Convention which in 1975 and again in 1976 resolved that the section was 'out of touch with reality and should be redrafted along the lines of the' proposed new section 48 on salaries of members of the Parliament. The new section 48 recommended by the Convention read as follows:

> The Parliament shall determine, or provide for the determination of, the remuneration, salaries and allowances of each Senator and each member of the House of Representatives to be reckoned from the day on which he takes his seat.[99]

5.102 The Bill, *Constitution Alteration (Removal of Outmoded and Expended Provisions) 1983* made no provision for alteration of section 48 or section 66.

Reasons for recommendation

5.103 In Chapter 4 of this Report we have already recommended alteration of section 48.[100] We consider it desirable that a similar alteration be made to section 66. We accordingly recommend that section 66 be omitted and that the following section be substituted:

> 66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the remuneration of the Ministers of State, an annual sum the amount of which shall be as fixed by the Parliament.

FEDERAL EXECUTIVE COUNCIL

Recommendation

5.104 We *recommend* that sections 62 and 63 of the Constitution be omitted and that there be substituted the following section:

> 65. (1) There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth.
>
> (2) The Councillors shall be the Queen's Ministers of State for the time being, who shall each make the oath or affirmation prescribed by the Parliament.
>
> (3) The Governor-General may convene meetings of the Federal Executive Council.
>
> (4) The provisions in this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

5.105 The effect of the proposed alterations is:

(a) to limit the membership of the Federal Executive Council to the Prime Minister, Ministers and Assistant Ministers of State for the Commonwealth for the time being;

(b) to make it clear that the power to convene a meeting of the Federal Executive Council is vested in the Governor-General;[101] and

(c) to preserve the present constitutional requirement that members of the Federal Executive Council shall be sworn in, but to clarify what is meant by that requirement.

99 ACC Proc, Melbourne 1975, 174; ACC Proc, Hobart 1976, 206-7.
100 para 4.684-4.691.
101 Under section 126 of the Constitution this power can be assigned to a deputy.

5.106 The recommendations outlined above need to be read in conjunction with other recommendations concerning provisions of the Constitution which invest powers and functions in the Governor-General in Council,[102] and also with our recommendation for alteration of section 126 of the Constitution. That section deals with appointment of deputies to the Governor-General.[103]

Current position

5.107 The main provisions in the Constitution which deal with the Federal Executive Council are sections 62, 63 and 64. Sections 62 and 63 provide as follows:

> 62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.
>
> 63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

Under section 64 the Queen's Ministers of State for the Commonwealth are members of the Council *ex officio*. In practice they are sworn in as Executive Councillors before being commissioned as Ministers.

5.108 The oath of office to be sworn by Executive Councillors is not prescribed either by the Constitution or by Act of Parliament. Its form is based on that sworn by Privy Councillors in the United Kingdom and includes an undertaking that the Councillor 'will not directly or indirectly reveal such matters as shall be debated in Council.'

5.109 Although the members of the Council hold office only during the pleasure of the Governor-General, in practice the Ministers who have been sworn in as Executive Councillors continue to be members of the Council even when they have ceased to hold Ministerial office.[104] But once having ceased to hold Ministerial office, members of the Council are no longer summoned to attend meetings. They are referred to as members not under summons.

5.110 Meetings of the Council are formally convened either by the Governor-General or by a deputy appointed by the Governor-General under section 126 of the Constitution who has been authorised to summon meetings of the Council. The practice has been to appoint as deputy the Vice-President of the Council who is a Minister appointed to the position of Vice-President on the advice of the Prime Minister.

5.111 Although not, strictly speaking, a member of the Executive Council, the Governor-General presides over meetings of the Council. Meetings may also be presided over by any of his duly appointed and authorised deputies. At present the practice is for the Governor-General to appoint all Ministers to be deputies to preside over meetings of the Council at which the Governor-General is unable to be present, according to a prescribed order of precedence.

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102 See list below under the heading 'Powers of the Governor General' – 'Introduction', para 5.144-5.146.

103 See the heading 'Administrator of the Commonwealth and deputies of the Governor-General', para 5.192.

104 We are aware of only one case in which the appointment of an Executive Councillor has been terminated. This occurred on 22 December 1977 when the appointment of Senator Sheil, a Minister without portfolio, was terminated following certain statements by him on policy matters: JA Pettifer, *House of Representatives Practice* (1981) 111.

5.112 Neither the Constitution nor any Act of the Parliament specifies a quorum for meetings of the Council. At a meeting of the Executive Council on 12 January 1901 it was decided that at least two members of the Executive Council, exclusive of the Governor-General, shall be necessary to constitute a meeting of the Executive Council for the exercise of its powers.[105] Current practice requires the presence of either the Governor-General (or Vice-President of the Council) and two other Executive Councillors who are Ministers, or three Executive Councillors who are Ministers.

5.113 Meetings of the Council are arranged when there is business to transact. It meets frequently during the Autumn and Budget sessions of the Parliament. The business to be transacted is listed in a document, called the Schedule, and at the conclusion of a meeting this is signed by those present, including, if present, the Governor-General.

5.114 The business is of a purely formal nature. What is presented is a recommendation, known as a Minute, that something which is required, by the Constitution or by statute, to be done or made by the Governor-General in Council be so done or made. This Minute is signed by the responsible Minister and is accompanied by an explanatory memorandum. Once the recommendation is approved, the Governor-General marks the Minute 'Approved' and signs it. Some other instrument, for example, regulations may have to be executed to give legal effect to the decision.

5.115 If the Governor-General is not present at a meeting of the Executive Council, the Schedule and each approved Minute are subsequently submitted for the Governor-General's signature.

Previous proposals for reform

5.116 ***Australian Constitutional Convention.*** At the Adelaide (1983) session of the Australian Constitution Convention it was resolved that certain practices should be recognised and declared to be practices which should be observed as conventions in Australia. Several of these practices related to the Federal Executive Council. These were:[106]

> **Composition of the Executive Council**
>
> (12) The Governor-General chooses Executive Councillors (including a Vice-President of the Council) on the advice of the Prime Minister.
>
> (13) Even if members of the Executive Council retain their positions they are under summons only while they are also members of the Government.
>
> . . .
>
> **Operation of the Executive Council**
>
> (15) The Executive Council is not a deliberative body: it give (sic) formal advice to the Governor-General by way of approval of a written submission by a Minister.
>
> (16) The Governor-General is entitled to receive full information concerning matters before the Executive Council and, whilst bound to accept the unanimous advice of his Ministers, may raise, for Ministerial consideration, questions concerning matters submitted to, or recommended by, the Council.
>
> (17) The Governor-General is informed in advance of proposed Executive Council meetings and of the proposed business, and decides whether he will be present.
>
> (18) The Governor-General, on the advice of the Prime Minister, appoints the Vice-President of the Executive Council to be a deputy of the Governor-General for the purposes of summoning and presiding at meetings of the Council at which the Governor-General is not to be present. The Governor-General also appoints each

105 *Hansard*, 24 May 1973, 2673.
106 ACC Proc, Adelaide 1983, vol I, 320.

Minister, other than the Vice-President, to be his deputy for the purpose of presiding at meetings of the Council at which the Governor-General, the Vice-President or a more senior Minister is not present.

(19) A meeting of the Executive Council consists of at least two Ministers in addition to the Governor-General, the Vice-President or deputy of the Governor-General who is presiding.

Advisory Committee's recommendation

5.117 The Advisory Committee on Executive Government has recommended 'that there be no change to the powers, functions, composition and procedures of the Executive Council.'[107] This recommendation does, however, need to be read in conjunction with other of the Committee's recommendations, in particular:

(a) the recommendation that 'Section 51 should be amended by granting the Commonwealth Parliament power to make laws with respect to the exercise of any executive power by the designated constitutional organ';[108]

(b) the recommendation that 'Section 61 should be amended to provide that the exercise of the executive power of the Commonwealth shall be subject to legislative control';[109]

(c) the recommendation 'that the Constitution be amended to provide explicitly that all powers vested in the Governor-General, except the "reserve powers", be exercisable only in accordance with ministerial advice';[110] and

(d) the recommendation of the majority 'that the Commonwealth Parliament enact a code of practice governing the reserve powers . . .'.[111]

5.118 The Committee's recommendation in relation to the Federal Executive Council proceeds on the assumption that there will be no change in the powers given by the Constitution to the Governor-General and the Governor-General in Council. The other recommendations referred to above[112] do, however, propose that the Constitution be altered in ways that would affect the exercise of powers invested in the Governor-General. They would give the Parliament express powers to regulate the exercise of the powers of the Governor-General and the Governor-General in Council.

5.119 For reasons we explain later in this Chapter[113] we propose a somewhat different approach to a number of the problems the Advisory Committee has identified. For example, we recommend that a number of the powers presently invested by the Constitution in the Governor-General should be invested in the Governor-General in Council. We also recommend that some powers invested in the Governor-General should be declared to be powers to be exercised on the advice of the Prime Minister.

Reasons for recommendations

5.120 The proposed alterations do not in any way affect the powers of the Federal Executive Council; nor do they involve any change in the manner in which the business of the Council is transacted, or in the relationship between the Council and the Governor-General. They are framed on the assumption that the Council is not a deliberative body

107 Executive Report, 50.
108 id, 59.
109 ibid.
110 id, 37.
111 id, 39.
112 para 5.117.
113 para 5.144, 5.145, 5.165.

but rather one whose primary function is to give formal advice to the Governor-General as to the exercise of powers which, by the Constitution or Acts of Parliament, may be exercised only by the Governor-General in Council.

5.121 We have recommended, that the provision governing the composition of the Federal Executive Council be altered so that membership is restricted to the Queen's Ministers of State for the time being. As has already been pointed out,[114] they are already members of the Executive Council *ex officio,* but they remain members of the Council even after they have ceased to hold Ministerial office. In our view it is desirable that the Constitution accurately reflect the well-established constitutional convention that the only members of the Executive Council who may be called on to participate in meetings of the Council are persons who are presently Ministers. Certainly the Constitution should not convey the impression, as it presently does, that appointments to the Council are a matter for the Governor-General's personal choice.

5.122 If membership of the Council is limited to the Queen's Ministers of State for the time being and they are members of the Council *ex officio,* it is not, strictly speaking, necessary to require that members of the Council be formally sworn in as members. At present, persons who are to be commissioned as Ministers are first sworn in as Executive Councillors, though the Constitution does not indicate what it is that is to be sworn or affirmed. Once having been sworn as members of the Executive Council, the incoming Ministers may then tender formal advice to the Governor-General concerning the establishment and disestablishment of departments, a power which, under section 64, is exercisable only by the Governor-General in Council. The formal commissioning of Ministers may then proceed in conformity with the new Administrative Arrangements Order approved by the Governor-General in Council.

5.123 We see no reason why members of the Executive Council should not continue to be sworn in as members of that body. We think, nonetheless, that the Constitution should clearly state that swearing in involves the making of an oath or affirmation and that the form of that oath or affirmation should be as prescribed by the Parliament. Were our recommendation regarding the composition of the Executive Council to be adopted, the commissioning of persons as Ministers would necessarily have to precede their swearing in as members of the Council. The making of any new Administrative Arrangements Order would follow the swearing in of the new members of the Council.

5.124 Our other recommendation for alteration of the constitutional provisions concerning the Federal Executive Council is designed to clarify a matter which is not, at present, altogether clear but which, in our view, ought to be clarified lest it give rise to doubts about whether a meeting of the Council has been validly constituted and consequent doubts about the validity of acts of the Governor-General in Council. It concerns who has authority to convene a meeting of the Council. It is, we think, desirable that there be unambiguous rules on these matters, rules which make it 'possible to distinguish an accidental assembly of persons who are Executive Councillors from a meeting of "the Federal Executive Council".'[115]

5.125 There is, as Professor Sawer has pointed out, an ambiguity in section 62 of the Constitution in relation to the power to summon a meeting of the Council. According to him:[116]

114 para 5.107.
115 G Sawer, *Federation under strain* (1977) 94.
116 id, 94-5.

> The reference in s. 62 to members of the Council being 'summoned' by the Governor-General could be interpreted as meaning that a Council occurs only if the Governor-General summons members of the Council . . . for the purpose of advising him, and it might further be implied that the presence of the Governor-General is necessary to the gathering being a Council, so far as s. 62 is concerned. On the other hand, the 'summoning' in s. 62 could be interpreted as referring only to bringing the intended members into the Governor-General's presence for the purpose of swearing them; the order of words is better suited to that interpretation. It may be that even without aids from s 62, one could reach the conclusion that *prima facie* the mark of existence of an Executive Council is that it should be summoned by the Governor-General; the long history of the unfolding of the prerogative through the various Councils of the Crown, which includes the development of parliament, supports such a view.

5.126 It has long been assumed that the Governor-General does have power to summon a meeting of the Council, and that a meeting of Executive Councillors is not a meeting of the Council unless the meeting has been convened by the Governor-General or by a deputy appointed under section 126 of the Constitution who has been authorised to summon a meeting of the Executive Council. The Letters Patent of 1984 relating to the office of Governor-General proceed on this assumption. Under the alterations we propose, the power to convene a meeting of the Council is expressly reposed in the Governor-General, whose power under section 126 to appoint deputies to exercise that power is preserved.[117]

5.127 The alteration to the Constitution we propose is, it should be noted, one which gives the Governor-General power to *convene* rather than to *summon* meetings of the Executive Council. We think the word 'convene' is the more appropriate of the two. As an Irish judge once observed: 'There is an obvious difference between "convened" and "summoned" . . . "convened" is applied, properly, not to individuals but to aggregate bodies. A Board is "convened"; an assembly is "convened"; a senate is "convened"; but A is not "convened", he is "summoned, warned or noticed".'[118]

THE GOVERNOR-GENERAL

Appointment and terms of office

Recommendations

5.128 We *recommend* no alteration of the provisions of the Constitution which relate to the appointment of the Governor-General and to the Governor-General's terms of office other than of the provision relating to the Governor-General's salary.

5.129 We *recommend* that section 3 be omitted and the following section be substituted:

> **Remuneration of the Governor-General.**
>
> 3. There shall be payable to the Queen out of the Consolidated Revenue Fund of the Commonwealth, for the remuneration of the Governor-General, an annual sum the amount of which shall be fixed by the Parliament.
>
> The remuneration of the Governor-General shall not be reduced during his continuance in office.

Current position

5.130 Section 2 of the Constitution provides that the Governor-General is to be appointed by the Queen. Clause II(a) of the Letters Patent relating to the office of

117 See 'Administrator of the Commonwealth and deputies to the Governor-General', para 5.192.
118 *R v Smith* 1 Jebb & S 634, quoted in *Stroud's Judicial Dictionary* (4th edn, 1971) vol 1, 598.

Governor-General, dated 21 August 1984, require the appointment to be made by commission under the Sign Manual and Great Seal of Australia. Such appointment is at the Queen's pleasure.[119]

5.131 It has been accepted for over sixty years that the appointment of the Governor-General should be on the advice of the Prime Minister of Australia. This convention was recognised at the Adelaide session of the Australian Constitutional Convention in 1983.[120] At the same time it was resolved that informal consultation between the Monarch and the Australian Prime Minister should precede the Prime Minister's advice.[121]

5.132 The Constitution does not prescribe any qualifications for appointment of a person to the office of Governor-General, though clause II(b) of the Letters Patent of 21 August 1984 stipulates that, before assuming office, a person appointed to be Governor-General shall take the oath or affirmation of allegiance in the form set out in the schedule to the Constitution, and also the oath or affirmation of office, in the presence of the Chief Justice or another Justice of the High Court of Australia.

5.133 Section 3 of the Constitution provides for payment of a salary to the Governor-General. It states:

> There shall be payable to the Queen out of the Consolidated Revenue Fund of the Commonwealth, for the salary of the Governor-General, an annual sum which, until the Parliament otherwise provides, shall be ten thousand pounds.
>
> The salary of a Governor-General shall not be altered during his continuance in office.

The effect of this section and section 51(xxxvi.) is that the Parliament may fix the annual salary payable to a Governor-General, but once having fixed it, cannot vary it during the incumbent's term of office. In practice this has meant that the Parliament has normally fixed the salary after the retirement of one Governor-General and before the new incumbent takes office. Section 3 operates as a standing appropriation of the annual salary which the Parliament has determined.

Advisory Committee's recommendations

5.134 The Advisory Committee on Executive Government considered whether any alterations should be made to the Constitution concerning the appointment of a Governor-General, qualifications for appointment, salary, term of office, removal from office, and offices which a Governor-General may hold after retirement.[122]

5.135 The Committee recommended no change to the present constitutional position other than replacement of section 3 by a provision modelled on section 72(iii.) of the Constitution. That section provides that Justices of the High Court and of other federal courts 'Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.'

5.136 Although the Committee did not recommend any alterations to the Constitution in relation to the other matters mentioned, it did express views on what it considered to be three desirable practices:

(a) The Governor-General should be an Australian citizen.[123]

119 *Gazette*, S334-5, 24 August 1984.
120 ACC Proc, Adelaide 1983, vol I, 319.
121 ibid.
122 Executive Report, 31-5.
123 id, 32. This was also the view of Australian Constitutional Convention – see ACC Proc, Adelaide 1983, vol I, 319.

(b) Governors-General should continue to be appointed 'during the Queen's pleasure', no maximum term should be specified and, on the assumption that, by convention, the current term is five years, that term should be capable of extension.[124]

(c) It would be undesirable for a former Governor-General to hold office under the Crown, either of the Commonwealth or a State.[125]

5.137 On the matter of removal of a Governor-General from office, a majority of the Committee concluded that the present position, which allows the Queen, acting on the advice of the Prime Minister, to remove a Governor-General at any time, is 'superior to the alternative, which would be a complicated provision for removal of the Governor-General on the ground of misbehaviour or incapacity, with complicated procedures to ascertain their existence'.[126] It was pointed out that were a Prime Minister to advise the Queen to remove the Governor-General from office, the Queen would 'be entitled to exercise her rights to be consulted, to encourage and to warn', though were the Prime Minister 'to persist in his advice that the Governor-General should be dismissed, the Queen would . . . have eventually to act upon it.'[127]

5.138 The Committee suggested that one way of ensuring 'some minimum formal procedure for the dismissal of the Governor-General' would be to insert in the Letters Patent relating to the office of Governor-General a clause similar to clause II in the Letters Patent of 14 February 1986 relating to the Governor of Queensland. This clause provides that the Governor's appointment may be terminated only by an instrument in writing, signed by the Queen, taking effect on its publication in the State's Government Gazette or at such later time as the Gazette specifies.[128]

Submissions

5.139 The Advisory Committee on Executive Government considered submissions on the appointment and terms of office of the Governor-General. These are noted in Chapter 3 of its Report. Few submissions on the appointment and terms of office of the Governor-General were received after the publication of the Committee's report.

5.140 The later submissions included a submission from the Queensland Government on the recommendations of the Advisory Committee.[129] They included also several submissions supporting the proposition that the Governor-General should be an Australian citizen.[130] Some suggested that the Constitution should be altered to provide that the Queen's power to remove a Governor-General from office is to be exercised on the advice of Australian Ministers[131] or on the advice of the Prime Minister.[132]

Reasons for recommendations

5.141 We agree with the Advisory Committee's recommendations that there should be no alteration of the Constitution in respect of the appointment of a Governor-General, qualifications for appointment to the office, the terms of office and removal from it. We

124 Executive Report, 33.
125 id, 35.
126 id, 34.
127 ibid.
128 ibid.
129 Queensland Government S3290, 4 February 1988.
130 eg New Australian Republican Party S2469, 9 September 1987; Federation of Ethnic Communities Council of Australia S2561 and S2829, 31 October 1987; M O'Rourke S2415, 31 August 1987.
131 eg T Corley S2999, 11 November 1987.
132 eg W Phillips S3031, 5 November 1987.

believe that the convention that the Queen does not appoint a Governor-General except on the advice of the Prime Minister of Australia is so well established that there is no need to alter section 2 of the Constitution to make it clear that the Queen's power of appointment cannot be exercised except on that advice. For the same reason we do not think it necessary to alter the Constitution to limit the class of persons who may be appointed to the office of Governor-General to Australian citizens.

5.142 We note, but make no comment on, the suggestion by the Advisory Committee that the Letters Patent relating to the Governor-General be amended by the insertion of a clause similar to clause II of the Letters Patent of 14 February 1986 relating to the Governor of Queensland.

5.143 We do, however, *recommend* that section 3 of the Constitution be altered to make it clear that although the salary payable to the Governor-General cannot be reduced by the Parliament during his or her term of office, it can be increased. We agree with the Advisory Committee's view that section 3 should be expressed in terms similar to section 72(iii.) of the Constitution.

Powers of the Governor-General

Introduction

5.144 A number of recommendations concerning the powers and functions of the Governor-General and the Governor-General in Council have been made in earlier parts of this Report. We refer, in particular, to our recommendations on:

(a) sessions and meetings of the Parliament and prorogation and dissolution of the House of Representatives;[133]

(b) issue of writs for Senate elections;[134]

(c) recommendation of money votes;[135]

(d) assent to Bills and reservation and disallowance of Bills;[136]

(e) dissolution of both Houses of the Parliament and the convening of joint sittings;[137]

(f) appointment and dismissal of Ministers;[138]

(g) establishment of departments of State;[139] and

(h) the Federal Executive Council.[140]

5.145 Further recommendations affecting the powers and functions of the Governor-General and the Governor-General in Council appear in later sections of this Chapter[141] and in Chapter 13. These include recommendations on:

(i) the command in chief of the naval and military forces (section 68);[142]

133 Chapter 4 under the headings 'Meetings of Parliament', para 4.214-4.216. 'Terms of the Federal Parliament', para 4.343.
134 Chapter 4 under the heading 'Electoral laws and writs for elections', para 4.442.
135 Chapter 4 under the heading 'Recommendation of money votes', para 4.589.
136 Chapter 2 under the heading 'Reservation and disallowance', para 2.172, 2.173.
137 Chapter 4 under the heading 'Disagreements between the Houses', para 4.611.
138 Chapter 5 under the heading 'Appointment and terms of office of the Prime Minister and Ministers', para 5.30, 5.64.
139 Chapter 5 under the heading 'Ministers and departments', para 5.30.
140 Chapter 5 under the heading 'Federal Executive Council', para 5.104-5.106.
141 para 5.174, 5.192.
142 Chapter 5 under the heading 'The command in chief of the Defence Forces', para 5.174.

(j) appointment and removal of judges (section 72);[143] and

(k) amendment of the Constitution (section 128).[144]

5.146 This part of the Chapter deals with matters of general principle and with provisions in the Constitution which appear to us to enshrine general principles regarding the powers and functions of the Governor-General.

Current position

5.147 Under the Constitution, some powers are invested in the Queen, some in the Governor-General and some in the Governor-General in Council. Of the powers given to the Queen, some are exercisable by her alone, but on Ministerial advice, and some by the Governor-General. The powers given to the Governor-General in Council are powers which can be exercised only on the advice of the Federal Executive Council (section 63). These were the powers which the Framers of the Constitution considered to be purely statutory or which had, by custom or statute, been detached from the prerogatives of the Crown.[145] The powers invested in the Governor-General alone, on the other hand, were ones which replicated Royal prerogatives, that is, powers possessed by the Queen under the common law.[146]

5.148 This explanation of why some powers were vested in the Governor-General and others in the Governor-General in Council is not entirely satisfactory because some of the powers vested in the Governor-General were clearly not among the Royal prerogatives, for example the power under section 57 to dissolve both the Senate and the House of Representatives, and the Governor-General's power under section 128. On the other hand various powers of appointment to public offices exercisable by the Governor-General in Council were still prerogative powers.

5.149 When the Framers of the Constitution decided that some powers should be reposed in the Governor-General and others in the Governor-General in Council, they did not intend that the powers given to the Governor-General alone should be exercised in every case at his or her personal discretion. The powers of the Governor-General, Edmund Barton observed during the Convention Debates, 'can nevèr be exercised without the advice of a responsible Minister, and if that advice is wrongly given it is the Minister who suffers.'[147] '[N]o.one who understood these matters', Barton commented, 'would dream of adding the words "in Council".'[148]

5.150 There does not appear to be any firmly established convention that all of the powers vested by the Constitution in the Governor-General must be exercised on the advice of the Executive Council. The Advisory Committee on Executive Government identified three cases in which it is accepted that the advice of a single Minister is sufficient.[149]

143 Chapter 6 para 6.162, 6.180, 6.203.
144 Chapter 13 para 13.1.
145 They included issue of writs for general elections for the House of Representatives (section 32), creation of departments of State (section 64) and various powers of appointment (sections 67, 72 and 103).
146 Conv Deb, Adelaide 1897, 908-15; Conv Deb, Melbourne 1898, vol II 2249-64; Quick and Garran, 406. See also *New South Wales v Commonwealth (Seas & Submerged Lands Case)* (1975) 135 CLR 337, 364-5 (Barwick CJ).
147 Conv Deb, Melbourne 1898, 2254.
148 ibid.
149 Executive Report, 37.

5.151 Then there are the so-called 'reserve powers', the powers which are said to be exercisable by the Governor-General without or contrary to Ministerial advice. The Advisory Committee identified these as the power to appoint and to dismiss the Prime Minister (section 64), dissolution of the House of Representatives (section 5), and a double dissolution pursuant to section 57 of the Constitution.[150] How the reserve powers should be exercised is, however, regulated to a large extent by constitutional convention and at the Brisbane session of the Australian Constitution Convention in 1985, a resolution was passed approving a series of statements about practices which ought to be observed.[151]

5.152 Other powers, not itemised in the Constitution, are exercisable by the Governor-General by virtue of section 61 of the Constitution. These powers include some which were formerly assigned to the Governor-General by the Monarch pursuant to section 2 of the Constitution. Section 61 vests the Executive power of the Commonwealth in the Queen and declares it to be exercisable by the Governor-General as the Queen's representative. The power is expressed to extend 'to the execution and maintenance of . . . [the] Constitution, and of the laws of the Commonwealth.' Section 2 provides, *inter alia,* that the Governor-General 'shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.'

5.153 One effect of section 61 is to endow the Crown in right of the Commonwealth with certain prerogative powers. These include some of the prerogatives which in the early years of Federation were assumed to be prerogatives which could not be exercised by the Governor-General unless they were expressly assigned to the Governor-General under section 2. The generally accepted view now is that section 61 'enables the Crown to undertake all Executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution.[152] It includes the prerogative powers of the Crown, that is, powers accorded to the Crown by the common law.'[153] We deal further with section 61 later in this Chapter.[154]

5.154 Section 2 of the Constitution provides:

> A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

5.155 Assignments of powers pursuant to section 2 have been made on four occasions, in every case on the advice of Australian Ministers. In 1941, the Governor-General was authorised to declare war on Finland, Hungary, Romania and Japan. On 2 November 1954, the Queen, acting on the advice of the Federal Executive Council, assigned further powers, including the power to appoint certain diplomatic officers and consuls and to grant an exequatur in respect of foreign consuls. On 30 May 1973, the Queen, again acting on the advice of the Federal Executive Council, assigned powers respecting the appointment and withdrawal of ambassadors and high commissioners. On 8 December 1987 the Queen assigned:

150 id, 38-9.

151 ACC Proc, Brisbane 1985, Vol I, 415-7. These resolutions are set out in Chapter 2 above, under the heading 'Resolutions of the Australian Constitutional Convention'.

152 See Chapter 2.

153 *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J); see also *Victoria v Commonwealth and Hayden (Australian Assistance Plan Case)* (1975) 134 CLR 338, 405-6 (Jacobs J).

154 Under the heading 'The Parliament and the executive', para 5.207-5.221.

'powers and functions in respect of the issuing of letters patent:

(a) granting a supplemental charter to anyone in the Commonwealth of Australia to whom a charter of incorporation has been granted by Us or Our predecessors; or

(b) revoking, amending, or adding to, any charter of incorporation or supplemental charter granted to anyone in the Commonwealth of Australia by Us or Our predecessors . . .'.

5.156 On 1 December 1987 the Queen, acting on the advice of the Prime Minister,[155] formally revoked the assignments made in 1954 and 1973. This was done on the basis that the powers assigned were already exercisable under section 61 and that powers assigned under section 2 should not include powers exercisable by the Governor-General under section 61.

5.157 Finally, it should be noted that the Letters Patent of 29 October 1900 constituting the offices of Governor-General and Commander in Chief duplicated a number of the provisions in the Constitution conferring powers on the Governor-General, and also granted some other powers which are now clearly among the powers embraced by section 61. The new Letters Patent of 21 August 1984 eliminated these redundant clauses and at the same time revoked the Royal instructions to the Governor-General dated 29 October 1900.[156]

Advisory Committee's recommendations

5.158 The Advisory Committee on Executive Government made the following recommendations in relation to matters relevant to this part of the Chapter:

(a) The Constitution be altered to provide explicitly that all powers vested in the Governor-General, except the 'reserve powers', be exercisable only in accordance with Ministerial advice.[157]

(b) Principles, as set out, to guide the exercise of the 'reserve powers' should be enacted by the Federal Parliament.[158] (Two members of the Committee dissented from this recommendation.)

(c) The first clause of section 61 should be altered to provide: 'The executive power of the Commonwealth is vested in the Governor-General.'[159]

(d) Section 2 should be altered to omit the final clause which impliedly empowers the Queen to assign powers and functions to the Governor-General.[160]

Submissions

5.159 The Advisory Committee on Executive Government considered submissions relating to the powers of the Governor-General in Chapter 3 of its Report. Following the publication of the Committee's Report, we received a number of submissions on the same subject.

155 The principle that assignments under section 2 should be made on the advice of the Prime Minister was endorsed by the Australian Constitutional Convention in Adelaide 1983 – ACC Proc, Adelaide 1983, vol I, 319.
156 *Gazette*, S334-5, 24 August 1984.
157 Executive Report, 37.
158 id, 38-43.
159 id, 52.
160 id, 57.

5.160 A number of these later submissions suggested that the provisions of the Constitution relating to the powers of the Governor-General should not be changed.[161]

5.161 An equally large number of the submissions recommended that these provisions of the Constitution should be changed. Some favoured definition, limitation and codification of the powers of the Governor-General.[162] Many recommended that the powers of the Governor-General should, in most cases, be exercisable only on the advice of the Federal Executive Council.[163]

5.162 In its submission on the Advisory Committee's Report, the Government of Queensland[164] expressed the view that the Committee had been overly conservative in its view of what the reserve powers of the Governor-General are. It argued strongly against legislative enactment of practices to govern the exercise of these powers and suggested that some of the practices recommended by a majority of the Committee were less than satisfactory. It recommended that the Commission should endorse the practices which the Australian Constitutional Convention had, at the Adelaide and Brisbane sessions of 1983 and 1985 respectively, resolved should be observed as conventions.

5.163 The Committee's recommendation for alteration of section 61 to vest the executive power of the Commonwealth directly in the Governor-General, it was further submitted, was unnecessary. On the other hand, the proposed alteration of section 2 was considered to have merit.

Reasons for recommendations

5.164 We are in broad agreement with the general proposition that the Constitution should be altered to make it clear that most of the powers vested in the Governor-General should be exercisable only on Ministerial advice.

5.165 Elsewhere in this we recommend that certain powers vested in the Governor-General – the power to appoint and dismiss Ministers and the power to appoint deputies – should be declared to be exercisable on the advice of the Prime Minister.[165] We recommend also that certain other powers of the Governor-General should be vested in the Governor-General in Council.

5.166 The matter of appointment and the term of office of the Prime Minister is dealt with earlier in this Chapter.[166]

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161 eg J Bradbury S2869, 2 November 1987; R Kershaw S2805, 24 October 1987; C den Roden S3084, 20 November 1987; R and S Barnes S2868, 28 October 1987; G Smalley S2821, 29 October 1987; R McDonald S3166, 9 January 1988; G Burgoyne S2712, 17 October 1987; J Tolson S3041, 11 November 1987; J Jones S2909, 26 October 1987; N Barnfield S2907, 29 October 1987; L Fisher S2767, 22 October 1987; H Nicholas S2557, 12 December 1987; B Edwards S2690, 15 October 1987; S Holme S2569, 29 November 1987; A Richardson S2915, 29 October 1987; Tasmanian Government S3373, 15 March 1988.

162 eg G Hollebone S2785, 27 October 1987; G Yeates S3146, 6 January 1988; E Greer S3132, 29 December 1987 and S3242, 5 February 1988; C Lloyd S3056, 18 November 1987; T Manning S2175, 29 May 1987; W Riley S2811, 23 October 1987.

163 eg Citizens for Democracy S3051, 13 November 1987; J Goldring S2582, 28 December 1987; T Corley S2999, 11 November 1987; F McGuirk S3284, 8 January 1988; G Yeates S3146, 6 January 1988; N Forbes S2591, 20 December 1987; W Phillips S3031, 5 November 1987; W Riley S2811, 23 October 1987; J Steward S2952, 16 September 1987; H Hall S2706, 18 October 1987.

164 Queensland Government S3290, 4 February 1988.

165 Under the headings 'Appointment and terms of office of the Prime Minister and Ministers' para 5.30, 'Administrator of the Commonwealth and deputies of the Governor-General', para 5.192.

166 para 5.30, 5.58-5.72.

5.167 For the purposes of this Report we do not think it necessary to canvass in detail the proposal by a majority of the Committee that legislation be enacted to lay down principles to guide the exercise of the reserve powers.[167] Our view is that our Terms of Reference neither require nor invite us to make recommendations on what legislation ought to be enacted by the Parliament in the exercise of its constitutional powers, except in cases where it is clear that legislation would need to be enacted to effectuate a constitutional provision.

5.168 For the same reason we offer no comment on the principles which the majority of the Advisory Committee recommended for enactment other than that some of these principles would not be apt were our recommendations for alteration of the Constitution to be adopted.

5.169 None of our remarks in this connexion should, however, be taken as implying that we consider it undesirable or inappropriate for efforts to be made by bodies such as the Australian Constitutional Convention to formulate statements regarding the manner in which certain constitutional powers should and should not be exercised, and regarding the factors which ought to be taken into account in their exercise.

5.170 The recommendation of the Advisory Committee that section 61 of the Constitution be altered so that the executive power of the Commonwealth is vested directly in the Governor-General is not one we endorse. Although the Committee recognised that 'The Queen was, and still is, the formal Head of State of Australia and, therefore, the supreme head of the executive branch of government',[168] it thought:

> it would be wise to amend section 61 to remove any uncertainty regarding the relationship between the Queen and the Governor-General and to ensure that the language of that section provides no support for the notion that the Queen of Australia (even though acting on the advice of Commonwealth ministers) can exercise any Commonwealth executive power.[169]

5.171 We are not persuaded that the alteration of section 61 proposed by the Committee is either necessary or desirable. The alteration would not enlarge the range of powers exercisable by the Governor-General. So long as the Queen of Australia is head of State, we consider it entirely appropriate that the executive power of the Commonwealth should, as at present, be formally invested in her and declared to be exercisable by the Governor-General. The Queen is, we note, a constituent part of the Parliament (section 1). Were section 61 to be altered in the way proposed by the Committee, an equally good case could be made for alteration of the definition of the Parliament to exclude the Queen and to substitute the Governor-General. Our judgment is that any proposal to alter section 61 to eliminate reference to the Queen would be construed by many electors as derogatory and but a step towards establishment of a republican form of government.

5.172 The alteration to section 2 of the Constitution which the Committee has recommended is, however, one which we support without hesitation. Were that section to be altered as proposed, it would read simply:

> 2.(1) There shall be a Governor-General, who shall be appointed by the Queen and shall be Her Majesty's representative in the Commonwealth.
>
> (2) The Governor-General shall hold office during Her Majesty's pleasure.

167 The question of whether the Constitution should be altered to make it clear that the Parliament has authority to enact such legislation is considered under the heading 'The Parliament and the Executive', para 5.207-5.221.

168 Executive Report, 51.

169 id, 52.

We *recommend* accordingly. The alteration would entail omission of those words which suggest that there are some powers which the Governor-General cannot exercise unless they have been expressly assigned.[170]

5.173 As has already been pointed out[171] there is now no doubt that all of the powers which have, in the past, been assigned to the Governor-General pursuant to section 2 are now powers which are exercisable under section 61. The Queen's revocation in 1987 of all extant assignments under section 2 recognises that fact. The part of section 2 which would be excised by the proposed alteration, we agree, 'can now be regarded as entirely obsolete.'[172]

The command in chief of the naval and military forces

Recommendation

5.174 We *recommend* that section 68 of the Constitution be altered to read:

> The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative, acting with the advice of the Federal Executive Council.

The object of this proposed alteration is to make it clear that whatever powers the Governor-General may exercise by virtue of having the command in chief of the Defence Force are powers which, constitutionally, cannot be exercised except in accordance with the advice of the Federal Executive Council.

Current position

5.175 Section 68 of the Constitution provides:

> The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

It is clear beyond doubt that whatever powers the Governor-General may exercise pursuant to this section, these powers are ones that are exercisable only on the advice of the responsible Minister. In fact, the Governor-General's role as Commander in Chief is 'essentially a titular one' and always has been.[173] As the present Governor-General noted in an address to the Joint Services Staff College, Canberra, in June 1983:

> no question of any reserve power lurks within the terms of s. 68 and practical considerations make it essential, even were constitutional ones not also to require it, that the Governor-General should have no independent discretion conferred upon him by that section.[174]

5.176 Whether section 68 has the effect of conferring any substantive powers is open to question. Any of the Royal prerogatives in relation to the disposition of the armed forces[175] are already included within the executive power of the Commonwealth under section 61 of the Constitution. Those powers are, moreover, subject to regulation by the Parliament in exercise of the defence power granted by section 51(vi.) and have been so regulated by the *Defence Act 1903.*

170 In Chapter 14 of the Final Report we will recommend adoption of a general savings clause to preserve the position of office holders appointed under provisions which have been altered.

171 See above under the heading 'Powers of the Governor General' – 'Current position', para 5.147-5.157.

172 Executive Report, 57.

173 *Coutts v Commonwealth* (1985) 157 CLR 91, 109 (Deane J).

174 Sir Ninian Stephen, 'The Governor-General as Commander-in-Chief' (1984) 14 *Melbourne University Law Review* 563, 570.

175 *Chandler v Director of Public Prosecutions* [1964] AC 763; *Burmah Oil Co v Lord Advocate* [1965] AC 75.

5.177 Section 8 of that Act vests the 'general control and administration of the Defence Force' (as defined in section 30) in the Minister for Defence. Since 1975 provision has been made in the Act for an officer styled the Chief of Defence Force Staff who has command of the Defence Force (section 9(2)). The Secretary of the Department of Defence and the Chief of Defence Force Staff jointly have the administration of the Defence Force except with respect to:

(a) matters falling within the command of the Defence Force by the Chief of Defence Force Staff or the command of an arm of the Defence Force by the Chief of Staff of that arm of the Defence Force; or

(b) any other matter specified by the Minister (section 9A).

The powers so vested are, however, required to 'be exercised subject to and in accordance with any directions of the Minister' (sections 8, 9(2) and 9A) and the command vested in the Chief of the Defence Force Staff is expressly declared to be subject to section 68 of the Constitution (section 9(5)). Particular powers conferred on the Governor-General by the Act are, by virtue of section 16A of the *Acts Interpretation Act 1901* (Cth), required to be exercised on the advice of the Federal Executive Council.

5.178 ***Intention of the Framers.*** The Framers of the Constitution intended section 68 to be merely declaratory of pre-Federation practice. It had long been the practice for colonial governors to be commissioned by the Monarch as commanders in chief of local forces.[176] These commissions were in the nature of delegations of the Royal prerogative of command of the armed forces.[177] There had been occasions on which colonial governors, including governors of Australian colonies, had asserted authority to exercise the command in chief of the local forces independently of advice from the responsible Minister, but by the end of the nineteenth century it had been established and accepted that for a governor so to act was highly improper, indeed, unconstitutional. Even the Monarch could not exercise the command in chief save on Ministerial advice.[178]

5.179 At the third session of the Federal Convention held in Melbourne in 1898, Alfred Deakin moved that clause 68 of the draft Constitution – the clause which was later to be substantially enacted as section 68 – be altered to read:

> The command in chief of the naval and military forces of the Commonwealth is hereby vested in the Governor-General acting under the advice of the Executive Council.[179]

Deakin considered that because some Australian colonial governors had, in the past purported to exercise authority as commanders in chief otherwise than in accordance with Ministerial advice, the Governor-General's obligation to act on such advice should 'be placed beyond doubt'.[180] Although the motion to amend the clause was defeated, it was not because the delegates disagreed with the proposition that the command in chief should be exercised only on advice of the responsible Minister.

176 Colonial Service Regulations of 1892 stipulated that a colonial governor appointed as commander in chief was not invested with command of Her Majesty's regular forces in the colony except by special appointment – Stephen, op cit, 566.

177 This prerogative had been affirmed in the preamble to an English statute of 1661 (13 Chas 2, Stat 1, C.5). This declared that 'Forasmuch as within all his Majesties realms and dominions the sole supreme government command and disposition of the Militia and of all forces by sea and land and of all forts and places of strength is and by the laws of England ever was the undoubted right of his Majesty and his royal predecessors . . .'. The Monarch relinquished personal command of the armed forces in 1793 when a separate office of General Commander in Chief was created.

178 Stephen, op cit, 569; HE Renfree, *The Executive Power of the Commonwealth of Australia* (1984) 180-1.

179 Official Records of the Debates, 1898, Vol II, 2249.

180 id, 2251; see also 2257.

5.180 The reason was rather that the delegates believed that the constitutional convention was so well established that it was not necessary to spell it out. Edmund Barton pointed out that the command in chief of the armed forces was one of the Royal prerogatives and in drafting the Constitution, the practice had been not to add the words 'in Council' after the word 'Governor-General' where a power to be invested in the Governor-General was presently a prerogative power. The term 'Governor-General in Council' had been used only in relation to those prerogative powers which had 'long been demitted or got rid of by statute or other practice'.[181]

5.181 Barton even suggested that were the proposed amendment to be adopted it would 'probably, if not certainly, be struck out' when the Bill for the Constitution came before the United Kingdom Parliament.[182] 'We shall be told', he predicted, 'that we ought to understand that the matter is sufficiently regulated by constitutional usage already, and that the prerogative which is nominally vested in the Queen, is actually wielded by the Cabinet'.[183]

Advisory Committee's recommendations

5.182 The Advisory Committee on Executive Government concluded that the commander in chief of the Defence Force should continue to be the Governor-General. In its view the principle which section 68 enshrines, namely that 'of military subordination to the civil authorities', is an important one and should be preserved.[184] The Committee considered, nonetheless, that section 68 should be altered to make it clear that the Governor-General's powers as commander in chief 'are purely ceremonial'.[185] It recommended two further alterations of a formal nature:

(a) The constitutional provision should refer to 'the Defence Force of the Commonwealth', rather than 'the Naval and Military Forces of the Commonwealth', to include the Air Force and any other military forces that may be established in the future.

(b) Section 68 should be reworded 'to confer an office, rather than a power'.[186]

Accordingly, the Committee recommended 'that section 68 be amended to refer to the Defence Force, and to provide that the titular head of the Defence Force shall be the Governor-General who shall be known as the Commander in Chief'.[187]

Submissions

5.183 The Advisory Committee on Executive Government considered submissions on the Governor-General as commander in chief of the armed forces in Chapter 3 of its Report.

5.184 Since the publication of that Report we have received the following submissions:

(a) The Constitution should be altered to provide that the Governor-General act as commander in chief on the advice of the Federal Executive Council.[188]

181 id, 2253.
182 id, 2255.
183 id, 2254. See also remarks of J Symon at 2261.
184 Executive Report, 35.
185 ibid.
186 ibid.
187 ibid.
188 eg G Yeates S3146, 6 January 1988; W Phillips S3031, 5 November 1987; A Richardson S2915, 29 October 1987, L Foley S2887, 28 October 1987.

(b) The Governor-General should be able to exercise the command in chief independently of the advice of the Federal Executive Council.[189]

(c) The Constitution should be altered to clarify section 68 in relation to the air force.[190]

(d) The Constitution should be altered to clarify what powers the Governor-General, as commander in chief, may exercise in times of emergency.[191]

(e) The command in chief of the defence forces should not reside in the Governor-General.[192]

5.185 The Queensland Government submitted that it was unnecessary to change section 68 as it is already well understood that the Governor-General would act as commander in chief on the advice of the Federal Executive Council.[193]

5.186 We wrote to the Minister for Defence, Hon KC Beazley, MP seeking his views on possible changes to section 68 of the Constitution. In response, Mr Beazley said that:

> there seems to have been a long history of misunderstanding about the meaning and application of section 68 and the role of the Governor-General as Commander-in-Chief of the Defence Force. My own view is that there is unlikely to be doubt in the future on the part of a government or on the part of a Governor-General that the title is purely titular, but that despite the clear understanding on their part there will remain some prospect of misinterpretation by others of section 68. I would not have thought that any misapprehensions in the future would be of greater consequence than those in the past, given that those responsible for effecting the provisions of section 68 are unlikely to misinterpret it. I would add that there is little likelihood in my view of a misunderstanding by the Chief of the Defence Force and Chiefs of Staff that the Governor-General's powers under section 68 are purely ceremonial.
>
> As you would be aware section 68 descended from the inherent prerogative of the crown in command of the United Kingdom's military forces. I see no particular purpose served by breaking with that tradition and hence I would not argue against the proposition that the Governor-General should be the Commander-in-Chief of the Defence Force even though in a purely utilitarian sense the title has little or no meaning.
>
> . . .
>
> My suggestion would be that you either add 'titular' to 'office of the Governor-General' or, as Alfred Deakin proposed at the Constitutional Conference of 1898, add 'acting under the advice of the Executive Council' to the rewording you are considering.[194]

Reasons for recommendation

5.187 We agree with the Advisory Committee that the general principle which section 68 expresses, namely that the command in chief of the Defence Force should be vested in Governor-General, should be retained. The alteration which we propose to the section does not, however, involve, as the Committee's recommendation does, a reformulation of the entire section. It involves merely the addition of words having the same effect as those which in 1898 Deakin proposed should be added to the proposed section.

189 eg E Winney S3019, 26 October 1987; H Nicholas S2557, 12 December 1987; C den Ronden S3084, 20 November 1987.
190 N Berryman S3100, 24 November 1988; E Winney S3019, 26 October 1987; H Nicholas S2557, 12 December 1987.
191 eg A Douglas S2812, 26 October 1987.
192 Citizens For Democracy S3051, 13 November 1987.
193 Queensland Government S3290, 4 February 1988.
194 Hon KC Beazley, MP S2942, 5 November 1987.

5.188 While there is no doubt that the office of commander in chief is purely titular or honorific and that any powers exercisable by that officer can, by constitutional convention, be exercised only Ministerial advice, we are of the view that this convention is one which should be embodied in the Constitution. We have come to this view largely because it is apparent that the true constitutional position is not generally understood. It is still assumed by some people that the Governor-General can, under section 68, exercise a command function independently of Ministerial advice.[195] This assumption is plainly ill-founded.

5.189 We see no reason why section 68 should be altered to omit the reference to 'the naval and military forces of the Commonwealth' and to substitute the words 'the Defence Force of the Commonwealth'. The expression 'the Defence Force' is defined in section 30 of the *Defence Act 1903* (Cth) to consist of three arms: the Australian Navy, the Australian Army and the Australian Air Force, and it could be redefined by legislation to include other arms. But constitutionally the expression 'the naval and military forces of the Commonwealth' is a generic expression which embraces any branch of the armed forces of the Commonwealth. A similar expression is employed in the description in section 51(vi.) of the power of the Federal Parliament to legislate with respect to defence – 'The naval and military defence of the Commonwealth . . .'. It has not been suggested that the formulation of this power should be altered and we do not recommend any such alteration.

5.190 We also see no reason to alter section 68 in the manner recommended by the Advisory Committee so as to indicate that the Governor-General merely holds the office of commander in chief, and is the titular head of the Defence Force. As far as we have been able to discover, there is no difference in law between holding the office of commander in chief and having the command in chief of armed forces.

5.191 Before Federation, the term used in the commissions of colonial governors and in some colonial legislation was 'commander-in-chief'.[196] The term commander-in-chief was also used in the Letters Patent of 29 October 1900 (since revoked) constituting the office of Governor-General and the subsequent commissions of Governors-General.[197] The term 'Command-in-Chief' seems to have been derived from section 15 of the *British North America Act 1867* (now the Canadian *Constitution Act 1867*).[198]

Administrator of the Commonwealth and deputies of the Governor-General

Recommendation

5.192 We *recommend* that section 126 of the Constitution be altered to read:

> The Governor-General may, with the advice of the Prime Minister, appoint any person, or any persons jointly or severally, to be his deputy or deputies within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function.

195 See Stephen, op cit, 564-5.

196 See eg *The Volunteer Force Regulation Act 1867*, section 4 (NSW); *Volunteers Act 1878* (Qld), section 3; *Defence Act 1885* (Tas), section 3.

197 This was in accordance with Colonial Service Regulations and Colonial Office practice.

198 This section provides: 'The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.'

Current position — Administrator

5.193 When the Governor-General is absent from Australia, the office is occupied by an Administrator appointed by the Queen pursuant to section 4 of the Constitution. On assuming the administration of the Government of the Commonwealth, the Administrator exercises all of the powers and functions of the Governor-General. Dormant commissions for the office of Administrator are generally held by all the State Governors; the acting commission is held by the senior Governor.

5.194 The commissions to the Administrators appointed under section 4 are issued by the Queen on the advice of the Prime Minister of Australia. This practice was recognised by the Australian Constitutional Convention in 1983 and declared to be one which should be observed as a convention in Australia. Specifically it was resolved that the convention be that:

> Commissions to administrators under section 4 of the Constitution are issued and withdrawn on the advice of the Prime Minister of Australia and are issued only to State Governors. Where it is necessary for an administrator to act under his commission, the most senior available holder of a dormant commission assumes duty, seniority amongst State Governors being determined according to the dates of their appointment as State Governors.[199]

5.195 The circumstances in which a person appointed as an Administrator may exercise the powers, functions and authorities of the Governor-General are defined in clause III of the Letters Patent relating to the office of Governor-General, dated 21 August 1984.[200] Under that clause, an Administrator may exercise the Governor-General's powers, functions and authorities 'only in the event of the absence out of Australia, or the death, incapacity or removal, of the Governor-General for the time being'. The reference to 'absence out of Australia' is defined to mean 'absence out of Australia in a geographical sense' but so as not to include 'absence out of Australia for the purpose of visiting a Territory that is under the administration of the Commonwealth of Australia'.

5.196 Clause III of the Letters Patent also stipulates that on the occasions when an Administrator may exercise the powers, functions and authorities of the Governor-General, 'the administration of the Government of the Commonwealth' shall not be assumed by an Administrator except by request. In the event of the absence of the Governor-General from Australia the request must ordinarily be made by the Governor-General or the Prime Minister. In the event of the death, incapacity or removal of the Governor-General the request must ordinarily be made by the Prime Minister.

5.197 The rules set out in clause III include provisions defining the circumstances in which an Administrator shall cease to exercise the powers etc of the Governor-General.

Current position — deputies

5.198 The office of deputy of the Governor-General is provided for in section 126 of the Constitution. This reads:

> 126. The Queen may authorise the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function.

199 ACC Proc, Adelaide 1983, vol I, 319.
200 *Gazette*, S334-5, 24 August 1984.

The requisite authority to appoint deputies was originally conferred by clause VI of the Letters Patent issued by the Queen on 29 October 1900 to constitute the office of Governor-General. New Letters Patent were issued by the Queen, acting on the advice of the Prime Minister, on 21 August 1984.[201] These revoked the Letters Patent of 1900 as amended. Clause IV of the new Letters Patent authorises the Governor-General to appoint deputies under section 126 of the Constitution, but the authorisation is subject to certain limitations. They are that a person appointed as a deputy:

> shall not exercise a power or function of the Governor-General assigned to him on any occasion –
>
> (i) except in accordance with the instrument of appointment;
>
> (ii) except at the request of the Governor-General or the person for the time being administering the Government of the Commonwealth that he exercise that power or function on that occasion; and
>
> (iii) unless he has taken on that occasion or has previously taken the Oath or Affirmation of Allegiance in the presence of the Governor-General, the Chief Justice or another Justice of the High Court of Australia or the Chief Judge or another Judge of the Federal Court of Australia or of the Supreme Court of a State or Territory of the Commonwealth.[202]

5.199 Among the resolutions passed at the Adelaide session of the Australian Constitutional Convention in 1983 on practices which should be observed as conventions, there were three relating to appointment of deputies under section 126 of the Constitution and the role of these deputies:

(a) The power of the Queen under section 126 of the Constitution to authorise the Governor-General to appoint a deputy is exercised on the advice of the Prime Minister of Australia.

(b) The Governor-General acts on the advice of the Prime Minister in appointing a deputy under section 126.

(c) A State Governor who is appointed as a deputy of the Governor-General acts on the advice of Commonwealth Ministers in Commonwealth matters.[203]

5.200 The present practice is for the Governor-General to appoint all Ministers for the time being as deputies for certain limited purposes. The Vice-President of the Executive Council is appointed a deputy with authority to summon meetings of the Federal Executive Council and to preside over any meeting of the Executive Council at which the Governor-General is unable to be present. The other Ministers are appointed as deputies, but their authority is limited to presiding over a meeting of the Executive Council when neither the Governor-General nor Vice-President (or acting Vice-President) is able to be present. Occasionally a deputy is appointed when the Governor-General visits a relatively inaccessible part of the country. Deputies are also appointed to swear in members of Parliament.

5.201 The office of deputy to the Governor-General differs from that of Administrator in three respects:

(a) The Administrator is appointed, and can only be appointed, by the Queen, whereas a deputy to the Governor-General is appointed by the Governor-General.

201 *Gazette*, S334, 24 August 1984.

202 The oath or affirmation of allegiance is declared to be that in 'the form set out in the Schedule to the Constitution' (clause V).

203 ACC Proc, Adelaide 1983, vol I, 319.

(b) The Administrator can exercise all of the powers of the Governor-General merely by virtue of the instrument of appointment whereas a deputy to the Governor-General cannot exercise any power or function of the Governor-General other than one specifically assigned to him or her. Thus if a deputy has been appointed and the only power delegated is to preside at meetings of the Federal Executive Council, he or she does not have authority to perform acts on behalf of the Governor-General. The authority is merely to preside and to signify to the Governor-General that the Council has approved a minute (that is, recommendation) placed before it.[204]

(c) The Administrator stands in the shoes of the Governor-General, whereas a deputy to the Governor-General is merely a delegate of the Governor-General and the relationship between that deputy and the Governor-General is governed by the ordinary rules about delegations of public powers.[205]

Advisory Committee's recommendation

5.202 The Advisory Committee on Executive Government formed the view that sections 4 and 126 were provisions that appeared 'to work well' and accordingly recommended that they not be altered.[206]

Reasons for recommendation

5.203 We agree with the Advisory Committee's recommendation in relation to section 4 of the Constitution. We have, however, concluded that there are elements of section 126 which are no longer consistent with Australia's status as a sovereign, independent nation and which can now be regarded as outmoded.

5.204 Under the section as it now stands, the Governor-General's power to appoint deputies is dependent on the Queen having authorised the power to be exercised. But that authority was conferred even before the federation came into being. It is most unlikely that the authority would now be withdrawn. Section 126 as it now stands also enables the Queen to exercise control over the Governor-General as regards the powers and functions assigned to deputies, over when deputies can exercise their assigned powers, and, arguably, also over the manner in which deputies exercise their assigned powers and functions. Of course, this power of control would not now be exercised except on the advice of the Prime Minister.

5.205 In our opinion, the authority of the Governor-General to appoint deputies and to delegate powers and functions to them should stem directly from the Constitution, and not, as at present, from the Letters Patent issued thereunder. Likewise, that authority should not be limited in any way which suggests that the Queen retains effective power to control the manner in which the capacity to appoint deputies is exercised or to determine what powers and functions may be assigned to and exercised by them. That capacity is, we recognise, an important one and should be conferred by express constitutional provision.

5.206 We also recognise that the power is one which, by convention, would be exercised only on Ministerial advice. We think it appropriate that this convention be incorporated in section 126 by the inclusion of words which indicate that the powers formally invested in the Governor-General to appoint deputies, and to assign powers and functions to them,

204 JA Pettifer, *House of Representatives Practice* (1981) 112.
205 See M Aronson and N Franklin, *Review of Administrative Action* (1987) 55-60.
206 Executive Report, 36.

can only be exercised on the advice of the Prime Minister. Under the new section 126 which we propose, the Prime Minister would be the person who would have to take responsibility, politically, for the uses made of the power.

THE PARLIAMENT AND THE EXECUTIVE

Introduction

5.207 Most of our recommendations concerning the relationship between the legislative and executive branches of government of the Commonwealth have already been dealt with in Chapter 4 of this Report and in preceding parts of the present Chapter. In this part we deal principally with the ambit of the executive power of the Commonwealth and with the powers of the Parliament to enact legislation with respect to the exercise of those powers, and also with respect to specific powers invested by the Constitution in the Governor-General and the Governor-General in Council.

5.208 Our remarks are addressed primarily to recommendations of the Advisory Committee on Executive Government that:

(a) section 51 of the Constitution be altered by granting the Commonwealth Parliament power to make laws with respect to the exercise of any executive power by the designated constitutional organ; and

(b) section 61 of the Constitution be altered to provide that the exercise of the executive power of the Commonwealth shall be subject to legislative control.[207]

We give reasons why a majority of us do not endorse these recommendations.

Current position

5.209 The Constitution grants a number of specific powers to the Queen, the Governor-General and the Governor-General in Council. Constitutionally, it is unnecessary to classify any of those specific powers according to whether they are legislative or executive in character. The Constitution also refers to a broad category of power described simply as 'the executive power of the Commonwealth' (section 61). It implies that this power is somehow distinguishable from, 'the legislative power of the Commonwealth' which, by section 1, is vested in the Federal Parliament, and from 'the judicial power of the Commonwealth' which, by section 71 of the Constitution, is vested in certain courts.

5.210 The executive power includes, as has already been pointed out,[208] such of the Royal prerogatives as pertain to the subjects of federal legislative power. What else it might include is not entirely clear. It does not, however, extend beyond that which has been or could be the subject of valid legislation.[209]

5.211 The prerogatives and any other power imported by section 61 can be regulated by federal legislation or even replaced by statutory powers. Such legislation may be enacted in exercise of the Federal Parliament's power to make laws with respect to particular subjects, or in exercise of the power conferred by section 51(xxxix.) to make laws with respect to matters 'incidental to the execution of any power vested by this Constitution in ... the Government of the Commonwealth ... or in any department or officer of the

207 Executive Report, 59.
208 see Chapter 2, footnote 102.
209 *Victoria v Commonwealth and Hayden (Australian Assistance Plan Case)* (1975) 134 CLR 338, 362 (Barwick CJ), 378-9 (Gibbs J), 396 (Mason J), and 406 (Jacobs J).

Commonwealth.' The Parliament cannot, however, legislate to invest executive power in federal courts. Whether it may legislate to invest executive power in itself or in any House of Parliament is, however, unsettled.

5.212 The extent to which the Parliament can legislate to control the exercise of the specific powers invested by the Constitution in the Governor-General and the Governor-General in Council is a question on which opinions are divided. There is no doubt that the Parliament cannot legislate to place these powers in other hands. The problem is rather whether the Parliament has power to make laws which regulate the exercise of the powers, for example by prescribing procedures which must be followed. The differing opinions are noted in the Advisory Committee's Report.[210]

Advisory Committee's recommendations

5.213 The Advisory Committee on Executive Government considered several submissions from academic lawyers concerning the terms of section 61. Some suggested 'that the prerogative was unsuitable as a measure of Commonwealth executive power, and that any reformulation of section 61 should endeavour to dispense with it'.[211] One suggested that the only sources of executive power should be the Constitution, another that the only source should be statutes.[212] The Committee thought that there was 'much to be said for dispensing with the prerogative, an admittedly archaic and uncertain element of the common law'[213] but concluded that if executive powers were to depend solely on the enactment of legislation or on specific provisions in the Constitution, 'the practical working of government could be severely disrupted'.[214] It therefore decided not to recommend any alteration of section 61 other than that previously mentioned which would involve omission of reference to the Queen.

5.214 We agree with the Committee's view that section 61 should not be altered as regards the ambit of executive power.

5.215 The Committee did, however, recommend that the Constitution be altered to make it clear beyond doubt that the exercise of the executive power under section 61 is subject to legislative control. It also recommended that section 51 be altered to provide that the Parliament has 'power to make laws with respect to the exercise of any executive power by the designated constitutional organ'.[215] This recommendation is linked with the earlier recommendation by a majority of the Committee that legislation be enacted to regulate the exercise of the Governor-General's reserve powers.[216]

Submissions

5.216 The Advisory Committee on Executive Government considered submissions on the Parliament and the Executive in Chapter 4 of its Report. Since publication of that Report we have received the following submissions on this topic:

(a) that the convention of Ministerial responsibility be expressly recognised in the Constitution;[217]

210 Executive Report, 58-9.
211 Executive Report, 55.
212 ibid.
213 id, 56.
214 ibid.
215 id, 59.
216 id, 38-43.
217 eg L O'Shea S2998, 8 November 1987.

(b) that the Parliament to control all the acts of the Executive;[218] and

(c) in its submission on the entire report of the Committee the Government of Queensland stated that it did not agree with these particular recommendations; it considered that the proposed alterations of sections 51 and 61 were 'not needed and would totally denude the Governor-General of any meaningful role in the governance of our nation'.[219]

Reasons for recommendation

5.217 The majority of us (Sir Maurice Byers, Professor Campbell, Sir Rupert Hamer and Mr Whitlam) are not persuaded that it is necessary to alter the Constitution to include express statements that the executive power of the Commonwealth and the powers invested in the Governor-General and Governor-General in Council are subject to legislative control. The Parliament already has power to legislate to regulate the exercise of the prerogatives of the Commonwealth and other powers included in section 61 – even to abrogate them.

5.218 We acknowledge that there is room for difference of opinion about the Parliament's power to regulate the exercise of the specific powers vested in the Governor-General and the Governor-General in Council, but we note that there is no decision of the High Court which distinctly denies the Parliament a competence to enact such legislation. We are inclined to the view that section 51(xxxix.) of the Constitution would support much legislation of this type, for example legislation of the kind already enacted to do with qualifications and procedures in selecting Justices of the High Court. Section 51(xxxix.) would, we have no doubt, be interpreted in the light of the principles of responsible government which the Constitution implies and also in the light of the constitutional principles received from the United Kingdom which accord Parliaments supremacy over the executive organs of government.

5.219 Professor Zines is in agreement with the other members of the Commission that no alteration of the Constitution is necessary to enable the Parliament to legislate to control the general executive powers vested by section 61. Any power included in section 61 is reflected in a legislative power of the Commonwealth.

5.220 There is more doubt as to legislative control of specific powers conferred by the Constitution on the Governor-General or the Governor-General in Council. There is often no express legislative power in relation to the specific subject of Executive authority, for example, the dissolution of a House of Parliament or the appointment of judges. To legislate, it is necessary to rely on section 51(xxxix.) – 'Matters incidental to the execution of any power vested by this Constitution ... in the Government of the Commonwealth ... or in any department or officer of the Commonwealth.' If the specific executive powers in question are construed as conferring a discretion it is arguable that it is not 'incidental' to the exercise of the discretion to control it, either at all or to any considerable degree. The argument that section 51(xxxix.) is sufficient for this purpose depends on implication, namely, the concept of parliamentary supremacy over the Executive. Professor Zines is of the view, like the majority of the Commission, that the High Court is likely to hold that Parliament has the necessary power because of this principle.[220]

218 eg L Foley S2887, 28 October 1987; L O'Shea S2998, 8 November 1987; A Richardson S2915, 29 October 1987.

219 Queensland Government S3290, 4 February 1988.

220 He so advised the Australian Constitution Convention: 'Opinion on Integrated Courts Scheme', Judicature Sub-Committee Report, ACC Proc, Brisbane 1985, vol II, 27, 33-6.

5.221 There is, however, much legal opinion to the opposite effect, and Professor Zines considers that the matter should be put beyond doubt by constitutional alteration. In his view, it should be made clear that all actions by the Governor-General or the Governor-General in Council should be subject to control by Parliament as the supreme law making body and the most democratic element in our Constitution. He would, therefore, recommend that there be added to section 51 a paragraph conferring power on the Parliament to make laws with respect to the regulation and control of any power vested by this Constitution in the Governor-General or the Governor-General in Council.

TRANSFERRED DEPARTMENTS

Recommendations

5.222 We *recommend* that the Constitution be altered by repealing:

(i) section 52(ii.);

(ii) section 69; and

(iii) sections 84 and 85.

Current position

5.223 Sections 52(ii.), 69, 84 and 85 of the Constitution provide as follows:

> 52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to –
>
> . . .
>
> (ii.) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth:
>
> 69. On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth:-
>
> Posts, telegraphs, and telephones:
> Naval and military defence:
> Lighthouses, lightships, beacons and buoys:
> Quarantine.
>
> But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.
>
> 84. When any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth.
>
> Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation, payable under the law of the State on the abolition of his office.
>
> Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension or retiring allowance shall be paid to him by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his term of service with the State bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer.

Any officer who is, at the establishment of the Commonwealth, in the public service of a State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth.

85. When any department of the public service of a State is transferred to the Commonwealth –

(i.) All property of the State of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary:

(ii.) The Commonwealth may acquire any property of the State, of any kind used, but not exclusively used in connexion with the department; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth:

(iii.) The Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament:

(iv.) The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred.

5.224 ***Transfer of departments on the establishment of the Commonwealth.*** These sections of the Constitution are all concerned with the departments of the public services of the Australian colonies which were to be transferred to the Commonwealth either on the establishment of the Commonwealth or shortly thereafter. The departments to be transferred are identified in section 69. The departments of customs and excise were to be transferred on the establishment of the Commonwealth. The other departments listed were to become transferred to the Commonwealth on a date or dates to be proclaimed by the Governor-General. These were the departments of:

(a) Posts, telegraphs, and telephones;

(b) Naval and military defence;

(c) Lighthouses, lightships, beacons and buoys; and

(d) Quarantine.

Basically what was involved in the transfer of these departments to the Commonwealth was a transfer of public servants to the service of the Commonwealth and the transfer to the Commonwealth of property used in connexion with the work of those departments. The detailed provisions on the transfer of personnel and property were set out in sections 84 and 85. The effect of those sections will be explained later.

5.225 Power to legislate with respect to the subjects dealt with by the transferred departments was given to the Federal Parliament by other sections of the Constitution. The power to legislate with respect to customs and excise was encompassed by the general power conferred by section 51(ii.) of the Constitution to make laws with respect to taxation, and by virtue of section 90 was declared to be an exclusive federal power. Concurrent power to legislate was granted to the Federal Parliament in relation to:

(a) Postal, telegraphic, telephonic and other like services (section 51(v.));

(b) The naval and military defence of the Commonwealth and of the several States . . . (section 51(vi.));

(c) Lighthouses, lightships, beacons and buoys (section 51(vii.)); and

(d) Quarantine (section 51(ix.)).

Section 114 prohibited States from raising or maintaining 'any naval or military force' without the consent of the Federal Parliament.

5.226 The State departments of posts, telegraphs and telephones, and naval and military defence were formally transferred to the Commonwealth on 14 February 1901 and 25 February 1901 respectively, in each case by virtue of a proclamation under section 69. No dates, however, were fixed by proclamation for the transfer of the other State departments listed in the section. The reason was that the Commonwealth did not wish to employ all the officers in the State departments in which quarantine and lighthouse officers were employed. The quarantine officers were generally employed in public health departments and lighthouse officers in departments responsible for harbours and rivers. It was decided that these two classes of officers should be transferred to the federal public service under legislation enacted in reliance on section 51 powers.[221] The transfers were effected by the *Quarantine Act 1908* (Cth) and the *Lighthouses Act 1911* (Cth).

5.227 Sections 84 and 85 of the Constitution deal with rights and obligations which arise when departments of the public service of a State become or are transferred to the Commonwealth. When those sections apply, their effect is as follows:

(a) the officers of the transferred department 'become subject to the control of the Executive Government of the Commonwealth' (section 84, para one);

(b) the officers of the transferred departments are guaranteed certain rights (section 84, paras 2 and 3) and financial outlays necessary to give effect to those rights are a charge on federal revenues;[222]

(c) persons who, at the establishment of the Commonwealth, are officers of the public service of a State (but not of a transferred department) and are (by consent of the Governor in Council) transferred to the federal public service are guaranteed the same rights as officers of transferred State department who are retained in the service of the Commonwealth (section 84, para four);

(d) all State property used exclusively in connexion with the transferred department is vested in the Commonwealth; that is to say, title automatically passes without need of any formal conveyance – 'but in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary' (section 85(i.));

(e) the title to property passing under section 85(i.) includes title to Royal metals and minerals, that is gold and silver;[223]

(f) States are to be compensated by the Commonwealth for the value of property passing under section 85(i.), as agreed between them: and if there is no agreement, as determined under federal legislation;[224]

(g) the Commonwealth is authorised to 'acquire any property of the State, of any kind used, but not exclusively used in connexion with the [transferred State] department'. If this power is exercised, the State has a right to be compensated by the Commonwealth. If there is no agreement as to the amount to be paid, the value of the property is to 'be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in

221 See opinions 317 (11 August 1908) and 455 (28 June 1912) of RR Garran in *Opinions of Attorneys-General of the Commonwealth of Australia*, vol I, 1901-14 (1981) 393, 589.

222 *Bond v Commonwealth* (1903) 1 CLR 13.

223 *Commonwealth v New South Wales* (1923) 33 CLR 1.

224 Query whether the federal legislative power is subject to the 'just terms' proviso in section 51(xxxi.).

land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth' (section 85(iii.)); and

(h) the Commonwealth becomes subject to the State's current obligations in respect of the transferred department (section 85(iv.)).

5.228 In our view, sections 84 and 85 have no application when a State department is transferred to the Commonwealth otherwise than under section 69, for example, by legislation in exercise of section 51 powers.[225] If, however, a transfer pursuant to federal legislation involves the acquisition of State property, the legislation must provide for acquisition on just terms (section 51(xxxi.)).

5.229 Section 52(ii.) of the Constitution grants to the Federal Parliament exclusive power to legislate on 'Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth'. This provision relates only to the departments transferred to the Commonwealth under section 69,[226] though, according to the New South Wales Court of Appeal, the exclusive legislative power it confers extends to matters relating to federal departments and statutory corporations which have replaced those departments.[227]

5.230 According to Quick and Garran, the power to legislate with respect to 'matters relating to any department' includes 'all matters relating to the organization, equipment, working, and management of the department, the appointment, classification, and dismissal of officers, and all the general body of law relating to its conduct and administration' and 'all the machinery, procedure, and regulation, without which a public department would be impotent'.[228] This interpretation of section 52(ii.) has been approved by a majority of the New South Wales Court of Appeal.[229] On the other hand, section 52(ii) does not confer power to legislate with respect to the subject matters with which the transferred departments dealt. Federal power to legislate with respect to those matters derives rather from section 51 and is a concurrent power.[230]

Previous proposals for reform

5.231 ***Australian Constitutional Convention.*** At the Melbourne (1975) session of the Convention and again at the Hobart (1976) session, it was resolved that:

(a) the last paragraph of section 84 be omitted; and

(b) the second phrase in section 85(i.) – 'but in the case of departments controlling customs and excise and bounties, for such time only as the Governor-General may declare to be necessary' – be omitted.[231]

225 See *Trower v Commonwealth* (1923) 32 CLR 585, 589 (Isaacs J); *Cosway v Commonwealth* (1942) 65 CLR 629, 637 (McTiernan J); Quick and Garran, 817; opinion 521 (5 November 1913), of WH Irvine in *Opinions of Attorneys-General of the Commonwealth*, vol I, 1901-1914 (1981) 668. Examples of federal legislation providing for the transfer of State officers include the *Income Tax (War-Time) Arrangements Acts* of 1942 and 1946 and the *Commonwealth Public Service Acts* of 1945 and 1946. The validity of the first of these Acts was upheld in *South Australia v Commonwealth* (1942) 65 CLR 373.

226 *Carter v Egg and Egg Pulp Marketing Board (Vict)* (1942) 66 CLR 557, 571 (Latham CJ).

227 *Australian Postal Commission v Dao* (1985) 63 ALR 1.

228 Quick and Garran, 660.

229 *Australian Postal Commission v Dao* (1985) 63 ALR 1, Kirby P and Samuels JA. See also *The King v Taylor; Ex parte Professional Officers' Association – Commonwealth Public Service* (1951) 82 CLR 177, 184 (Latham CJ).

230 *The King v Brislan; Ex parte Williams* (1935) 54 CLR 262, 274-5 (Latham CJ); *Carter v Egg and Egg Pulp Marketing Board (Vict)* (1942) 66 CLR 557, 571 (Latham CJ), 583 (Starke J).

231 ACC Proc, Melbourne 1975, 175; ACC Proc, Hobart 1976, 207.

These resolutions were part of a series of resolutions dealing with provisions in the Constitution which were considered to be expended or outmoded. They followed recommendations in a report from Standing Committee C.[232] The Committee was advised that the parts of sections 84 and 85 which would remain after the omissions mentioned above could have a continuing operation 'especially if the reference power [under section 51(xxxvii.)] were to be used'.[233]

5.232 The Bill, *Constitution Alteration (Removal of Outmoded and Expended Provisions) 1983* was intended to give effect to the Convention resolutions in relation to sections 84 and 85.[234]

5.233 At the Brisbane (1985) session of the Convention it was resolved:

(i) that if the inter-change of powers proposal was put to referendum and passed before the next plenary session of the Convention, matters relating to any department of the public service the control of which is transferred to the Commonwealth by the Constitution should be designated as matters on which the States may legislate; but that

(ii) if the inter-change of powers proposal were not implemented or a designation not made, the Constitution be altered by repealing section 52(ii.) altogether.[235]

5.234 This resolution followed a recommendation by the Fiscal Powers Sub-Committee of the Convention.[236] In its Report the Sub-Committee commented[237]:

> Section 52(ii.) has not caused serious practical difficulties in the past. This is partly because it has been subsumed within the general doctrine of Commonwealth immunity. Nevertheless, the issue potentially is raised whenever a State law purports to apply to one of the transferred departments. Some of the immunities cases presently before New South Wales courts, for example, involve the application of New South Wales occupational safety laws to Commonwealth defence establishments and might bring section 52(ii) into operation. In combination with other aspects of immunities, the section may cause further problems. A State law which fell within section 52(ii.) would not be applied by the *Commonwealth (Application of Laws) Act 1970* (Cth) within a Commonwealth place. The relationship between sections 64 of the *Judiciary Act 1903* (Cth) and section 52(ii.) also raises complex legal questions.

The Sub-Committee went on to say[238] that if the general doctrine of Commonwealth immunity from the operation of State laws were to be abrogated, as was recommended:

> section 52(ii.) should be altered as well, in the interests of completeness and consistency. It is not necessary in principle for the Commonwealth to have exclusive power in this matter, particularly if the exclusivity applies to some departments and not to others. It is doubtful, in fact, that the Commonwealth needs an express power to legislate for matters relating to its own departments at all. In the absence of section 52(ii.) the Commonwealth nevertheless would have power to legislate for such matters pursuant either to the incidental power in section 51(xxxix.) or to the incidental power that accompanies each of the substantive heads of power in section 51.

232 ACC 1974, Standing Committee C, 'Interim Reports to Executive Committee' (1974), 12, ACC Proc, Melbourne 1975.
233 id, 31.
234 Clauses 12 and 13.
235 ACC Proc, Brisbane 1985, vol I, 420.
236 ACC Proc, Brisbane 1985, vol II, paras 3.23-3.27.
237 id, para 3.24.
238 id, para 3.25.

Advisory Committee's recommendations

5.235 Section 52(ii.) of the Constitution was considered by the Advisory Committee on the Distribution of Powers. The Committee recommended that:

1. In the event of a Constitutional referendum approving a proposal for an interchange of powers between the State and Commonwealth Parliaments, matters relating to any department the control of which is transferred to the Commonwealth by the Constitution should be designated as matters on which the States may legislate.
2. If the interchange of powers proposal is not implemented, or a designation is not made, the Constitution should be altered by deleting section 52(ii.) of the Constitution altogether.[239]

5.236 In so recommending, the Committee supported the intent of the resolution of the Australian Constitutional Convention in 1985, and essentially for the same reasons as were given by the Fiscal Powers Sub-Committee of the Convention. It agreed in particular that:

(a) it is not necessary in principle for the Commonwealth to have exclusive powers in this matter, particularly if the exclusivity applies to some departments but not others; and

(b) there was no need for an express power for the Commonwealth to legislate for matters relating to its own departments, given the existence of the incidental powers.[240]

5.237 Although the Committee acknowledged the existence of a connexion between section 52(ii.) and the doctrine of Commonwealth immunities, it did not see its recommendations in relation to section 52(ii.) 'as being dependent upon the abrogation or other alteration of the present doctrine of Commonwealth immunity'.[241] It also noted that its recommendations would

> not in any way prevent the Commonwealth using its incidental powers of legislation to override or render ineffective, as a result of section 109, any State laws which impede or otherwise prevent the effective discharge of the functions and duties performed by Commonwealth public servants.[242]

5.238 The Committee did not express any views on sections 69, 84 and 85 of the Constitution.

Submissions

5.239 The Commission received no submissions on sections 52(ii.), 66, 84 or 85 of the Constitution.

Reasons for recommendations

5.240 ***Section 52(ii.).*** We *recommend* that section 52(ii) be repealed from the Constitution principally on the ground that, in our view, it is unnecessary. Although in Chapter 10[243] we recommend that the Constitution be altered to provide for inter-change of powers between the States and the Commonwealth, we are not persuaded that section 52(ii.) should be repealed only if that particular alteration is not made.

239 Powers Report, 179.
240 id, 181.
241 id, 182.
242 ibid.
243 para 10.564.

5.241 There are four reasons why we have concluded that section 52(ii.) is unnecessary.

(a) The Federal Parliament already has power under section 51 to legislate on the matters referred to in section 52(ii).

(b) Even in the absence of section 52(ii.) the Federal Parliament would probably have exclusive power to legislate on the matters to which section 52(ii.) relates and matters in relation to federal departments of the public service other than those transferred under the Constitution. As Latham CJ observed in *Carter v Egg and Egg Pulp Marketing Board (Vict)*:[244] 'Any State legislation professing to control a Commonwealth department would be invalid because no State Parliament has or ever has had any power to legislate on such a subject.'

(c) If State Parliaments did have concurrent power to legislate on the matters referred to in section 52(ii.), the Federal Parliament could, by virtue of section 109, enact legislation which would override State legislation on those matters.[245]

(d) It is anomalous that the Constitution purports to give the Federal Parliament exclusive power to legislate on matters relating to some departments but not others.

5.242 ***Section 69.*** We *recommend* that section 69 be repealed on the ground that it is a provision the force of which is spent. Transfers of State departments which were effected under the section will be saved by the general savings clause which we propose should be added to the Constitution.

5.243 ***Sections 84 and 85.*** We *recommend* that these two sections be repealed from the Constitution principally because, in our opinion, they are expended provisions. Unlike Standing Committee C of the Australian Constitutional Convention, we do not think the sections can have any continuing operation; in other words, they cannot apply to the transfer of any State departments to the Commonwealth other than transfers under section 69.

5.244 We have also had regard to the following matters:

(a) Even if sections 84 and 85 do have a continuing operation, they are unnecessary because the legislative powers granted to the Federal Parliament by section 51 of the Constitution are sufficient to enable that Parliament to enact legislation to deal with matters associated with the transfer of administrative functions and responsibilities from States to the Commonwealth, and with transfer of personnel and property.

(b) State property interests are adequately protected by section 51(xxxi.) and perhaps more so than they would be if section 85 applied. Furthermore, there is no suggestion that federal legislation which has been enacted in the past for the transfer of State officers to the services of the Commonwealth has not adequately protected the interests of transferred officers.

(c) Assuming again that sections 84 and 85 have a continuing operation they do not appear to us to be entirely apt to deal with the matters that would now be dealt with were the Federal Government to take over the administration of legislation and programs previously administered by State departments. The State department as such is not what the Commonwealth would wish to be transferred. What would be sought to be transferred is responsibility for the

244 (1942) 66 CLR 557, 571.
245 See *Dao v Australian Postal Commission* (1987) 70 ALR 449.

performance of certain functions. Those functions may be performed by only one section of the State department, or by sections of two or more State departments. Transfer of State public servants and of State property may be involved, but as the immediate post-Federation experience with the quarantine and lighthouse staff showed, transfer of departments is not always the appropriate mode of achieving the desired ends. That experience shows, if anything, that the transfer of a State department to the Commonwealth, whatever the means, is not likely to be employed to accomplish a transfer of functions and responsibilities from a State to the Commonwealth.

CHAPTER 6

AUSTRALIAN JUDICIAL SYSTEM

THE STRUCTURE OF THE AUSTRALIAN JUDICIAL SYSTEM

Recommendation

6.1 We do *not recommend* any alteration to the Constitution to provide for the integration of the court systems of the Commonwealth and the States.

Current position

6.2 In the United States it was taken for granted that a federal society required federal and state systems each to have the three arms of government, legislative, executive and judicial. The Australian Constitution similarly recognises State judicial power and federal judicial power, which has resulted in separate systems of courts. There are, however, two major departures from the American scheme:

(a) The High Court of Australia is the final Australian court of appeal in respect of all matters, whether decided in federal or State jurisdictions. This Court, therefore, cuts across the classical form of federalism referred to above and is, apart from the Crown, the only institution in the original Constitution that could be described as 'national' in the sense that it is the final authority on all legal issues, whether federal or State.

(b) The Parliament of the Commonwealth is empowered under section 77 of the Constitution to invest State courts with federal jurisdiction. The State courts can thus become judicial agents of the Commonwealth for certain purposes.

6.3 The Report of the Advisory Committee on the Australian Judicial System provides a clear and fairly detailed account of the existing structures of the courts of the Commonwealth, the States and the Territories[1] It is unnecessary to repeat it here.

6.4 A number of prominent lawyers and judges have argued over the past 60 years that a dual system of courts into federal and State is not an essential ingredient of federalism and that the constitutional provisions in Chapter III, which provide for the division, were misconceived. In general it is a judge's duty, within his or her jurisdiction, to apply to a particular case all the relevant law whatever be its source. In that sense, the courts are not mere arms of the Commonwealth or the States. There is an Australian legal system even though the rules and principles of law may vary in different States, and the rules that a judge has to apply in any one State emanate from the Parliament of the State, the Commonwealth (or at times the United Kingdom) or from the common law.

6.5 This led Owen Dixon KC (later Chief Justice of Australia) to argue in 1927 before the Royal Commission on the Constitution that the courts should not be seen as pertaining to any particular government or governments in our federal system. They should be independent organs which derived their existence and authority from the Constitution itself.[2]

1 Judicial Report, 15-26, para 3.1-3.43.
2 id, 30, para 3.62.

6.6 Although the division of federal and State jurisdictions had given rise to a number of difficulties and legal conundrums, the system operated fairly smoothly for the first seventy years or so of the Commonwealth. Apart from certain original jurisdiction conferred either by legislation or by the Constitution on the High Court, and some specialised and limited jurisdiction given by legislation to federal courts in bankruptcy and industrial matters, the Australian judicial system in practice closely resembled a national model. For the most part State courts, exercising both State and federal jurisdiction, were pre-eminently the courts of original jurisdiction and first appeal in most matters. The High Court was a final court of appeal in all matters. Although a number of technical problems of jurisdiction and allied matters did arise, the system, by and large, worked well.

6.7 The creation of the Federal Court of Australia[3] and the Family Court of Australia[4] changed this situation considerably. Jurisdictional problems and conflicts of jurisdiction between State and federal courts became more frequent and serious. In the case of the Family Court most of the difficulties have related to the limited legislative power of the Commonwealth in matters concerned with family law and domestic relations. This issue is dealt with in Chapter 10.[5] The Report of the Advisory Committee sets out and explains the nature of these jurisdictional conflicts, some of which, in the case of the Federal Court, have been alleviated by decisions of the High Court, which enable the Federal Court to decide issues arising under State law where those issues form part of the one 'matter' in respect of which jurisdiction (arising under federal law) has been conferred on the Federal Court. If the non-federal issues can be seen as part of a single controversy which involves the federal issues the Federal Court has jurisdiction to determine the entire 'matter'[6]

6.8 The jurisdictional conflict may be exacerbated where any matter arising under a particular Federal Act or provision of an Act is made exclusive to a federal court. In those circumstances no single court may have jurisdiction to determine the whole controversy between the parties. Recent legislation has endeavoured to reduce the area of exclusive jurisdiction of the Federal Court. Important exceptions are in relation to matters which are unlikely to be part of a controversy that extends beyond federal law, such as income tax appeals or applications under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)[7].

6.9 Whatever may be thought of present difficulties arising from actual or potential jurisdictional conflict between State and federal courts, there is a view held by many that the existence of the federal courts and the increase in their jurisdiction have had a serious impact on the status and prestige of the Supreme Courts of the States.[8] It is thought by some that this situation will worsen with an increase in the areas of federal legislation. Most members of the Advisory Committee considered that it was inevitable that this trend would continue if nothing was done about it. It is this aspect that has given rise to various proposals for restructuring the Australian court system. These proposals are summarised in the Advisory Committee's Report[9] and are aimed at creating in one way or another an integrated judicial system.

3 *Federal Court of Australia Act 1976*, section 5.
4 *Family Law Act 1975*, section 21(1).
5 See para 10.156-10.179A.
6 Judicial Report, 26-29, para 3.44-3.60.
7 *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987* (Cth).
8 Judicial Report, 28, para 3.53.
9 id, 30-5, para 3.61-85

Previous proposals for reform

6.10 ***Australian Constitutional Convention.*** At the Adelaide (1983) session, the Australian Constitutional Convention resolved to recommend an amendment to the Constitution to integrate federal courts and State Supreme and Appeal Courts into a single system with a trial level, an appellate level and the High Court as the final court of appeal.[10]

6.11 The Judicature Sub-Committee of Standing Committee D of the Convention to which the matter was referred recommended instead that there be a cross-vesting jurisdiction at trial level among federal courts and the State and Territorial Supreme Courts, and the creation of an Australian Court of Appeal. The Federal Court and each Supreme Court of a State or Territory would thus have jurisdiction, State, Territorial and federal, to enable it to determine all issues in any matter arising before it. The Court of Appeal would be a federal court consisting of permanent judges (some appointed on the recommendation of State Governments) and all judges of the trial level courts, who would be available to sit on appeals from time to time.[11]

6.12 The Australian Constitutional Convention in 1985 resolved only in favour of the cross-vesting of jurisdiction at trial level[12] Legislation has been enacted by the Commonwealth, the States and the Northern Territory to this effect[13]

Advisory Committee's recommendation

6.13 Like the legal profession and the judges generally, the members of the Advisory Committee were deeply divided on many issues relating to the desirable structure of the Australian judicial system. Although a majority recommended that there should be no structural change, they in turn were divided on the reasons for their recommendations. On some matters, however, all the members were in agreement. Those matters are as follows:

(a) They rejected the view that there should be created a single court system which was independent of both State and federal governments. Their reasons were, first, that other branches of government have functions in relation to the judiciary. It is Parliament's function to determine what courts there should be, their jurisdiction, composition and the means for determining procedure and the finance of the courts; secondly, it is for the Executive to appoint judges and magistrates, to provide facilities for the courts and to initiate legislation in relation to them. Above all, the other branches of government must bear political responsibility for those matters.

(b) All members of the Advisory Committee agreed that the jurisdictional difficulties referred to above[14] did not warrant any substantial changes in the structure of the Australian judicial system. Their reasons were first, that the problems that had arisen in respect of the Family Court, for example, in relation to the custody of ex-nuptial children, were best dealt with by widening federal legislative power or by reference from the States under section 51(xxxvii.) of the Constitution, rather than changing the judicial system; secondly, High Court decisions had reduced many of the problems associated with jurisdictional conflicts; thirdly, other problems might be

10 ACC Proc, Adelaide 1983, vol I, 317.
11 Judicature Sub-Committee: Report to Standing Committee on an Integrated System of Courts (1984) 14, ACC Proc, Brisbane 1985, vol II.
12 ACC Proc, Brisbane 1985, vol I, 422.
13 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), (NSW), (Vic), (Qld), (SA), (WA), (Tas), (NT).
14 para 6.7-6.8.

cured by legislation such as reducing the area of exclusive jurisdiction; fourthly, the implementing of a system of cross-vesting jurisdiction would deal with nearly all the remaining difficulties.

(c) It follows from the above that all members agreed that if there was to be an integrated system of courts, or at any rate a national court of appeal (as to which there was disagreement) the court or courts would have to be federal.

6.14 The main area of disagreement among the members of the Advisory Committee was on the question on whether a change to the judicial structure was warranted by the change that had occurred to the relative position of the State Supreme Courts as a result of the increase in jurisdiction conferred on, and exercised by, the federal courts. Four members of the Advisory Committee (Professor Crawford, Mr Justice Gummow, Mr Jennings, QC and Mr Justice McGarvie) answered this question in the negative. Two members (Mr Justice Jackson and Mr Justice Kennedy) dissented on this issue.

6.15 In fact, however, there were broadly three different views expressed on the general question as to the desirable structure of the Australian judicial system and the extent to which practical considerations were an impediment to bringing it about. Those views are as follows:

(a) Among the majority members, Professor Crawford and Mr Justice Gummow were opposed to an amalgamation of federal and State courts partly on conceptual grounds. For them the power of establishing a court system was an essential feature of a polity, such as the federal and State governments. By this, they did not, of course, mean that a polity could not operate without courts of its own. The experience of the Commonwealth in the first seven decades of its existence indicated by and large that that was not so. It was not the *existence* of the courts, but the power to create them that was, for those members, an essential ingredient of statehood. They also believed that a national system of courts, even if legally created by federal law and administered by the Federal Government, would inevitably be of a hybrid nature under which no single Parliament or Government would be able to take political responsibility. The legal responsibility of the Federal Government would be sapped by political arrangements with the States involving all governments having a say in the creation and administration of the courts and appointments to them. Any unification scheme would also be likely to ignore the lower courts which are increasingly courts of first instance in most cases, and it would, those members considered, be undesirable to leave those courts isolated from a national system.[15]

(b) The two other members of the majority (Mr Jennings, QC and Mr Justice McGarvie) began with a premise opposed to that of Professor Crawford and Mr Justice Gummow. They considered that in principle there was great advantage in an integrated court system and favoured one along the lines proposed by Mr Justice Burt. That scheme involved the Supreme Courts having unlimited original civil and criminal jurisdiction (and appellate jurisdiction from lower courts) with an Australian Court of Appeal (as a federal court) to hear appeals from decisions of the Supreme Courts. They were of the view, however, that such a system was not at present feasible. It would mean that the Commonwealth would have to forgo the appointment of trial judges and the States would not be able to retain the power of choosing whether a court of first appeal should consist of trial judges or permanent appeal judges. Such a substantial change should, in their view,

15 Judicial Report, 40, para 3.106.

not be made if there was 'significant institutional and political opposition to it'. Nevertheless, those members considered that their view of the ideal system would be brought about by an evolutionary process beginning with the agreement of governments to cross-vest jurisdiction, followed by the development of mechanisms, and then institutions, to deal with the direction of cases to the appropriate courts.[16]

(c) The two minority members (Mr Justice Jackson and Mr Justice Kennedy), like the members referred to in (b) above, began with the general desirability of an integrated system. For them, however, the reduction and likely future reduction in the exercise of federal jurisdiction by State courts was so serious that immediate steps should be taken to amalgamate the Supreme Courts, the Federal Court and possibly the Family Court into a single court. They agreed with other members that it was necessary for the political branches of government to have responsibility for courts, but denied that it was essential for each government in a federation to have its own courts. They referred to the cross-vesting measures as a 'palliative' and asked what would happen to the effectiveness of such a system if a State or the Commonwealth withdrew from it.[17]

Reasons for recommendation

6.16 For the reasons given by the Advisory Committee, we are of the view that there should be one Parliament and one Government politically responsible for the establishment, maintenance, organisation and jurisdiction of, and appointments to, a court. Any attempt to remove the court from a particular governmental system would mean the creation of an institution which would involve the participation of all Australian Governments, with none directly and fully responsible. This would inevitably fetter boldness and innovation and foster conservatism and inertia.

6.17 We are, however, unable to accept the proposition advanced by two members that the question of an integrated court system can be resolved by contemplating the essential nature of a polity in a federation. As the disagreement among the Advisory Committee's members indicates, *a priori* assumptions about the essence of a term can be based on little more than personal conviction or stipulative definition. Certainly, if experience is any guide, it is clear, from that of the Commonwealth, that a polity in a federation can function and indeed flourish without having very much in the way of trial courts or first appeal courts of its own. It seems to us to be no more than assertion to say that a State would not be truly a unit of the federation, despite its undoubted legislative and executive powers, if it did not have the power to create and administer courts. It would be a different matter if the so-called courts were merely administrative arms of the other level of government, thus threatening the State's independence and the integrity of its legislative or executive power. But that is not in issue.

6.18 It follows that we agree generally with the Committee that if there is to be a national system of courts they would need to be federal courts, whatever arrangements were made to enable the State Governments to participate in appointments to those courts or in determining other matters of organisation and administration.

6.19 Leaving aside the serious problems that face litigants in relation to the jurisdiction of the Family Court, it is clear to us, as it was to all members of the Advisory Committee, that, for the reasons they gave, the conflict of jurisdiction difficulties that can still arise do

16 id, 40-2, para 3.107-3.108.
17 id, 42, n 169.

not in themselves warrant such a great change to our system that would result from the establishment of an integrated national court structure. Certainly one should first wait to examine the effectiveness of the legislation relating to the cross-vesting of jurisdiction. The problems in relation to family law are more serious, but, as is indicated above,[18] those problems relate more to the legislative powers of the Federal Parliament. That issue is dealt with in Chapter 10.[19]

6.20 The question of the relative status and prestige of State Supreme Courts is more difficult. Matters that come within federal jurisdiction have increased as a result of federal legislation and no doubt this trend will continue. Many of the areas of federal jurisdiction relate to fields of commerce, business and finance. If jurisdiction in these areas is made exclusive to a federal court, the State courts, while still remaining busy tribunals, will find a reduction in the richness and variety of much of their work. High Court decisions, which uphold a federal court's jurisdiction to deal with non-federal aspects of a controversy between litigants as 'accrued' jurisdiction, have made it politically less difficult for the Commonwealth to confer exclusive jurisdiction on federal courts, because it reduces the possibility that litigants will have to go to two courts in order to have determined all aspects of their dispute.

6.21 Governments have in fact recognised this problem as shown by recent federal legislation making much of the Federal Court's jurisdiction concurrent with State courts, and by the cross-vesting legislation of the Commonwealth, the States, and the Northern Territory, in accordance with the recommendations of the Australian Constitutional Convention.

6.22 The chief differences of opinion seem to relate to the likely outcome of the present proposals as to cross-vesting. For example, Mr Jennings and Mr Justice McGarvie 'feel that with all systems under full workload there will be an abundant supply of important work for all courts which make themselves efficient'.[20] Mr Justice Gummow and Professor Crawford, on the other hand, declare that 'even if the jurisdiction vested in a federal court is vested concurrently rather than exclusively, it is likely that an increasing proportion of litigants would be attracted to a federal court.'[21] They do not indicate the reasons for this prediction.

6.23 There is little doubt that, for a variety of reasons, the Federal Court has proved to be popular with litigants and most observers believe that its work would not suffer if its jurisdiction were exercised concurrently with State courts.

6.24 Some have argued that competition between the courts will result in increased efficiency among them all. Others, such as the minority members of the Advisory Committee, have declared that a reduction in competition for resources, for example, in relation to appointees and in the duplication of registries, buildings and libraries, would itself increase efficiency.

6.25 Having regard to the present lack of experience with the system of cross-vesting and the differences in the predictions of experienced judges and lawyers as to its effect, we do not consider that this is the time to bring about such a great change to the Australian judicial system, insofar as the reasons for change are based on the status and prestige of State courts. We believe, with Mr Jennings and Mr Justice McGarvie, that the situation is

18 para 6.7. See also para 6.13.
19 para 10.156-10.179A.
20 id, 42, para 3.108.
21 id, 42, para 3.109.

not so desperate nor the decline of State courts so likely that there is no time to see how the situation evolves over the next few years as a result of recent legislation. The question of the validity of the cross-vesting legislation is discussed below.[22]

6.26 It can be, and has been, argued that, regardless of the above problems with the present system, a national court system in place of the present dual arrangements is preferable. It would certainly do away with much of the highly technical and socially barren doctrines and distinctions that encumber our law. It would, as Sir Owen Dixon and Mr Justice Else-Mitchell and others have emphasised, make clear that the role of the courts is to apply and enforce the law of the land as organs independent of the governments or legislatures responsible for their creation, appointment and administration.

6.27 As we have said above, we reject the view that a vital federal system requires both levels of government to have a court system. We cannot, however, ignore nearly 90 years of growth and evolution of our judicial institutions merely to put in place a system that might be regarded as preferable. The practical difficulties of changing to such a system are not insuperable, but would nevertheless be quite great. If the problems of conflict of jurisdiction and the status of the State courts do not themselves warrant such a vast change, then we do not consider the change in structure should take place solely for the reason that it would, at some cost, produce a better system.

6.28 We agree with the Advisory Committee, for the reasons they gave, that, assuming the existing division of courts remains, a case has not been made out to amend the Constitution to establish a national court of appeal between the present courts of first appeal and the High Court.[23]

Cross-vesting of jurisdiction[24]

Recommendation

6.29 We *recommend* that the Constitution be altered to empower State and Territorial legislatures with the consent of the Federal Parliament, to confer State and Territorial jurisdiction, respectively, on federal courts.

Reasons for recommendation

6.30 It is apparent from what has been said above[25] that we regard the agreement among the Commonwealth, the States and the Northern Territory for the cross-vesting of jurisdiction as highly desirable. As one of the reasons for not proceeding at this stage to provide for an integrated court system by constitutional amendment, we have given the need to examine future experience under the cross-vesting arrangements.

6.31 Generally speaking, the cross-vesting proposal involves the following:

(a) The Federal Parliament vests (with some exceptions) the jurisdiction of the Federal Court and the Family Court in the Supreme Courts of the States and Territories.

(b) The States' and the Northern Territory's legislatures vest the State and Territorial jurisdiction, respectively, of their Supreme Courts in the Federal Court, the Family Court and other State and Territorial Supreme Courts.

22 para 6.34-6.37.
23 id, 35-7, para 3.86-3.90.
24 id, 43-5 para 3.113 – 3.116.
25 para 6.21.

(c) There are provisions for transfer and removals to ensure that cases are heard in the appropriate court.

6.32 The result would be that, with few exceptions, no court would lack jurisdiction to determine all claims and defences that arise in a case. As has been mentioned above,[26] following the recommendations of the Australian Constitutional Convention, legislation has been enacted to this end by the Commonwealth, the States and the Northern Territory.

6.33 The Advisory Committee raised the question of the constitutional validity of the cross-vesting legislation of the States. In the case of federal legislation vesting jurisdiction in the State courts, there is no problem. Section 77 (iii.) of the Constitution gives the Parliament power to invest State courts with federal jurisdiction. The consent of the State is not required. There is no express provision giving the States power to confer State jurisdiction on federal courts.

6.34 Outside the field of judicial power the High Court has upheld legislation conferring State authority on federal officers or tribunals where a Federal Act expressly permits it. Similarly, it has upheld federal law conferring authority on State officials or bodies where a State Act expressly authorises it. In neither case is there any constitutional provision dealing with these arrangements. Their validity is said to depend on the nature of the federal system, which envisages cooperation between the levels of government.[27] There is no reason in principle why this argument should not apply to cooperative arrangements relating to the exercise of judicial power, unless there is something in the operation of Chapter III of the Constitution which indicates a contrary intention.

6.35 One argument is that Chapter III does evince a contrary intention because it makes express provision to enable the Commonwealth to invest State courts with federal jurisdiction, but says nothing about the reverse situation. It is clear, however, that section 77(iii.) does not require any 'cooperation'. State courts have a duty to exercise any federal jurisdiction with which they are invested, whether or not the State Parliament or Government consents. In the absence of section 77(iii.) it could have been argued that this could not be done because the Constitution impliedly prevents the Commonwealth from impairing the structural integrity of the State's governmental institutions.

6.36 Professor Zines advised the Australian Constitutional Convention that the cross-vesting proposals were valid insofar as State legislation was concerned. He did, however, indicate that there was no direct authority or even dicta on the question.[28] The Advisory Committee has expressed doubts regarding the validity of the proposals. It did not set out fully the reasons, but seemed to suggest there would be no way in principle of distinguishing between vesting federal courts with State judicial power in respect of 'matters' and the conferring of non-judicial power or power to give advisory opinions on those courts. The High Court, the Committee appeared to say, would be unlikely to uphold the latter exercise and, therefore, could not, in principle, uphold the cross-vesting proposal. Professor Zines's opinion was that any cooperative arrangements were subject to the separation of powers principle. The Queensland and Tasmanian Governments agree with Professor Zines's view.

26 ibid.

27 *The Queen v Duncan : Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535.

28 Judicature Sub-Committee: Report to Standing Committee on an Integrated System of Courts (1984) 27, ACC Proc, Brisbane 1985. vol II.

6.37 In the light of the doubts expressed by the Advisory Committee and the fact that there is no direct authority, the issue is clearly open to doubt and differences of opinion. The matter is too important, in our view, to be left in a state of uncertainty, and we agree with the Advisory Committee that there should be a constitutional amendment in the form they propose.

6.38 We recommend, therefore, insertion of a provision as follows:

> 77A. The Parliament of a State or the legislature of a Territory may, with the consent of the Parliament of the Commonwealth, make laws conferring jurisdiction on a federal court in respect of matters arising under the law of that State or Territory, including the common law in force in that State or Territory.

6.39 The position of Territorial courts is examined later.

The transfer of judicial power[29]

Recommendation

6.40 We do *not recommend* the alteration of the Constitution to provide for the transfer of State judicial power to the Commonwealth.

Reasons for recommendation

6.41 The Advisory Committee recommended that there should be a constitutional amendment authorising a State Parliament to transfer some or all of the judicial power of the State to the Commonwealth if the majority of electors voting so approved.

6.42 The notion of a transfer of State judicial power differs from the cross-vesting proposals, dealt with above,[30] or a reference of power under section 51(xxxvii.) of the Constitution. It means that the Commonwealth would become the sole repository of any power transferred. The transfer would, presumably, be irrevocable.

6.43 The Advisory Committee thought that in the future a State might wish to rid itself of judicial power. One situation envisaged was that the State jurisdiction of State courts relative to their federal jurisdiction might become so limited and inadequate that it was not thought worthwhile to continue the existence of the State courts.

6.44 There would not appear to be any demand for such a provision, nor any likelihood in the foreseeable future that any State would agree to such a measure. If the circumstances envisaged by the Advisory Committee in relation to State jurisdiction should ever occur the time would have come to consider a general amalgamation of courts and a national system.

6.45 We do not accept the Advisory Committee's recommendation.

THE HIGH COURT AND FEDERAL JURISDICTION

Recommendation

6.46 We *recommend* that sections 75 and 76 be repealed and the following provisions substituted:

> 75.(1) The High Court shall have original jurisdiction in all matters:
>
> (i.) Arising under this Constitution or involving its interpretation:

29 Judicial Report, 44-5, para 3.116.
30 para 6.29-6.39.

(ii.) Between any two or more of the Commonwealth, the States and the Territories:

(iii.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:

(iv.) Affecting ambassadors, high commissioners, consuls or other representatives of other countries:

(v.) In which there is sought an order, including a declaratory order, for ensuring that the powers or duties of an officer of the Commonwealth, other than a Justice of a superior court, are exercised or performed in accordance with law.

(2) The jurisdiction conferred by paragraphs (iii.), (iv.) and (v.) of sub-section (1) of this section may be limited or excluded by a law made by the Parliament, but only to the extent that the jurisdiction has been conferred on some other federal court, the jurisdiction of which is not limited as to locality, or on a court of each of the States and Territories.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i.) Arising under or involving the interpretation of a treaty:

(ii.) Arising under or involving the interpretation of a law made by the Parliament or of a law (including the common law) in force in a Territory:

(iii.) Relating to the same subject-matter claimed under the laws of different States or Territories:

(iv.) Of Admiralty and maritime jurisdiction.

Current provisions

6.47 Sections 75, 76 and 77 of the Constitution are as follows:

75. In all matters –

(i.) Arising under any treaty:

(ii.) Affecting consuls or other representatives of other countries:

(iii.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:

(iv.) Between States, or between residents of different States, or between a State and a resident of another State:

(v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter –

(i.) Arising under this Constitution, or involving its interpretation:

(ii.) Arising under any laws made by the Parliament:

(iii.) Of Admiralty and maritime jurisdiction:

(iv.) Relating to the same subject-matter claimed under the laws of different States.

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws –

(i.) Defining the jurisdiction of any federal court other than the High Court:

(ii.) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States:

(iii.) Investing any court of a State with federal jurisdiction.

6.48 The scheme of these provisions can be summarised as follows:

(a) Section 75 provides the 'entrenched' original jurisdiction of the High Court, that is, jurisdiction which Parliament cannot impair or abolish.

(b) Section 76 sets out additional original jurisdiction that Parliament may confer on the High Court.

(c) All the subjects of jurisdiction in sections 75 and 76 constitute the complete range of 'federal jurisdiction' which, under section 77, Parliament may confer on a federal court or vest in a court of a State, either exclusively or concurrently.

6.49 Jurisdiction in relation to the Territories has been regarded in a special way, and we discuss that issue later in this Chapter.[31]

Issues and reasons for recommendation

6.50 It is clear that the extensive entrenched original jurisdiction vested in the High Court by section 75 is unnecessary and could be a possible impediment to the efficient discharge of that Court's most important work, namely, in finally determining the law for Australia as a final appeal court and in interpreting the Constitution. It is difficult to see why, for example, the highest court in the land should be an available first instance forum in respect of most of the matters mentioned in section 75, no matter how trivial the issue in dispute. We take the view, therefore, that the High Court should be given constitutionally entrenched original jurisdiction only in rare cases.

6.51 One of the most important roles of the High Court in its original jurisdiction has been in relation to matters involving the Constitution. Yet, the High Court's general jurisdiction in this respect depends on legislation of the Parliament enacted under section 76(i.). This subject of jurisdiction was granted under the *Judiciary Act 1903 (Cth).* As the jurisdiction is not entrenched in the Constitution it can be taken away in whole or in part by the Parliament. We agree with the Advisory Committee[32] that 'the High Court's expertise in dealing with constitutional cases depends in part on its ability to be up to date with the range of constitutional issues as they arise from time to time and to determine them expeditiously if it is appropriate to do so.'

6.52 It is true that in other federations, such as the United States, constitutional issues are usually heard on appeal by the highest court, but the Australian experience has been different. The High Court has been pre-eminently the constitutional court of Australia. No doubt this great use of original jurisdiction came about partly because in 1907 (and until 1977) the Supreme Courts of the States were deprived of their jurisdiction to deal with most constitutional questions[33] in order to prevent appeals to the Privy Council direct from those courts. However that may be, experience since then has confirmed the view of the Advisory Committee.

6.53 Accordingly we recommend that the High Court have entrenched original jurisdiction in 'all matters arising under or involving the interpretation of the Constitution.'

6.54 Having regard to the status of the parties, the entrenched jurisdiction given to the High Court in suits between the Commonwealth and a State (as a result of section 75(iii.)) and between States (under section 75(iv.)) is obviously suitable and desirable.

31 para 6.115-6.126.
32 Judicial Report, 53-4, para 4.3.
33 Judiciary Act 1903, sections 38A and 40A.

6.55 The creation of Territories as bodies politic separate from the Commonwealth makes it equally desirable that suits between the Government of a Territory and any other Government in Australia should also be within the High Court's entrenched original jurisdiction.

6.56 We therefore agree with the recommendation of the Advisory Committee and we recommend that the High Court have entrenched original jurisdiction in all matters 'between any two or more of the Commonwealth, the States and the Territories'.

6.57 Constitutional matters and suits between governments were the only matters that the Advisory Committee recommended should be within the entrenched jurisdiction of the High Court. We agree with them.

6.58 The Advisory Committee then proposed that the High Court be invested by the Constitution with other original jurisdiction which Parliament could divest by legislation, provided that the particular subject of jurisdiction was vested in and remained vested in a federal court.

6.59 We shall consider, first, whether the proposed subjects should be subjects of federal jurisdiction and, secondly, whether they should be vested in the High Court subject to the suggested divesting condition.

6.60 The Advisory Committee recommended that section 75 be repealed and be replaced by the following provision:[34]

> Original jurisdiction of High Court
>
> 75.(1) The High Court shall have original jurisdiction in all matters –
>
> (i.) Arising under this Constitution or involving its interpretation:
>
> (ii.) Between any two or more of the Commonwealth, the States or the Territories:
>
> (iii.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
>
> (iv.) Affecting ambassadors, high commissioners, consuls or other representatives of other countries:
>
> (v.) In which there is sought an order (including a declaratory order) for ensuring that the powers or duties of an officer of the Commonwealth (other than a Justice of a superior court) are exercised or performed in accordance with law.
>
> (2) The jurisdiction conferred by paragraphs (iii.), (iv.) and (v.) of subsection (1) may be limited or excluded by a law made by the Parliament, but only to the extent that the jurisdiction has been conferred on some other federal court.

6.61 In proposed sub-section (1), paragraphs (i.) and (ii.) represent the constitutionally entrenched jurisdiction considered above.[35] Paragraph (iii.) is the same as existing paragraph (iii.) in section 75. Paragraphs (iv.) and (v.) correspond to existing paragraphs (ii.) and (v.) respectively of section 75.

(a) ***Paragraph (iii.): 'In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'.*** It is clear that any suit by or against the Commonwealth or its agencies should be a subject of federal jurisdiction.

(b) ***Paragraph (iv.): 'Affecting ambassadors, high commissioners, consuls or other representatives of other countries'.***[36] The alterations suggested to this head of jurisdiction are in line with the recommendations adopted by the Perth

34 Judicial Report, 57-8, para 4.18.
35 para 6.47-6.48.
36 cf section 75(ii.): 'Affecting consuls or other representatives of other countries'.

(1978) session of the Australian Constitutional Convention.[37] While it is likely that the High Court would construe 'other representatives of other countries' in existing section 75(ii.) as including ambassadors and high commissioners, it is today decidedly odd that the most important diplomatic representatives should be subsumed under a general phrase, while 'consuls' are specifically mentioned as the primary category. The wording of present section 75(ii.) reflects, of course, Australia's status in 1900 rather than its place in the world now. We agree with the alterations suggested by the Advisory Committee. We also agree that, having regard to the status of the parties, it is an appropriate subject of federal jurisdiction.

(c) ***Paragraph (v): 'In which there is sought an order (including a declaratory order) for ensuring that the powers or duties of an officer of the Commonwealth (other than a Justice of a superior court) are exercised or performed in accordance with law'.***[38] Except for the latter words in parenthesis and other minor changes, this proposed paragraph accords with the recommendation of the Australian Constitutional Convention in 1978.[39] The change in wording would ensure that this head of jurisdiction includes all remedies and procedures for federal judicial supervision of executive and administrative acts and is not confined to the remedies mentioned in the present section 75(v.). There is clearly no reason, if review of administrative action is to be a subject of federal jurisdiction, why it should include some writs and remedies and not others. The Advisory Committee also recommended that this subject should not extend to review of action by a Justice of a superior court. Under present section 75(v.) 'officer of the Commonwealth' includes such a Justice.[40] In the Advisory Committee's view, ordinary appellate processes should be the only means of reviewing the acts of federal superior court judges.[41] We agree. An application under section 75(v.) as proposed to be amended would, if it did not exclude a judge of a federal superior court, permit a review of a judgment as to an error of law, not necessarily limited to an error related to jurisdiction. In this way, the legislative policy of requiring special leave for appeals to the High Court could be circumvented. A review of a judgment on the ground of error of law serves in many cases the same purpose as an appeal. Where the issue relates to the Constitution, the High Court would have entrenched original jurisdiction and would be able to grant any appropriate remedy.

Investment in High Court subject to divesting

6.62 As explained above,[42] we consider that the proposed paragraphs (iii.), (iv.) and (v.) are appropriate heads of federal jurisdiction. Whether the High Court (as distinct from other federal or State courts) should have original jurisdiction is a different question. No doubt the extensive original jurisdiction invested in the High Court by the Constitution was because it was thought likely that it would be, for some time, the only federal court.

6.63 Until the first High Court judges were appointed in October 1903 and the enactment of the *Judiciary Act 1903*, the State Supreme Courts under their respective charters and Acts had jurisdiction over nearly all the matters referred to in sections 75 and

37 ACC Proc, Perth 1978, 204.
38 cf section 75(v.): 'In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.
39 ACC Proc, Perth 1978, 205.
40 *The King v Murray and Cormie; Ex parte Commonwealth* (1916) 22 CLR 437.
41 Judicial Report, 58, para 4.19.
42 para 6.54-6.61.

76. This, they exercised as 'State jurisdiction'. The Constitution and federal laws were binding upon them under covering clause 5 of the *Commonwealth of Australia Constitution Act 1900* and their duty was to apply the law, whatever its source.

6.64 With the enactment of section 39 of the *Judiciary Act* the jurisdiction of State courts, so far as it came within sections 75 and 76, was converted to federal jurisdiction and was exercised in accordance with the conditions laid down in that provision.

6.65 Before the enactment of the *Judiciary Act*, however, it had been held that State courts had no inherent or State jurisdiction to deal with two matters, namely where the Commonwealth was a defendant and in relation to judicial review of acts of officers of the Commonwealth.[43] If that view is correct, it follows that, unless the Constitution required such matters to be within the jurisdiction of a court, the Parliament could, by repealing existing legislation, ensure that no court could deal with such cases (unless they fortuitously came within some other subject of jurisdiction).

6.66 As the only court created by the Constitution is the High Court, we accept the general approach of the Advisory Committee that there are some matters which the Constitution should confer on the High Court unless Parliament invests that jurisdiction in another appropriate court.

6.67 The matters referred to by the Advisory Committee go beyond those which might be outside State jurisdiction, namely where the Commonwealth is a plaintiff and those affecting diplomatic representatives. Nevertheless we consider they are appropriate heads of federal jurisdiction and, having regard to the status of the parties, are appropriate to the High Court unless Parliament wishes to give the jurisdiction exclusively to another court or courts.[44]

6.68 In relation to this non-entrenched jurisdiction of the High Court, however, we do not agree with the Advisory Committee that divestment should occur only if the jurisdiction is conferred on a federal court. We find it difficult to understand why the Parliament should be deprived of the choice it has at present of conferring jurisdiction exclusively in federal courts or State courts. It might, for example, be thought appropriate that in respect of suits for small amounts where the Commonwealth or a diplomatic representative is involved, they should be brought in the non-superior courts of the States or Territories in the absence of lower federal courts.

6.69 In all cases, however, we consider that the issue of whether to use federal or State courts for matters within federal jurisdiction should remain a matter of policy for the Federal Government and Parliament.

6.70 On the other hand, as the rationale for this area of jurisdiction is that some court in any part of the country should have federal jurisdiction in relation to the matter, it should not be possible to deprive the High Court of jurisdiction by conferring jurisdiction on a federal court which does not have a nationwide jurisdiction or on the courts of some only of the States and Territories.

43 *Commonwealth v Limerick Steamship Co Ltd and Kidman* (1924) 35 CLR 69; *Ex parte Goldring* (1903) 3 SR (NSW) 260.

44 The Queensland Government has submitted that jurisdiction in respect of diplomats should be deleted: S1214, 25 November 1987.

Additional federal jurisdiction

Advisory Committee's recommendation

6.71 The Advisory Committee recommended that section 76 of the Constitution be replaced by the following provision:[45]

> 76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter –
>
> (i.) Arising under or involving the interpretation of a treaty:
>
> (ii.) Arising under or involving the interpretation of a law made by the Parliament or of a law (including the common law) in force in a Territory:
>
> (iii.) Between residents of different States or Territories, or between a State or Territory and a resident of another State or Territory:
>
> (iv.) Relating to the same subject matter claimed under the laws of different States or Territories:
>
> (v.) Of Admiralty and maritime jurisdiction.

Comment

6.72 The result of this recommended provision and section 77 of the Constitution as proposed to be amended would be that Parliament would have power to confer jurisdiction in relation to the matters mentioned on the High Court, a federal court or Territory and State courts. The jurisdiction vested in any such court might be exclusive of, or concurrent with, that of any of the other courts.

6.73 In comparing the Advisory Committee's recommendations with existing provisions the following should be noted:

(a) New paragraph (i.) extends the jurisdiction at present in section 75(i.) to cover matters 'involving the interpretation of a treaty'. The provision as a whole is taken out of section 75, that is, the entrenched jurisdiction of the High Court.

(b) Paragraph (ii.) corresponds to existing section 76(ii.) but extends the jurisdiction to cover matters 'involving the interpretation' of a federal law and a law operating in a Territory, including the common law.

(c) Recommended paragraph (iii.) corresponds in part to existing section 75(iii.). By putting it in section 76, the jurisdiction would no longer be within the High Court's entrenched jurisdiction. The jurisdiction is extended to cover matters between residents of different Territories or a resident of a State and a Territory.

(d) Recommended paragraphs (iv.) and (v.) are identical with existing paragraphs (iii.) and (iv.) of section 76.

Reasons for recommendation

6.74 Our views on each paragraph of recommended new section 76 are as follows:

(a) ***Paragraph (i.): 'Arising under or involving the interpretation of a treaty'.***[46] The Perth (1978) session of the Australian Constitutional Convention recommended that matters 'arising under any treaty' should be omitted from section 75 and should cease to be a subject of federal jurisdiction.[47] There is

45 Judicial Report, 58, para 4.18.
46 cf section 75(i.): 'Arising under any treaty'.
47 ACC Proc, Perth 1978, 204.

much to be said for that view, owing to the difficulty of determining how any matter could arise under a treaty. Treaties do not, generally speaking, change the law of the land.[48] This provision seems to have been copied from a similar one in the United States Constitution; however, in the United States self-executing treaties have the same status as Acts of Congress. So far as Australia is concerned, however, while the treaty may require Australia to change its law, that can be accomplished only by legislation. In that case any legal controversy would arise under the particular Act. The Advisory Committee points out that the expression 'arising under' in relation to existing section 76(ii.) has been given a wide meaning in recent years.[49] We are unable to see how the reasoning of those cases assists in construing the expression 'arising under any treaty'. There could, however, be cases where a matter 'involves' the interpretation of a treaty, namely where the law directly refers to the provisions of a treaty or incorporates its provisions by reference. Where the law concerned is a State Act it may not at present come within the field of federal jurisdiction. We are of the view that Parliament should be able to confer federal jurisdiction in relation to the interpretation of any treaty. As the negotiation and ratification of treaties are exclusively matters of federal constitutional concern, it seems appropriate that federal judicial power should extend to cases involving their interpretation. Although, as we have stated, we find it hard to envisage a matter that can arise under a treaty as distinct from involving its interpretation, we have concluded that we should accept the Advisory Committee's recommendation. The clear appropriateness of matters concerning treaties as a subject of federal jurisdiction, the possibility of a matter arising under a treaty in a manner that is beyond our present conception, and our view that matters involving their interpretation should be within federal jurisdiction combine to lead us to the conclusion that the present subject of section 75(i.) should also remain a subject of federal jurisdiction and should be placed in section 76.

(b) ***Paragraph (ii.): 'Arising under or involving the interpretation of a law made by the Parliament or of a law (including the common law) in force in a Territory'.***[50] We agree with the recommendation of the Advisory Committee. Our reasons are, first, that the High Court has given to the phrase 'arising under' in section 76(ii.) a meaning which seems to cover many, if not most, cases where the interpretation of federal law is involved.[51] The distinction, however, between a matter arising under federal law and one involving its interpretation remains.[52] There is, therefore, much uncertainty as well as much scope for highly technical, but socially irrelevant, legal argument in this area. For the reasons we have stated in respect of treaties, the interpretation of federal law is also, in our view, a desirable subject of federal jurisdiction. We deal with matters involving Territorial law later. For present purposes it is sufficient to say that, as all Territorial law is made pursuant to federal legislation and as the common law operating in the Territories is subject to federal legislative power, we do not see any reason for distinguishing a federal law operating in the States and a law operating

48 *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347.

49 The Report refers to *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575, 581; see Judicial Report, 59, para 4.19.

50 cf present section 76(ii.): 'Arising under any laws made by the Parliament'.

51 *Felton v Mulligan* (1971) 124 CLR 367; WA Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th edn, 1976) 479; Z Cowen and L Zines, *Federal Jurisdiction in Australia* (2nd edn, 1978) 58-60.

52 *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575, 581.

in Federal Territories. The Perth (1978) session of the Australian Constitutional Convention recommended that this head of jurisdiction be worded 'Arising under, or involving the interpretation of, a law made by the Parliament or an instrument made under such a law.'[53] We agree with the view of the Advisory Committee[54] that the addition of the latter words is unnecessary as any matter arising under a statutory instrument arises under the parent statute.

(c) ***Paragraph (iii.): 'Between residents of different States or Territories, or between a State or Territory and a resident of another State or Territory'.***[55] This subject of jurisdiction, known as 'diversity jurisdiction', was a direct copy of a similar subject of federal jurisdiction in the United States Constitution. The orthodox explanation of the American provision is that it was intended for the protection of out-of-State litigants against parochial prejudice in State courts. There was in fact no fear of such bias in Australia. Mr Justice Higgins described our provision as 'a piece of pedantic imitation of the Constitution of the United States and absurd in the circumstances of Australia, with its State Courts of high character and impartiality.'[56] In *Howe's Case* it was held that a corporation was not a resident for purposes of diversity jurisdiction. The reasoning in that case was criticised in argument in *Crouch v Commissioner for Railways (Q),*[57] and the High Court was invited to overrule it. While the High Court accepted that the reasoning in *Howe's Case* was not very satisfactory, they refused to overrule it. The various judges remarked there was little to be said for this head of jurisdiction and, therefore, the result of *Howe's Case* in confining its operation was, as a practical matter, desirable. The Perth (1978) session of the Australian Constitutional Convention recommended that this subject of jurisdiction be repealed.[58] The Advisory Committee, however, recommended that it be preserved (though removed from the High Court's entrenched jurisdiction). They recommended against extending it to matters where corporations were parties.[59] The reasons for the latter recommendation were (a) that the 'residence' of a corporation is a highly artificial concept, which does not always have regard to practical realities and (b) where there is a 'real federal interest' the legislative power over the corporations referred to in section 51(xx.) would, together with section 76(ii.), provide a sufficient source of federal jurisdiction. The Advisory Committee did not provide any reasons for the preservation of diversity jurisdiction where it relates to natural persons. We agree with the Australian Constitutional Convention and the submission of the Queensland Government that there is no sufficient reason for retaining diversity of residence as a subject of federal jurisdiction. Our reasons are first, that there is no foundation for the view that State courts are likely to be biased against residents of other States; secondly, if the corporations power provides a sufficient basis for matters of 'real federal interest' where corporations are concerned, it follows, in our view, that all the other subjects of federal

53 ACC Proc, Perth 1978, 204.
54 Judicial Report, 58, para 4.19.
55 cf section 75(iv.): 'Between States, or between residents of different States, or between a State and a resident of another State'.
56 *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290, 330. See also 330 (Starke J) and the views of Mr Owen Dixon, KC given to the Royal Commission on the Constitution, 1929, Minutes of Evidence, 785.
57 (1985) 159 CLR 22.
58 ACC Proc, Perth 1978, 204-5.
59 Judicial Report, 59, para 4.19.

legislative power are enough to deal with all other matters of federal interest. If the Commonwealth legislates on those subjects, disputes between litigants relating to them will arise under federal law or involve the interpretation of those laws and thus be actually or potentially within federal jurisdiction. It has been suggested that diversity jurisdiction is useful in that the matters that come within it will at times encompass conflict of laws problems, which, it is argued, are suitable matters of federal jurisdiction.[60] We later recommend[61] that the Commonwealth be given legislative power in respect of principles of choice of law. For present purposes it is enough to say that, as the writers referred to above admit, many conflict of laws cases can arise when there is no diversity jurisdiction and many diversity suits will involve no conflict of laws problems. We recommend the repeal of all the words in section 75(iv.) after 'Between States' and we recommend against their insertion in section 76.

(d) ***Paragraph (iv.): 'Relating to the same subject matter claimed under the laws of different States or Territories'.***[62] The Perth (1978) session of the Australian Constitutional Convention recommended that these matters should no longer be within federal jurisdiction.[63] The problem has been to determine what the paragraph means. In his evidence to the Royal Commission on the Constitution,[64] Mr Owen Dixon KC said of the provision: 'So far, the meaning of this and the application of it has been elucidated by no one'. It has not since been elucidated. The Advisory Committee recommended that this head of federal jurisdiction be preserved on the ground that the provision may be of use in resolving in federal jurisdiction matters of conflict of laws (including statutes) among the States[65] As the High Court will be required to give some meaning to this provision, despite its obscurity, the Advisory Committee's view is a possible interpretation. In the circumstances we *recommend* that the subject remain within federal jurisdiction. We also agree that the words 'or Territories' be added to it.

(e) ***Paragraph (v): 'Of Admiralty and maritime jurisdiction'.***[66] Our view regarding the importance of Admiralty and maritime issues is indicated by our recommendation in Chapter 10, that the Parliament of the Commonwealth should be invested with express legislative power in this area.[67] We recommend that this remain a subject of federal jurisdiction.

Judicial determination of social facts : use of the Inter-State Commission

Recommendation

6.75 We *recommend* that the Constitution should be altered to give power to the Parliament to authorise a court to request the Inter-State Commission to enquire into and report on any fact relating to trade and commerce that is relevant to a matter that arises under the Constitution or involves its interpretation.

60 M Pryles and P Hanks, *Federal Conflict of Laws* (1974) 117.
61 para 10.326.
62 cf section 76(iv.): 'Relating to the same subject-matter claimed under the laws of different States'.
63 ACC Proc, Perth 1978, 204-5.
64 Minutes of Evidence, 786.
65 See also W A Wynes, 'The Judicial Power of the Commonwealth' (1938) 12 *Australian Law Journal* 8, 9.
66 cf section 76(iii.) which is the same.
67 See para 10.130.

Reasons for recommendation

6.76 The question whether a statutory provision is valid under the Constitution may depend upon the existence of certain social, economic or technical facts. For example, whether under section 51(i.) a federal law is a reasonable and appropriate means for effectuating a policy in relation to the export of a product may depend on a knowledge of the trade and the nature of the product. Similarly, whether, for the purpose of section 92, a law which burdens or discriminates against interstate trade is justified in the public interest, or whether it goes beyond what is reasonably appropriate for that purpose, involves examining the social problem and the means available for resolving it. The question whether a law, not made in pursuance of a treaty, is related to a matter of international interest or concern, within section 51(xxix.), may call for information as to the nature of the international concern. A law depending upon the operation of the defence power in a time of emergency requires a finding as to whether the degree of emergency is such that the law is a reasonable means of dealing with it.

6.77 All these cases involve the court making findings of fact. These facts, of course, differ from those which are peculiar to the parties to a dispute, which are generally known as 'adjudicative facts'. The facts we are concerned with may be described, for present purposes, as 'constitutional facts'.

6.78 On some occasions the facts may be such that they are within common knowledge, such as the existence of a state of war, or that eggs are a perishable commodity. On other occasions they may be ascertained by reference to standard works, the accuracy of which is generally accepted. In such cases the court can take 'judicial notice' of those facts. In a number of cases the parties may agree on the facts concerned. The High Court has, however, recognised that the issue of validity may turn on the proof of constitutional facts by evidence.[68]

6.79 If our recommendations for a Chapter in the Constitution on 'Rights and Freedoms' is adopted, the need for evidence of constitutional facts may be considerably increased. This has been the experience under the *Canadian Charter of Rights and Freedoms*, particularly in relation to the issue whether, under section 1, a law limiting a declared right or freedom is 'demonstrably justified in a free and democratic society'. In Canada, the burden of showing this is on those who argue that the law should be upheld.[69]

6.80 It may be necessary for the courts, and for the High Court in particular, to develop techniques to deal with these questions of constitutional facts. It is, of course, possible for the High Court to remit the case to a lower court to determine the facts. It may be, also, that there will be a re-examination of the principles of judicial notice.

6.81 Sometimes suggestions are also made for the use of written argument in the nature of a 'Brandeis brief' setting out relevant social and economic facts. It is also possible that the court may wish to use court appointed experts to enquire into and report, or it may wish to have enquiries made into, specific facts by expert bodies.

6.82 In a paper prepared for the Commission and set out, in part, in Appendix M, Professor Enid Campbell has satisfied us that, subject to rights of trial by jury, in relation to either adjudicative or constitutional facts, the court has a degree of power under its rules and its inherent authority to refer questions of fact to any person it considers appropriate to make an enquiry and report.[70] It is, of course, for the court alone to make

68 eg, *Uebergang v Australian Wheat Board* (1980) 145 CLR 266.
69 *R v Oakes* (1986) 24 CCC (3d) 321; 26 DLR (4th) 200.
70 See also Judicial Report, 678, para 5.8.

conclusive findings on all issues relevant to its decision. It follows, we think, that the Parliament has power under section 51(xxxix.) – the incidental power – to authorise the High Court to refer questions of fact to an outside person or body for enquiry and report.

6.83 It is not within our Terms of Reference to discuss how these constitutional facts should be proved or noticed, and as there is, generally speaking, no issue of constitutional power we make no comment on that matter. It seems to us, however, that the High Court might see a role in constitutional adjudication for the Inter-State Commission. For this purpose we consider that a constitutional provision would be desirable.

6.84 Many of the cases concerning constitutional facts have arisen in relation to section 92 of the Constitution. The determination of these cases can have a great effect on segments of the economy. Whatever construction is given to that provision – whether as an individual right to trade or as a provision designed to prevent protectionist policies – enquiries into the nature of the particular trade and the purpose and effect of legislative rules and administrative decisions may be necessary.[71]

6.85 The Court might consider that expert adjudication and enquiry by the Inter-State Commission on some of these questions would be desirable in the circumstances. It might be thought that, having regard to the economic, business and bureaucratic ramifications involved in any particular control of an area of trade, such an enquiry would be preferable to an investigation that is subject to the same rules and procedures as ordinary adjudicative facts. Of course, any such report would be governed by the terms of reference and by the directions of the Court, and its findings could not in any way bind the Court.

6.86 One illustration of the sort of issue we have in mind is that which occurred in *Permewan Wright Consolidated Pty Ltd v Trewhitt.*[72] In that case the High Court upheld the validity of a Victorian law, requiring eggs to be tested and graded by the Victorian Marketing Board before they could be sold, in its application to the sale of eggs in the course of interstate trade. It was vital to that decision that there was no evidence adduced as to discrimination against out-of-State eggs in the administration of the legislation.

6.87 In a comment in the *Australian Law Journal*, Dr G de Q Walker set out material which purported to show a consistent line of conduct by the Board aimed at preventing the entry of New South Wales eggs into Victoria. He claimed that the upholding of the legislation in its application to interstate trade achieved that result.[73] As mentioned above, the issue of discrimination was not raised in the *Permewan Wright Case.*

6.88 If, however, such an issue were raised in the future, the Court might perhaps see merit in an expert enquiry into the operation of the egg industry by the lawyers and economists who constitute the Inter-State Commission.

6.89 While, as we have said, we believe that in general the Court may be empowered to refer questions of fact, including social facts, to an outside body for inquiry, there is some doubt as to whether that body can be the Inter-State Commission.

6.90 The Inter-State Commission has express constitutional authority (section 101) and the appointment, term of office and removal of its members are provided for in the Constitution (section 103). The removal provisions are the same as for federal judges. It is possible that acting as an aid to the judicial power does not come within its functions as

71 We examine section 92 of the Constitution in Chapter 11, para 11.157-11.206.
72 (1979) 145 CLR 1.
73 (1980) 54 *Australian Law Journal* 356, 359-61.

prescribed in section 101, namely, 'such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.'

6.91 Yet the constitutional independence and protection from arbitrary removal of members of the Commission and the expertise in matters of trade and commerce that it can be expected to have might be regarded as making it a particularly appropriate body for enquiry and report.

6.92 The Advisory Committee on Trade and National Economic Management recommended a wider role for the Inter-State Commission in relation to section 92.[74]

6.93 We are not, of course, presuming to suggest how the courts should go about deciding constitutional cases. We consider, however, that if they should see fit to employ the Inter-State Commission for the purposes we have indicated, the Constitution should not stand in the way. We recommend, therefore, that the Constitution should be altered to give power to the Parliament to authorise a court in constitutional cases to request the Inter-State Commission to enquire into and report on any fact relating to trade and commerce that is relevant to the case before it.

6.94 We *recommend* that the following provision be inserted in the Constitution:

> 77B. Subject to section eighty of this Constitution, in any matter that arises under this Constitution, or involves its interpretation, and relates to trade and commerce, a court may refer a question of fact to the Inter-State Commission for inquiry and report.

Appellate jurisdiction of the High Court

Recommendation

6.95 We *recommend* that the Constitution should be altered:

(a) to extend the appellate jurisdiction of the High Court to appeals from 'decisions', and interlocutory judgments etc of other courts, the Inter-State Commission and a Justice of the High Court;

(b) to provide that the High Court cannot be deprived by Parliament of the power to grant special leave to appeal from decisions of any court in Australia;

(c) to repeal section 74 of the Constitution (which regulated appeals to the Privy Council) and to provide in section 73 that decisions of the High Court shall not be subject to any appeal or prerogative appeal.

Current provision

6.96 Section 73 of the Constitution provides:

> 73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences –
>
> (i.) Of any Justice or Justices exercising the original jurisdiction of the High Court:
>
> (ii.) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:
>
> (iii.) Of the Inter-State Commission, but as to questions of law only:

74 Trade Report, 213, 220, 223.

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any manner in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

6.97 Appeals to the Privy Council from all Australian courts have been abolished.[75] The High Court is therefore a final court of appeal.

Reasons for recommendation

6.98 The present statutory position is that appeals to the High Court are by special leave.[76] The Court usually grants such leave only in respect of decisions of Full Courts.[77]

6.99 In conformity with the views of the Advisory Committee, we consider that the High Court should not be denied jurisdiction to determine an appeal from a decision of any Australian Court if special leave is granted. At present where a decision does not come within the second last paragraph of section 73, Parliament may prescribe 'exceptions' and 'regulations' preventing the High Court from hearing an appeal. State Parliaments may achieve that result by preventing appeals from lower courts to the Supreme Court of the State in matters of State jurisdiction. In matters determined outside federal jurisdiction the appellate jurisdiction of the High Court under section 73 is limited to judgments etc 'of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council'.[78]

6.100 As the Advisory Committee points out, it will also be open to the State to establish a new court from which appeals could not be taken, and thus prevent High Court supervision.[79] In our opinion no part of the law of this country, whether State or federal, should be shielded from review by the High Court.

6.101 We agree, therefore, with the Advisory Committee's recommendations that:

(a) Section 73 should prohibit Parliament from prescribing any condition or regulation which would prevent the High Court granting special leave to appeal from a decision of any Australian court. Such a provision would replace the second last paragraph of section 73, with its reference to rights of appeal to the Privy Council at Federation. The latter have been abolished and, therefore, such a provision is, today, clearly inappropriate.

(b) The appellate jurisdiction of the High Court should extend to the hearing and determination of appeals from any court including a Justice of the High Court, a federal court or the court of a State or Territory.[80]

75 *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth); *Australia Act 1986* (Cth); *Australia Act 1986* (UK).

76 *Federal Court of Australia Act 1976*, section 33(3), *Family Law Act 1975*, section 95(a), *Judiciary Act 1903*, sections 35(2), 35AA(2). Under section 95(b) of the *Family Law Act 1975*, however, an appeal from a decree of a court exercising jurisdiction under that Act can be brought upon a certificate of the Full Family Court.

77 Judicial Report, 22, para 3.26.

78 The latter court was intended to cover the Local Court of Appeal of South Australia from which, at Federation, a direct appeal lay to the Privy Council. See id, 16, para 3.7.

79 id, 55, para 4.7.

80 We examine the position of the Territorial courts later. For the present, it is enough to say that, while it seems clear that legislation which gives the High Court appellate jurisdiction from Territorial courts is valid, such jurisdiction can be abrogated by legislation.

6.102 The Advisory Committee also draws attention to a number of decisions declaring that the phrase 'judgments, decrees, orders and sentences' does not include interlocutory decisions, despite the view of Quick and Garran that it did.[81] We agree that there should be added to the end of that phrase the words 'whether final or interlocutory'.

6.103 The Advisory Committee also recommended the addition of the words 'decisions' to the matters referred to in the phrase. The High Court has given a rather narrow construction to 'judgments, decrees, orders and sentences', so as to exclude, among other things, a number of decisions given by State courts on a stated case, and decisions on an appeal from an acquittal where the appeal cannot affect the verdict.[82]

6.104 The addition of the word 'decisions' would require the Court to take a broader view of its jurisdiction. It may not extend to purely abstract advisory judgments, but it could be interpreted to cover judgments on questions of law that are related to a matter that has yet to be determined.[83] Some judgments given on a stated case, not presently within section 73, would, in our view, come within the concept of interlocutory judgments or orders.

6.105 The present interpretation of 'judgments, etc.' appears to ignore the appellate jurisdiction of the High Court in respect of orders of the Inter-State Commission. The addition of 'decisions' in section 73 may, therefore, ensure that this head of jurisdiction is not rendered nugatory.

6.106 The Advisory Committee has also pointed out that the Constitution does not make provision for appeals from orders of a single judge of the High Court which deals with matters in respect of pending appeals, such as an order for security or costs. Such orders are made within appellate jurisdiction. Section 73(i.) specifically limits the appellate jurisdiction to appeals from orders of any Justice 'exercising the original jurisdiction of the High Court'. Accordingly, we agree that that paragraph should be worded 'Of a Justice of the High Court'.

6.107 The Advisory Committee[84] made a number of comments and suggestions for legislation relating to appeals to the High Court. As these comments and suggestions did not involve constitutional change, we pass them on to the Attorney-General for consideration.

Privy Council appeals

6.108 We *recommend* that section 73 be altered to read as follows:

> 73.(1) The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all decisions, judgments, decrees, orders and sentences, whether final or interlocutory:
>
> (i.) Of a Justice of the High Court:
>
> (ii.) Of any other federal court or of any court of a State or Territory:
>
> (iii.) Of the Inter-State Commission, but as to questions of law only.
>
> (2) The judgment of the High Court in all such cases shall be final and conclusive and shall not be subject to appeal, by prerogative or otherwise.

81 Judicial Report, 55, para 4.7.
82 *Saffron v The Queen* (1953) 88 CLR 523; *Minister for Works (WA) v Civil and Civic Pty Ltd* (1967) 116 CLR 273, 279; *In the Marriage of Fisher* (1986) 67 ALR 513.
83 eg, *Oteri and Oteri v The Queen* (1976) 11 ALR 142.
84 Judicial Report, 55, para 4.10.

(3) A law made by the Parliament shall not prevent or restrict the High Court from granting special leave to appeal from a decision, judgment, decree, order or sentence, whether final or interlocutory, of a Justice of the High Court or of another federal court or of a court of a State or Territory.

Current position

6.109 Section 74 of the Constitution provides:

> 74. No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.
>
> The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.
>
> Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

6.110 The *Privy Council (Limitation of Appeals) Act 1968* (Cth) and the *Privy Council (Appeals from the High Court) Act 1975* (Cth) abolished all appeals from the High Court to the Privy Council, except insofar as the first paragraph of section 74 authorises an appeal on an 'inter se' question, where the High Court has certified the question is one which ought to be determined by the Privy Council.[85] All appeals to the Privy Council from State courts were abolished by the *Australia Act 1986.* (Cth). Only one certificate under section 74 has been granted by the High Court, and that was in 1912.[86] All subsequent applications have been refused. It is clear that no certificates will be granted in the future. In 1985 the High Court declared that – 'Although the jurisdiction to grant a certificate stands in the Constitution, such limited purpose as it had has long since been spent.' They declared that provision had become 'obsolete'.[87]

Advisory Committee's recommendation

6.111 The Advisory Committee considered that section 74 should be repealed, but pointed out that there might be an argument that the effect of repeal was to revive the prerogative to admit appeals to the Privy Council. The Committee did not think such an argument would be successful, but suggested that if there was any doubt section 74 should provide that no appeal shall be permitted from a judgment etc. of an Australian court to the Queen in Council.

Reasons for recommendation

6.112 We do not think, however, that it is desirable that any reference to the Queen in Council should remain in the Constitution.

6.113 There is the further problem that if section 74 is repealed, the constitutional authority for the federal legislation of 1968 (insofar as it relates to the High Court) and 1975 would disappear. Those provisions were enacted under the authority of the last paragraph of section 74.

85 *Attorney-General (Cth) v T & G Mutual Life Society Ltd* (1978) 144 CLR 161.
86 *Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth* (1912) 15 CLR 182.
87 *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* (1985) 195 CLR 461.

6.114 Both the above concerns, however, can be dealt with by:

(a) repealing section 74

(b) inserting at the end of what is at present the first paragraph of section 73, the words 'and shall not be subject to appeal, by prerogative or otherwise.'

We so *recommend.*

The Territories

Recommendation

6.115 We *recommend* that section 77 be altered to confer on the Parliament power to invest any court of a Territory with federal jurisdiction.

Current position and issues

6.116 Much of the subject of constitutional law relating to jurisdiction in the Territories is difficult or obscure and devoid of any rational or social purpose. The difficulties have arisen because Territorial courts have been held to be created under section 122 of the Constitution (conferring power on the Parliament to make laws for the government of any Territory) and not under Chapter III of the Constitution. The result is that the provisions of section 72, relating to the appointment and tenure of judges, and section 80 (trial by jury) are not applicable to Territorial courts and jurisdiction.

6.117 It has been held that a Territorial court is not a 'federal court' and therefore section 73(ii.) of the Constitution does not operate to grant an appeal to the High Court from judgments of a Territorial court.[88] On the other hand, it is clear that the High Court, by legislation under section 122, may be given appellate jurisdiction in relation to judgments of the court of a Territory.[89]

6.118 There is dispute over whether laws made under section 122 are 'laws made by the Parliament' within the meaning of section 76(ii.), and therefore whether jurisdiction in relation to matters arising under such laws may be conferred on a federal court. Even if that issue is answered in the affirmative the further controversial point is whether common law matters in the Territories are outside the scope of section 76(ii.).

6.119 A major problem for the Commonwealth relates to jurisdiction in matters arising under a general law operating throughout Australia (including the Territories) and beyond. Under section 77 of the Constitution a State court may have federal jurisdiction which extends territorially throughout the nation and beyond. The same is, of course, true of federal courts; but, as Territorial courts are created under section 122, there must be a relevant nexus between the jurisdiction and the government of the Territory. The degree of connection required is far from clear.[90]

Reasons for recommendation

6.120 In the *Boilermakers' Case*[91] four judges of the High Court said :

88 *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591.
89 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432.
90 For a general examination of problems relating to Territorial jurisdiction see Z Cowen and L Zines, *Federal Jurisdiction in Australia.* (2nd edn, 1978) Ch 4.
91 *The Queen v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 290.

it would have been simple enough to follow the words of section 122 and of sections 71, 73 and 76(ii.) and to hold that the courts and laws of a Territory were federal courts and laws made by the Parliament .... But an entirely different interpretation has been adopted, one which brings its own difficulties ....'

6.121 We consider that the Constitution should be amended to rid our law of the obscurities and complexities that surround Territorial jurisdiction. This would at the same time remove the difficulties that face the Commonwealth in conferring jurisdiction in relation to national laws. The Constitution should be amended to produce the result that the judges, referred to above, considered would have been 'simple enough' to achieve under the existing Constitution.

6.122 We agree with the Advisory Committee[92] that many of the problems would be resolved by:

(a) a provision recommended earlier, namely by making section 76(ii.) read:

Arising under or involving the interpretation of a law made by the Parliament or of a law (including the common law) in force in a Territory.

(b) altering section 77(iii.) to provide the Parliament may make laws:

(iii.) Investing any court of a State *or Territory* with federal jurisdiction.

6.123 This requires a consequential alteration to section 77(ii.) which provides that the Parliament may make laws:

(iii.) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States.

The alteration is to add the words 'or the Territories' after the word 'States'.

Organisation of the High Court

6.124 We agree with the Advisory Committee that no alteration should be made to the Constitution to deal with the number of judges, divisions of the High Court or the admissibility of fresh evidence on appeal.[93] Issues relating to the appointment and dismissal of judges are dealt with later.

Remittal by High Court to other courts

Recommendation

6.125 We *recommend* that the Constitution be altered to add the following provision:

76A. The power of the Parliament to authorise the High Court to remit a matter to some other court extends to matters in respect of which original jurisdiction is vested in the High Court by this Constitution.

Reasons for recommendation

6.126 Section 44 of the *Judiciary Act 1903* empowers the High Court to remit any matter to a federal court or a State or Territorial court that has appropriate jurisdiction. It could be argued that this provision cannot validly extend to matters within the entrenched jurisdiction of the High Court. There are many judicial pronouncements to the effect that a grant of jurisdiction carries with it a duty to exercise that jurisdiction.[94] A writ of

92 Judicial Report, 51, para 4.142-4.146.
93 id, 60-2, para 4.23, 4.26, 4.27.
94 G Lindell, 'Duty to Exercise Judicial Review' in L Zines, (ed) *Commentaries on the Australian Constitution* (1977) Ch 5.

mandamus lies to compel lower courts to exercise jurisdiction. This assumes the existence of a duty. The High Court has in fact purported to remit matters that are at present within the provisions of section 75, that is, which are within its entrenched jurisdiction; but the issue has never been argued. We think that it is clearly desirable that the High Court should have the power to remit matters to other courts where it thinks it appropriate.

THE SEPARATION OF JUDICIAL POWER

Federal judiciary

Recommendation

6.127 We *recommend* that no alteration be made to the Constitution relating to the powers that can only be exercised, and that cannot be exercised, by federal courts.

Current position and issues

6.128 The independence of the judiciary and its separation from the legislative and executive arms of government, is, of course, an essential feature of the rule of law. It is regarded as of great importance in all democratic societies. It is, as the Advisory Committee points out, taken for granted in Australia that judges in interpreting and applying the law act independently of the Government.[95] The independence of the Australian judiciary – whether federal, State or Territorial – is widely accepted as a reality in our society. In the case of federal judges, their security of tenure is guaranteed by section 72 of the Constitution, which we discuss later.[96]

6.129 Section 71 of the Australian Constitution vests the judicial power of the Commonwealth in 'a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.'

6.130 From an early date, the High Court declared that 'the Parliament has no power to entrust the exercise of judicial power to any other hands.'[97] This principle has been applied ever since and is widely accepted as desirable.

6.131 The converse of this principle was established in the *Boilermakers' Case*[98] where it was held that a federal court could not be invested with non-judicial power except to the extent that this was incidental to its judicial functions. This doctrine has been subject to more controversy than that which denies the judicial power to bodies that are not courts. Its correctness and desirability have been questioned by some lawyers and judges. Chief Justice Barwick, for example, raised the issue whether the principle in the *Boilermakers' Case* was 'unnecessary .... for the effective working of the Australian Constitution or for the maintenance of the separation of the judicial power of the Commonwealth or for the protection of the independence of courts exercising that power.'[99]

6.132 The *Boilermakers' Case* put an end to the Court of Conciliation and Arbitration which had the function of making industrial awards (a non-judicial power) and interpreting and enforcing those awards (a judicial power). The two functions had to be

95 Judicial Report, 65, para 5.2.
96 para 6.180-6.203.
97 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.
98 *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 (PC) affirming *The Queen v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HC).
99 *Reg v Joske; Ex Parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87, 90. See also 102 (Mason J).

split and given to two different tribunals, one being a court and the other a non-judicial tribunal. Since the *Boilermakers' Case,* however, the High Court has taken a liberal view of the functions that may be conferred on courts, which have included broad discretions involving considerations of matters of policy[100]

6.133 In *Hilton v Wells*[101] a majority of the Court went further and declared that a non-judicial function (the issue of a warrant to intercept communications) could, consistently with the *Boilermakers'* doctrine, be conferred on 'a judge', which was defined to include a judge of the Federal Court. The basis of the decision was that the power was intended to be exercised by the judge personally and not as a judge of his court.[102] This decision, if it is followed, would seem to provide a fairly easy way for the Commonwealth to avoid the *Boilermakers'* principle.[103]

6.134 The Federal Attorney-General's Department has suggested that the *Boilermakers'* doctrine has created some difficulty in relation to industrial and human rights tribunals and family law.[104] The Advisory Committee has pointed out, however, that the present principle received strong support from many groups and persons.[105]

Reasons for recommendation

6.135 We agree with the Advisory Committee in recommending no change to the Constitution in this area. We strongly favour the principle that only courts, the members of which have the security of tenure guaranteed by section 72, should exercise the judicial power of the Commonwealth.[106] As the Advisory Committee said, 'if judicial power is to be exercised why should it not be exercised by a court?'.[107] The principle has not been so rigidly applied that it has had deleterious effect on the functioning of administrative tribunals. The High Court has recognised a large area of decision-making that can, at the Parliament's discretion, be conferred on either courts or tribunals. The rule of law requires that basic rights granted by the law should be determined by independent judges. Mr Justice Jacobs described the exclusive province of the judiciary as follows:

> The historical approach to the question whether a power is exclusively a judicial power is based upon the recognition that we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance of a trial for the determination

100 see P Lane, *Lane's Commentary on the Australian Constitution* (1986) 329-50; L Zines, *The High Court and the Constitution* (2nd edn, 1987) Ch 10.

101 (1985) 157 CLR 57.

102 Gibbs CJ, Wilson and Dawson JJ. Mason and Deane JJ strongly dissented.

103 There has been a practice for some years of appointing persons who are federal judges to non-judicial positions. They have been appointed diplomatic representatives, and members of administrative tribunals such as the Trade Practices Tribunal and the Administrative Appeals Tribunal. The Federal Court of Australia held that it was valid for a federal judge to be appointed in his or her personal capacity as a member of the Administrative Appeals Tribunal: *Drake v Minister for Immigration & Ethnic Affairs* (1979) 24 ALR 577. This case was approved by the High Court in *Hilton v Wells.* (1985) 157 CLR 57.

104 *Maynard v Neilson,* unreported decision of Wilcox J (Federal Court) 27 May 1988.

105 The submissions are listed in the Judicial Report, 67, n 15.

106 We do not, however, recommend any change to the present position relating to courts martial, as an exception from this principle: *The King v Cox; Ex parte Smith* (1945) 71 CLR 1. Another exception is that of the power of legislature to deal with cases of contempt: *The Queen v Richards: Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157. This is discussed in Chapter 4, para 4.692 and following.

107 Judicial Report, 66, para 5.5.

of criminal guilt is the classic example. But there are a multitude of such instances. One of them has been held to be the determination of a status of a person whereby the right to recover money owing by that person is barred: *Reg. v Davison.*.[108]

6.136 The converse principle of the *Boilermakers' Case* is not so clear. Because of the flexible approach taken by the High Court to that principle, it has rarely resulted in any provision conferring jurisdiction on a court being invalid. Indeed if *Hilton v Wells* is followed, the principle that courts cannot exercise non-judicial power will become close to being a mere formal prescription; but as the case was decided on a bare majority of a five-judge court, reconsideration is not foreclosed.[109]

6.137 The *Boilermakers'* doctrine has apparently prevented the Commonwealth from pursuing certain lines of development in a few areas. Whether the gains to society outweigh the disadvantages is a matter of dispute. There is, we believe, much to be said for not altering the Constitution to make any specific provision in this regard. This would allow the matter to be developed judicially in the course of time, having regard to situations that arise in actual cases. The High Court has allowed the Parliament considerable latitude in choosing to confer discretionary powers, and jurisdiction to apply broad standards, on federal courts. There could be occasions, however, where the particular function might be seen as hindering the proper exercise of the ordinary judicial work of a court or as damaging its standing in the eyes of the community. So, even if what remains of the *Boilermakers'* doctrine is overruled by the High Court as a general principle, it may be necessary, as the Advisory Committee pointed out, to create other standards or limitations to guarantee independence and proper functioning of the federal judiciary. It would be extremely difficult to draft in advance a suitable constitutional amendment to deal with a matter which requires such delicate balancing of interests.

6.138 We *recommend,* therefore, no alteration to the Constitution in relation to either of these limitations on federal powers.

Separation of judicial power at State and Territorial level

Recommendation

6.139 We *recommend* that no alteration be made to the Constitution relating to the terms of office of State or Territorial judges, magistrates or other persons exercising judicial power.

Current position

6.140 Neither of the principles referred to above applies to the courts of the States or Territories.[110] Under State law there are many non-judicial tribunals and persons who exercise power that in the federal sphere could be conferred only on courts consisting of judges who have tenure in accordance with section 72 of the Constitution. Similarly, State judges have power conferred on them (such as review on the merits of the exercise of administrative discretions) that could not, in accordance with the *Boilermakers'* principle, be exercised by federal judges.

108 *The Queen v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11; the citation of *The Queen v Davison* is (1954) 90 CLR 353.

109 *The Queen v Federal Court of Australia; Ex parte National Football League* (1979) 143 CLR 190, 233.

110 *The Queen v Lydon; Ex parte Cessnock Collieries Ltd* (1960) 103 CLR 15, 22; *Kotsis v Kotsis* (1970) 122 CLR 69, 76; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

6.141 While legislation of the States and Territories provides security of tenure for judges, that legislation can of course be repealed or amended by later legislation.

6.142 The result is, also, that, under section 77 of the Constitution, the Federal Parliament may invest federal jurisdiction in courts that do not comply with provisions that protect the functioning and independence of the federal judiciary. We examine later[111] the issues concerning the appointment and removal of federal, State and Territorial judges.

Issues

6.143 The Advisory Committee recommended against amending the Constitution to provide for the separation of judicial power in respect of matters of State or Territorial jurisdiction.[112] The Advisory Committee did not go into detail to explain why they considered that an approach should be taken in relation to these matters which was different from that adopted for federal jurisdiction. They admitted that their recommendations would leave the States and Territories free to distribute judicial powers as they thought fit; but they pointed to two guarantees, which they considered avoided the necessity to impose the further requirement of a separation of judicial power. These were:

(a) the supervisory jurisdiction of the Supreme Courts of the States and Territories over tribunals;

(b) the recommended appellate jurisdiction of the High Court in respect of decisions of all Australian courts 'including bodies properly described as courts, whatever their designation under State or Territory laws.'

6.144 It should be mentioned that the first reason given above[113] would provide a stronger case for not entrenching the separation of judicial power in federal jurisdiction, rather than in State jurisdiction. At present, under section 75(v.) of the Constitution, the High Court has entrenched jurisdiction to review decisions of federal tribunals. Under our proposals there will have to be a court of federal jurisdiction to exercise similar power. But the supervisory jurisdiction of the Supreme Courts of the States and Territories is not entrenched. It may be removed in respect of any particular matters by the State or Territory legislatures.

6.145 As for the second reason given by the Advisory Committee, it should be noted that the right of appeal to the High Court is, and probably will remain, subject to the grant of special leave.

6.146 We believe there is some inconsistency of principle in the approach of the Advisory Committee to federal and State jurisdiction in this respect, unless one takes the view (as has been urged, for example, by the Governments of Tasmania and Queensland)[114] that the exercise of State judicial power is not a matter that should be controlled by the Constitution of the Commonwealth. That view was rejected by the Advisory Committee, as is clear from the discussion referred to above regarding the structure of the Australian Judicial System.[115] In Chapter 2 we explain why we also reject those submissions.[116] We comment further on this matter later in this Chapter[117] under the heading 'Removal of judges'.

111 para 6.180-6.231.
112 Judicial Report, 68, para 5.8(b).
113 para 6.143.
114 Queensland Government S1214, 15 November 1987; Tasmanian Government S3340, 1 February 1988.
115 The Advisory Committee's reasons are set out in the Judicial Report, 11, para 2.8.
116 para 2.64-2.81.
117 para 6.180-6.231.

6.147 In discussing federal jurisdiction, the Advisory Committee indicated[118] that if judicial power is to be exercised it could see no reason why it should not be exercised by a court. The alternative would be, it said, that judicial power could be exercised by persons who were not guaranteed a tenure under the Constitution. These comments seem equally valid in the case of the exercise of State judicial power, assuming that the tenure of State judges was equally guaranteed. If that tenure was not provided for, one would then need to examine why federal judges required such protection, while State and Territorial judges did not.

6.148 It may also appear strange, in principle, that the Constitution prohibits the Commonwealth from vesting judicial power in federally appointed persons who do not have security of tenure, but allows such a power to be invested by Parliament in State courts without regard to whether the judges of those courts have security of tenure or not.

6.149 The controversial nature of the principle in the *Boilermakers' Case* (namely that federal courts cannot exercise non-judicial power) and the doubts about its future provide reasons for not amending the Constitution to impose such a restriction on State legislative powers. In any case it would, we think, be undesirable to prevent, say, a small State from using a court as a tribunal along the lines of the Administrative Appeals Tribunal of the Commonwealth. Similarly, the consequences of applying the *Boilermakers'* principle to the magistrates' courts of the States, could result in a diversion of funds and resources for doubtful social benefit. We are, therefore, principally concerned only with the more widely accepted principles that operate in the federal sphere, namely, that (a) judicial power should be exercised only by courts and (b) that members of courts should have a constitutionally guaranteed tenure. In principle there is a great deal to be said for treating the exercise of judicial power in federal and State courts in the same way in this respect.

6.150 The great importance of the issue is stressed by the members of the Advisory Committee[119] where they state that it is essential to a civilisation that there be confidence in laws. That in turn requires a confidence in those who interpret and enforce them. While they consider that the independence of judges is taken as axiomatic in Australia, they state[120] that 'Constitutional provisions dealing with issues such as separation of powers and the terms of appointment and removal of judges should promote the existence of, and ability to exercise, judicial independence.' Much could be endangered if governments gave power to interpret and enforce laws to persons who did not have judicial independence, particularly if the actions of those persons were not capable, or not easily capable, of review by the courts.

6.151 In respect of the States and Territories, however, there are considerable practical problems in applying to them the principles that are applicable in the federal sphere.

6.152 In a number of areas the States have, for some time, had tribunals, consisting of members appointed for a term of years, which exercise powers that, in the case of the Commonwealth, might only be exercised by courts. Provisions for removal vary considerably. Bodies of this nature include anti-discrimination, small claims, industrial, compensation and tenancy tribunals. Some of these tribunals have been held to be courts for purposes of particular State legislation relating to such matters as judicial review and payment out of suitors' funds,[121] although the criteria for determining whether they are courts for constitutional purposes might be different.

118 id, 66, para 5.5.
119 id, 65, para 5.2-5.3.
120 id, 65, para 5.3.
121 *Trevor Boiler Engineering Co Pty Ltd v Morley* [1983] VR 716; *Australian Postal Commission v Dao (No.2)* (1986) 69 ALR 125.

6.153 While there is no exclusive and inclusive definition of powers that, under Chapter III of the Constitution, can only be given to courts, it clearly includes the conclusive determination of questions of law and the power to make enforcement orders (unless purely ministerial) in relation to the settlement of a dispute about existing rights or duties.[122] Whether it includes the conclusive determination of questions of fact in relation to such disputes is more doubtful.[123]

6.154 As we have said, many State laws confer power on tribunals, other than the ordinary courts, which, according to the principles referred to above,[124] are 'judicial'. One result of providing that State judicial power can be exercised only by persons who have a tenure similar to that provided for in section 72 of the Constitution would be that the State would need to reconsider and amend a great deal of legislation which confers judicial power on tribunals, the members of which do not have this tenure. For example, the provisions of the *Equal Opportunity Act 1984* (Vic) confer powers on the Equal Opportunity Board that could not be vested in a similar federal tribunal. Under the *Sex Discrimination Act 1984* (Cth) and the *Racial Discrimination Act 1975* (Cth) the function of adjudication of complaints is exercised by the Human Rights and Equal Opportunity Commission, the members of which are appointed for a term of years. The Commission holds inquiries regarding breaches of the Act, and makes determinations such as an order for damages. However, if a respondent does not comply with a determination, the complainant must go to the Federal Court, which hears and determines the matter anew. This provision for judicial reconsideration is constitutionally required.[125] Under the Victorian Act, however, the Board can make conclusive determinations of fact and law. Similarly, the Small Claims Tribunal of Victoria exercises powers which in the federal sphere could only be conferred on a court the members of which had tenure in accordance with section 72 of the Constitution.

Reasons for recommendation

6.155 A majority of us (Sir Maurice Byers, Professor Campbell, Sir Rupert Hamer and Mr Whitlam) is of the view that the Constitution should not provide that the judicial power of a State should be exercisable only by courts consisting of members appointed until a prescribed age or for not less than a prescribed term of years. Our reasons are as follows:

(a) We do not believe that the wholesale changes that would otherwise be required to the State's system of tribunals would be justified. Many of the State tribunals have, generally, been regarded as having performed a useful service to the community. Neither the Advisory Committee nor the Commission has undertaken a detailed examination of systems of courts and tribunals in the States or of the extent to which judicial powers are exercised by bodies which do not satisfy requirements similar to those in section 72 of the Constitution; but we have reason to believe that the changes required to adapt them to the system operating in the federal sphere would be very great and costly.

(b) Many State tribunals, which would otherwise require changing, in one way or another, have given general community satisfaction. Some also argue that many of the functions which the States have taken from the ordinary courts and given to tribunals are better performed by the latter bodies, such as the

122 *Shell Co. of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530; *The Queen v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374; L Zines, *The High Court and the Constitution* (2nd edn, 1987) Ch 10.

123 *Rola Co (Australia) Pty Ltd v Commonwealth* (1944) 69 CLR 185.

124 para 6.128-6.133.

125 *Maynard v Neilson*, unreported decision of Wilcox J (Federal Court) 27 May 1988.

work of small claims tribunals, which provide judicial services at low cost to the consumer. As we have not examined the functioning of the various tribunals we cannot comment on such arguments. We mention them, however, to emphasise that the Commission has received no complaints about present State arrangements.

(c) Although the term of office of members of State tribunals is not secured by constitutional provision, the superior courts, in exercising their supervisory jurisdiction over such tribunals, have done much to assure a degree of independence. The courts have created and developed principles which uphold the right of tribunals with independent powers not to be dictated to by the Executive Government and which require those bodies to exercise their powers in accordance with rules of fair procedures and objectivity. While State Parliaments may override these principles, the courts require any such provisions to that effect to be express and manifestly clear. In our view, the States have shown no general tendency to enact such provisions.

6.156 We are of the view, however, that a measure of independence would be secured by constitutional provision relating to the removal of members of an inferior court. Whether a tribunal is a 'court' will be judged by the judicial power it exercises. This matter is discussed in the next section of this Chapter.

6.157 We are aware that, with no constitutional prescription as to the minimum term of office for members of inferior courts and of tribunals, the independence of those members could be compromised by a State or Territory appointing persons for very short terms, with the possibility held out of re-appointment. But, having regard to the practical problems referred to above,[126] and the general practice of retaining the supervisory jurisdiction of the Supreme Courts, a majority of us recommends that no alteration of the Constitution be made relating to terms of appointment of State or Territorial judges, magistrates or other persons exercising judicial power.

Dissent by Professor Zines

6.158 Professor Zines dissents from this recommendation. Having regard to the changes that would be needed to alter State and Territorial laws, however, he would recommend that the constitutional alteration he proposes should not operate for three years after it is approved. Professor Zines recommends that the Constitution should be altered to provide:

(a) that the judicial power of a State or a Territory can be exercised only by members of a court or other tribunal who are appointed until an age prescribed by Parliament for members of that court or tribunal; and

(b) that such persons can be removed only in accordance with provisions that are recommended by all members of the Commission in the next section of this Chapter.

6.159 If such a constitutional alteration is not acceptable, he recommends that a provision be included in the Constitution which would entrench the supervisory jurisdiction of the Supreme Courts in a manner similar to that which we have recommended for the amendment of section 75(v.), providing for judicial review of the functions of officers of the Commonwealth. Such a provision would be as follows:

126 See para 6.155.

The Supreme Court of a State shall have original jurisdiction in all matters in which there is sought an order (including a declaratory order) for ensuring that the powers or duties of an officer of the State (other than a judge of a superior court) are exercised or performed in accordance with law.

6.160 His reasons are as follows:

(a) The arguments that have been made in favour of ensuring that judicial power is exercised only by persons who are not secure in their places, and therefore, free from Executive dictation, threats or blandishments, far outweighs the inconvenience that might arise, and any social benefits that might be thought to derive, from the existing situation. The hiving off of areas of judicial action from the ordinary courts and giving them to persons who may be appointed for short terms, or even at the Government's pleasure, may represent an increasing incremental threat to the rule of law.

(b) If the advantages of leaving the States and Territories with this power are so great, it is difficult to understand why the Commonwealth should not be able to confer similar benefits on the people.

(c) The supervisory jurisdiction of the Supreme Courts does, to some degree, bolster the independence of tribunals exercising judicial power and provides some guarantee of procedural fairness and lack of bias, as has been noted by the majority. This jurisdiction is not, however, guaranteed by the Constitution or entrenched in State Constitutions. Privative clauses have not been uncommon in statutes, although the courts have by interpretation diluted their effect. In any case, review by the superior courts is no complete substitute for judicial officers, who can act freely and independently because they are secure in their positions.

6.161 If, however, it is thought that the cost and inconvenience of Professor Zines's first recommendation would be too great, he concedes that the entrenchment of supervisory jurisdiction would go a considerable way to ensure the preservation of judicial standards and some way to protect the independence of the tribunals.

APPOINTMENT AND REMOVAL OF JUDGES

Appointment of federal judges [127]

Recommendation

6.162 We *recommend* that no alteration be made to the Constitution relating to the appointment of federal judges.

Issues and reasons for recommendation

6.163 Under section 72 of the Constitution all federal judges are appointed by the Governor-General in Council, that is by the Federal Government. In Switzerland such appointments are made by the Federal Parliament. In the United States appointment to the federal judiciary is subject to approval by the Senate. We agree with the Advisory Committee that the Swiss and American examples should not be followed.[128] The scrutiny of candidates by a committee of the Parliament or of the proposed appointees by the Senate alone would produce political public debate that would in our view do little to ensure public confidence in the federal judiciary. Both Houses of the Federal Parliament are divided along party lines, and there would be little confidence that they would be

127 Judicial Report, 69-75, para 5.11-5.38.
128 id, 69, para 5.11.

acting as independent scrutineers of a candidate's qualities. The political partisanship shown in recent times by the United States Senate's investigation of names put forward by the President is something that we would not wish to see emulated in this country. Under our system of Parliamentary government it remains open to members of either House of Parliament to bring into question Executive decisions. We do not believe that any additional Parliamentary control should be provided for in the Constitution.

6.164 Suggestions have been made from time to time that there should be a body (usually called a Judicial Commission) consisting of judges, lawyers, academics and lay persons to advise the Government on judicial appointments. Sir Garfield Barwick, as Chief Justice, recommended such an arrangement in 1977.[129] If there were such a body it would have to be determined whether it would choose the appointee, provide a list from which the Governor-General in Council would have to choose or whether it would merely recommend. In the last case, there could be a provision requiring the Executive to give a public explanation for appointing someone other than a person recommended.[130]

6.165 The Advisory Committee summarises a report of the special Committee of the Canadian Bar Association in 1985 which strongly recommended advisory committees of various kinds relating to judicial appointments [131] at federal, Provincial and Territorial levels.[132]

6.166 The Advisory Committee considered that the Canadian experience was so greatly different from that of Australia, that nothing was to be gained from applying the Canadian Bar Association's recommendations to Australia. The major differences noted were:

(a) In the case of the Federal Supreme Court and the Federal Court of Canada it has been accepted by long custom and, partly, by statute that judges should come from various regions.

(b) There has been a long history of political patronage in making judicial appointments. Some Provinces have in fact reduced the size of their Provincial courts when a vacancy occurred so as to prevent the Federal Government making appointments to them. The Federal Government was of course of a different political persuasion from those of the Provinces concerned.[133]

(c) In Canada appointments are made from a wider range of people than in Australia, where judicial appointments 'are usually made from a relatively small group of those who specialise in the conduct of litigation'[134]

(d) Most Australian judges have not been proponents of particular political views. The Canadian Report referred to public 'dismay', 'uproar', 'outcry' and 'cynicism' regarding many appointments to the Bench. They suggested that some of those appointments in 1984 were 'a factor in the Liberals' subsequent electoral defeat.'

129 'The State of the Australian Judicature' (1977) 51 *Australian Law Journal* 480, 494.

130 A Judicial Commission was supported by the Courts (Federal) Committee of the Law Council of Australia and by Associate Professor G Winterton who advised the Council: 'Appointment of Federal Judges in Australia' (1987) 16 *Melbourne University Law Review,* 185. The Constitutional Committee of the Law Council opposed such a body.

131 Judicial Report, 70-1, para 5.15-5.20.

132 In Canada, appointments to the major courts of the Provinces are made by the Federal Government.

133 Judicial Report, 71, para 5.19.

134 id, 71, para 5.21. It is arguable whether this will continue or whether it is desirable.

6.167 We agree with the Advisory Committee that the picture painted by the Canadian Report of the experience in that country, if accurate, has little resemblance to that in Australia, in relation to appointments by any sphere of government.

6.168 This matter is connected with another issue that has been the subject of submission, exposition and debate, namely the appointment to the Bench of former Ministers and other Parliamentarians. From time to time there has been criticism in Australia and elsewhere of such appointments. Submissions have been made that persons engaged in politics should either not be appointed as judges at all or only after the lapse of a prescribed number of years. We do not consider that there should be any such restriction on the power of appointments. We accept the reasons of the Advisory Committee:[135]

> The selection of any period for a restriction or disqualification would be arbitrary in the extreme. Further, such appointments are carefully watched by the media and the electorate, and it is sufficient that the government must bear political responsibility for the appointment.

We add that it seems to us to be highly desirable that among the judiciary there should be some who have had political experience, provided, of course, that they possess all the other qualities that are required by a judge.

6.169 The Advisory Committee expressed the view that there was no need in Australia for a body such as an advisory committee or judicial commission to deal with judicial appointments because (a) such a body may tend to veto persons who are known to be supporters (or opponents) of the government of the day and (b) many of the persons most suitable to serve on such a body are likely to be the most suitable themselves to be appointed.[136]

6.170 On the other hand the Advisory Committee emphasised the importance of, first, ensuring that suitable candidates are not overlooked and, secondly, that the Attorney-General receives advice on possible appointees from those who are in a position to give that advice. On the latter issue they suggest that

> ... it should be established as a recognised practice that before appointing a judge to a federal court, other than the High Court, the Attorney-General should consult on a confidential basis with the Chief Judge of the court concerned and with the leader or leaders of the most appropriate legal professional organisations to obtain their advice as to the persons eligible for appointment, qualified to do the work of the court and who appear to have the necessary qualities.[137]

6.171 Others have argued in favour of a representative Judicial Commission on the grounds that it would be a safeguard against political patronage, allow for wider public scrutiny and be a method of ensuring that appropriate persons and groups are consulted before appointments are made.

6.172 Whether it would be desirable to establish a Judicial Commission to advise the Executive Government or whether the more informal method of consultation supported by the Advisory Committee are to be preferred, we are of the view that no alteration to the Constitution should be made.

6.173 It seems to us that the views of the Advisory Committee as to how the Attorney-General should proceed by way of consultation have much to commend them, and we pass them on to the Attorney-General for consideration, together with the latest submission of the Law Council of Australia on that matter.

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135 id, 73, para 5.27.
136 id, 71-2, para 5.21.
137 id, 72, para 5.23.

6.174 Whether there should be a more formal body is not, in the circumstances of Australia, of such fundamental importance as to warrant consideration of a constitutional alteration. On that basis the issue is one of governmental and legislative policy on which we do not think we should express a view. Indeed we note that Associate Professor Winterton, in a summary of his paper prepared for the Law Council of Australia, suggested that a Commission be established by statute under section 51(xxxix.) of the Constitution.[138] This does raise a constitutional issue, namely whether, if a Judicial Commission, with the power to restrict the choice of the Governor-General under section 72, is thought desirable, it could be created by statute. The general power of Parliament to control Executive discretion is discussed in Chapter 5 of this Report.[139]

Consultation with the States

6.175 As we have recommended against a national integrated court system, no case has been made out for requiring the Federal Government to consult the States before making federal judicial appointments (other than High Court appointments) or compelling the States to consult the Federal Government in respect of the appointment of State judges. While federal judges may decide issues of State law and vice versa, our recommendations are premised on the basis that each level of government is responsible for its own courts and its own judicial appointments.

6.176 Appointments to the High Court have, however, been regarded as being in a different category. As explained above, the High Court is at the apex of both the federal and State judicial systems. In addition, that Court determines issues covering the boundaries of power between the Commonwealth and the States. It has been argued, therefore, that the State Governments have a great interest in High Court appointments. This matter has been the subject of submissions to the Commission and of consideration by the Australian Constitutional Convention. Various suggestions have been made from time to time for giving the States a shared role in High Court appointments, such as requiring the agreement of all of the States or in allowing three or more States to veto any proposed appointments. Other suggestions are that the States in turn would nominate each alternate appointee or that appointments should be made on the recommendation of a committee consisting of the Federal and State Attorneys-General.[140]

6.177 We are opposed to any constitutional provision that would require a collective agreement of a number of governments of possibly different political persuasions and interests before a High Court appointment could be made. The result of such a procedure would be compromise candidates, and possibly appointment of persons that no government considered the best candidates available. It is difficult to expect that the political disputes which would be the consequence of such a procedure would not reach the media and become the subject of partisan debate. It would also give undue prominence to a balancing of regional considerations. We also believe, as indicated above,[141] that it should be for one government alone to take the responsibility for court appointments, and this includes High Court appointments. There should be no shirking of the responsibility by the argument that the decision was in fact a joint decision and, therefore, that no one in particular can be called to account by either a legislature or the public. We therefore agree with the Advisory Committee on this issue.[142]

138 (1987) 16 *Melbourne University Law Review*, 185.

139 para 5.207-5.221.

140 These suggestions are listed in the Judicature Sub-Committee: Second Report to Standing Committee (1985) 29-37, printed in ACC Proc, Brisbane 1985, vol II and the Judicial Report, 74, para 5.30. Since the Judicial Report, the Queensland Government has reiterated its view that no person should be appointed to the High Court against the wishes of at least three States. S1214, 25 November 1987.

141 para 6.175.

142 id, 74, para 5.32.

6.178 Section 6 of the *High Court of Australia Act 1979* (Cth) provides that, before an appointment to the High Court is made, the Attorney-General shall consult with the Attorneys-General of the States in relation to the appointments. The process of consultation is described by the Advisory Committee.[143] The interest of the States in this matter is obvious. There have been suggestions that at times the process of consultation has not been entirely satisfactory. Others believe that, on the whole, State influence in High Court appointments has considerably increased since the practice of consultation was begun by Senator Durack some time before the enactment of the above provisions. The Advisory Committee has made suggestions relating to the improvement of the consultative process,[144] and we pass them on to the Attorney-General for consideration.

Other matters relating to federal appointments

Recommendation

6.179 We *recommend* that there be no alteration to the Constitution relating to the term of office of federal judges or the appointment of acting judges or reserve judges to federal courts. We agree with the reasons of the Advisory Committee.[145]

Removal of federal judges

Recommendation

6.180 We *recommend* that the Constitution be altered to provide:

(i) that there be a Judicial Tribunal established by the Parliament to determine whether facts established by it are capable of amounting to proved misbehaviour or incapacity warranting removal of a judge; and that the Tribunal should consist of persons who are judges of a federal court (other than the High Court) or of the Supreme Court of a State or a Territory;

(ii) that an address under section 72 of the Constitution shall not be made unless:

- the Judicial Tribunal has reported that the facts are capable of amounting to misbehaviour or incapacity warranting removal, and
- the address of each House is made no later than the next session after the report of the Tribunal.

Current position

6.181 Section 72 of the Constitution provides that Justices of the High Court and other federal courts:

> (ii.) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity:

6.182 No federal judge has been so removed, but public controversy surrounding Justice Murphy of the High Court focused unprecedented professional and public opinion on this provision. There was dispute both about the meaning of the phrase 'proved misbehaviour' and about the procedures that should be pursued to give effect to the provision.

143 id, 74, para 5.31. See also Judicature Sub-Committee: Second Report to Standing Committee (1985) 30-1, ACC Proc, Brisbane 1985, vol II.
144 id, 74, para 5.33.
145 id, 74-6, para 5.34-5.42.

Issues and reasons for recommendation

6.183 It is clear to us, as it was to many others, including the Advisory Committee, that conduct which warrants removal of a judge should include:

(a) misconduct in carrying out the duties of office; and

(b) any other conduct that, according to the standards of the time, would tend to impair public confidence in the judge or undermine his or her authority as a judge.

Despite some opinions to the contrary, we believe that the phraseology of section 72 (ii.) authorises removal in those circumstances. This was the view of all three Commissioners of the Parliamentary Commission of Inquiry established in relation to Justice Murphy. It is also the view of the Advisory Committee.[146]

6.184 The Advisory Committee, however, considered that 'misbehaviour' was restricted to misbehaviour occurring after appointment as a judge and would not include earlier behaviour which perhaps came to light at a subsequent date, and which demonstrated unfitness for the office. The Advisory Committee therefore recommended that section 72(ii.) be amended by adding the words '(whenever occurring)' after the word 'misbehaviour'.[147]

6.185 We do not accept this recommendation. Once the view is taken that the provision deals with the behaviour that demonstrates unfitness for office, and that its purpose relates to public confidence in the judiciary, it seems to us difficult to accept an interpretation that would defeat that object. The more limited construction would mean, for example, that a judge who was, after appointment, found to have engaged as a legal practitioner in cheating his or her clients or (to use the Advisory Committee's example) to have lied to the court could not be removed from office.

6.186 We do not find anything in the words of section 72(ii.) that would require a court to come to such a conclusion, leading to the undermining of what we, the Advisory Committee and many others would regard as the purpose of the provision.

6.187 It might be argued that in view of the doubts expressed by the members of the Advisory Committee, the suggested words should be included by way of caution. There is in general much to be said for this approach, but countervailing considerations incline us against it. Clearly, there must be some misbehaviour which, if committed by a judge in youth or early adulthood, would not warrant his or her removal, but which would do so if committed while in office. The addition of the words as suggested by the Advisory Committee might lead some to the view that this distinction should never be made. Caution, therefore, requires us to recommend against the addition of the words.

6.188 ***Determination of facts.*** For removal of a federal judge the Constitution requires that the Parliamentary address be based on 'proved' misbehaviour or incapacity. Argument and debate occurred in connection with the investigation of Justice Murphy as to how the allegations should be 'proved'. The framers of the Constitution deliberately inserted the adjective to ensure, among other things, that the judge was not denied procedural justice, and the right to defend himself or herself. As Barton, the leader of the Convention, put it, the inclusion of the word 'would insure the Judge having a hearing.' It would 'prevent parliament from lapsing into any mis-trial of the matter.'[148]

146 id, 77, para 5.47-5.48.
147 id, 78, para 5.49.
148 Conv Deb, Melb 1898, vol I, 317.

6.189 It is generally recognised that the two Houses of Parliament are hardly suitable bodies to determine the facts that are alleged to constitute misbehaviour or incapacity. A committee of a House or a joint committee of both Houses produces in size a more convenient and efficient tribunal for the purpose, but can easily give rise to allegations of political partisanship, as happened in the case of the two Senate Select Committees reporting on Justice Murphy.[149] The result was the creation of a Parliamentary Commission under the *Parliamentary Commission of Inquiry Act 1986* (Cth). Three Commissioners, who were retired Supreme Court judges, were appointed by resolution of both Houses.

6.190 In respect of the issue of fact-finding, the Advisory Committee made the following recommendations:[150]

(1) The Constitution should provide:

(a) for a Judicial Tribunal established by legislation of the Commonwealth to determine whether facts found by it are capable of amounting to misbehaviour or incapacity warranting removal of a judge;

(b) that an address for removal of a judge may not be made unless the Judicial Tribunal has determined that the facts found by it are capable of amounting to misbehaviour or incapacity warranting removal;

(c) that the address of each House must be made not later than the next session after the Report of the Judicial Tribunal.

(2) Legislation establishing the Judicial Tribunal should provide for it to be composed of judges of the superior federal courts (other than the High Court) and of the Supreme Courts of the States and Territories. The legislation should provide for a method of selection of members which is in being before the identity of the judge whose behaviour is in question is known.

(3) Three judges should constitute the Tribunal for any hearing.

6.191 The principle that judges should be removed on an address of both Houses of Parliament is an important part of our British constitutional tradition going back to the *Act of Settlement 1701*. This principle has to be accommodated to the desirability, mentioned above,[151] of ensuring that the facts are determined fairly and objectively.

6.192 The Constitutional Committee of the Law Council of Australia submitted that the importance of the first principle led inevitably to the view that the Constitution should not provide for a fact-finding tribunal. The political responsibility of Parliament required, they thought, that it must be left to that body to have the facts determined in any way the Houses thought fit in each particular case. The Committee argued that if a tribunal determined whether particular facts warranted removal, Parliament would be required to accept that view or reject it, and so engage in controversy with, 'in effect the judiciary generally'.[152] This would undermine Parliamentary responsibility in relation to the issue.

6.193 As a result of that submission, the Advisory Committee distinguished two aspects of the matter:

149 Senate Select Committee on the Conduct of a Judge, Report to the Senate, August 1984, PP 168/1984; Senate Select Committee on Allegations Concerning a Judge, Report to the Senate, October 1984, PP 271/1984.

150 Judicial Report, xiv-xv, para 39-42.

151 para 6.188-6.190.

152 id, 78-9, para 5.54.

(a) the questions of what are the facts and whether they are *capable* of amounting to misbehaviour or incapacity warranting removal, and

(b) whether the facts so found do constitute misbehaviour or incapacity warranting removal, and, if so, whether there should be an address to the Governor-General.

The first questions would be for the Tribunal and the second for the Houses of Parliament.[153]

6.194 The Queensland Government opposes this recommendation. It considers that the assumption that the Parliamentary process is not capable of ensuring an objective finding of facts as to misbehaviour or incapacity is 'elitist and undemocratic'. It further states that the Parliament, after a finding by the Tribunal, would remain in the same difficult situation as would have been the case under the Committee's preliminary views. Also, the use of judges for the purpose was likened to Caesar judging Caesar.[154]

6.195 We consider that the recommended scheme is an appropriate division of functions between the Tribunal and Parliament and an effective reconciliation of political responsibility, on the one hand, and fair and efficient fact-finding, on the other. We also agree with the Advisory Committee that a House of Parliament should be permitted to refer matters back to the Judicial Tribunal if further fact-finding is required, as in the case of new evidence arising.[155]

6.196 We cannot agree with the Government of Queensland that the issue is whether the Parliamentary process is capable of providing for an objective inquiry into facts of this sort. It is simply the case that neither the Constitution nor the political process ensures such a result. We do not consider that democratic theory is breached by requiring an impartial body, of persons trained for the purpose, to determine facts relating to individual behaviour or capacity. The independence of the judiciary from political control is itself an important element of a democratic society, and the proposals of the Advisory Committee strengthen that principle. At the same time those recommendations give to the Parliament full scope to exercise its political responsibilities and also ensure that proceedings before the Tribunal cannot begin unless the matter is referred to it by the Attorney-General or other appropriate Minister.

6.197 The Advisory Committee then raised the issue whether a finding by the Tribunal should be a necessary prerequisite for an address for removal where a court has found all the relevant facts in the course of a trial. For example, a judge may have been found guilty of a crime that, on any view, would be capable of amounting to misbehaviour within the meaning of section 73(ii.). Like the Advisory Committee, we consider that this should not constitute an exception to the requirement of a determination by a Judicial Tribunal. Experience shows that borderline situations can arise as to whether the offence is of a nature which warrants removal.

6.198 The editor of the *Australian Law Journal* has raised the question whether, if the alleged judicial behaviour consisted of a crime, the institution of proceedings by the Director of Public Prosecutions was to take precedence or priority over a reference of the same subject matter to the Tribunal.[156] We consider that in those circumstances the

153 id, 79, para 5.55.
154 S1214, 25 November 1987.
155 id, 79, para 5.56.
156 (1988) 62 *Australian Law Journal*, 6.

Parliamentary Tribunal should report to Parliament that it would be desirable for its investigation to wait until the criminal proceedings were completed. The matter would then be for the Attorney-General to decide.

6.199 We accept the recommendation of the Advisory Committee that the members of the Judicial Tribunal should consist of judges of the superior federal courts, other than the High Court, and of the Supreme Courts of the States and Territories.[157] Clearly there could not be any persons better experienced and expert than superior court judges to deal with issues of evidence and the weight of evidence, which is part of the process of fact-finding. We agree that it is not appropriate to have a socially representative body for this purpose. The community itself is sufficiently represented in the Houses of Parliament, whose duty it would be to determine whether, given the facts, the judge should be removed, having regard to the prevailing standards of the community. Unlike the Advisory Committee, however, we think that the qualifications of members of the Judicial Tribunal should be prescribed in the Constitution.

6.200 It is, in our view, clearly desirable that there be a standing group of judges to constitute the Tribunal at any time a need arises to bring it into operation, rather than relying on ad hoc appointments. The rule should provide, in our opinion, for a system of rotation of members. The judges, perhaps in order of seniority, should hold their positions for a prescribed period and then the next three judges should take their place. In the event of a member ceasing to be a judge, the next judge on the list would replace him or her. We agree with the Advisory Committee that a judge should see it as part of a judge's ordinary duty to serve on the Tribunal. On the other hand, we also concur in the suggestion that such a judge should, in relation to any reference covering a judge of his or her court, be able to decline to serve in that case.[158] A Tribunal of three judges seems appropriate.

6.201 We do not consider that there is any need for the Constitution to make detailed provision for the constitution of the Tribunal except to the extent of providing for the qualifications of members. The size of the Tribunal, the method of rotation, the period of service and procedural matters should be left to legislation.

6.202 The recommendation of the Advisory Committee relates to all federal judges. We consider below[159] the question of the removal of federal magistrates.

6.203 We recommend the alteration of section 72 of the Constitution by adding the following paragraphs:

> An address for removal of a Justice shall not be made unless a Judicial Tribunal, requested by a Minister of State for the Commonwealth to inquire into an allegation of misbehaviour by or of incapacity of the Justice has reported that the facts found by it could amount to misbehaviour or incapacity warranting removal.
>
> The Parliament may make laws providing for the establishment, constitution and procedure of a Judicial Tribunal, but each member of the Tribunal must be a Justice of a superior federal court other than the High Court or a judge of the Supreme Court of a State or Territory.
>
> The address of each House of the Parliament must be based on facts found by the Tribunal and be made no later than the end of the next session after the report of the Judicial Tribunal.

157 Judicial Report, 80, para 5.59.
158 ibid.
159 para 6.214-6.221.

Removal of judges from State and Territorial superior courts

Recommendation

6.204 We *recommend* that the Constitution be altered to provide:

(i) that a judge of a superior court of a State shall not be removed except by the Governor-in-Council on an address from each House of the State Parliament, praying for such removal on the ground of proved misbehaviour or incapacity;

(ii) that removal shall not take place unless the Judicial Tribunal, referred to above,[160] has found that the conduct of the judge is capable of amounting to misbehaviour or incapacity warranting removal (where the Federal Parliament has not established a Tribunal, the State Parliament may do so);

(iii) that provisions for the removal of judges of the superior courts of the self-governing Territories be on the same terms as those of the States, the address being by each House of the Territory legislature. In respect of the superior courts of other Territories the removal provisions should be the same as those for federal judges.

Issues and reasons for recommendation

6.205 The Advisory Committee recommended that the removal provisions of the superior courts of the States and Territories should be constitutionally entrenched and should be similar to those for federal judges.[161]

6.206 All the considerations which lead to the view that federal judges should have security of tenure apply with equal force to State and Territory superior courts. Under the legislation of most States, Supreme Court judges are removable by the Governor on an address from the House or Houses of Parliament without cause being shown. The *Judicial Officers Act 1986* (NSW) requires as a prerequisite to an address a report of the Conduct Division stating its opinion that a matter could justify the removal of a judicial officer. The grounds must relate to 'ability and good behaviour'. In the Territories the removal provisions are the same as those in section 72 of the Constitution.[162]

6.207 While State Parliaments have not, in modern times, acted improperly in threatening to remove Supreme Court judges, we agree with the Advisory Committee that constitutional provision should be made in this regard of the same nature as that which is recommended for federal judges. As events in recent times in many areas of public life have illustrated, it is not enough to say, when one is concerned with basic institutions, that there is no immediate problem or threat or that political practice or usage in the past makes legal provision unnecessary. The protections for the judiciary in the Constitution were not inserted because any immediate mischief was anticipated. It is the function of a constitution to lay down a firm framework of government which will, so far as possible, withstand unexpected threats and emergencies. It would be hard to argue that the freedom and independence of the judiciary was not basic to that framework. This applies with great force to those courts – the Supreme Courts – that have the function of ensuring that all other public officers and bodies of the State exercise their functions according to law.

160 para 6.180.

161 id, 80-3, para 5.63-5.72.

162 There is a question whether at common law judges appointed during good behaviour may have their offices vacated by a declaration of a court upon proof of the absence of good behaviour, under a procedure initiated by a writ of *scire facias*. This is a procedure not used since the *Act of Settlement* and there is doubt whether it is a form of action that has survived (id, 81, para 5.64).

6.208 The Queensland and Tasmanian Governments, two committees of the Law Council of Australia and the Law Society of South Australia have expressed opposition to these recommendations. The two Governments, in particular, argue that such provisions would intrude into the constitutional structures of the States and so undermine their independence. We have earlier in Chapter 2 discussed the general issue.[163] In relation to the judicial system, however, the arguments against constitutional alteration on these grounds are even less compelling. The High Court's position as the final court of appeal of each State court system, the vesting in State courts of federal jurisdiction and the jurisdiction of the High Court and other federal courts in certain cases to determine matters of State law, all indicate that the judicial systems of the States cannot be regarded as of no interest and concern to the people of Australia generally. The interdependence of the several court systems is underlined by the recent moves towards cross-vesting of jurisdictions.

6.209 We agree with the Advisory Committee, and therefore, recommend that the Constitution be amended to provide that the judges of the superior courts of the State should be removable by the Governor in Council only upon an address of the House or Houses of the State Parliament on grounds of proved misbehaviour or incapacity. The recommendations we have made above[164] regarding findings by a Judicial Tribunal would similarly apply as a precondition of a Parliamentary address.

6.210 The Advisory Committee considered that the Judicial Tribunal established under federal law should be the tribunal for State and Territorial purposes. There could be a situation, however, where the Federal Parliament has not established a Tribunal, but the State Parliament or Government wishes to initiate proceedings for removal. In accordance with the view of the Advisory Committee, We *recommend* that, in those circumstances, the Parliament of a State should be empowered to provide for the Tribunal.[165] In the case of the Supreme Courts of the self-governing Territories, the address should be by the legislative House or Houses and removal by the Administrator in Council. In respect of other Territories the provisions should be the same as those for federal judges.[166]

6.211 The Queensland Government has submitted that, apart from the general issue of constitutional intrusion into the systems of the States, the notion of a tribunal appointed by the Federal Government having functions in relation to the State judiciary is inappropriate in a federal system. It argues, among other things, that such provisions should affect the continued independence of the State judiciary.[167] We do not see how the determination of facts by an independent tribunal consisting of judges of the federal courts and the Supreme Courts can be said to threaten the independence of State courts.

6.212 We agree with the Advisory Committee and recommend that any address should be not later than the next session of Parliament which begins after the Judicial Tribunal has delivered its findings.[168]

6.213 We recommend that there be inserted in the Constitution the following provision:

> 72B. (1) A judge of the Supreme Court, or of another superior court, of a State shall not be removed except on an address of each House of the Parliament of the State praying for such removal on the ground of proved misbehaviour or incapacity.

163 para 2.92-2.111.
164 para 6.180-2.203.
165 id, 82, para 5.71.
166 id, 82, para 5.69.
167 S1214, 25 November 1987.
168 id, 82, para 5.70.

(2) A judge of the Supreme Court or of another superior court of a Territory shall not be removed except on an address of both Houses of the Parliament or each House of the legislature of the Territory, if it is so empowered, praying for such removal on the ground of proved misbehaviour or incapacity.

(3) Such an address shall not be made unless a Judicial Tribunal, requested by a Minister of the State or a Minister having responsibility in relation to the Territory to inquire into an allegation of misbehaviour by or of incapacity of the judge, has reported that the facts found by it could amount to misbehaviour or incapacity warranting removal.

(4) The Parliament of the Commonwealth may make laws providing for the establishment, constitution and procedure of a Judicial Tribunal for the purposes of this section, but if the Parliament has not established such a Tribunal, the Parliament of the State, or a legislature for the Territory that has been so empowered by a law of the Commonwealth, may make laws providing for the establishment, constitution and procedure of a Judicial Tribunal for that State or Territory. In either case, each member of the Tribunal must be a Justice of a superior federal court other than the High Court or a judge of the Supreme Court of a State or Territory.

(5) The address of each House of the Parliament of the State or of the legislature of the Territory must be based on facts found by the Tribunal and be made no later than the end of the next session of that Parliament or legislature after the report of the Judicial Tribunal.

Federal magistrates

Recommendation

6.214 We *recommend* that the Constitution be altered to provide:

(i) for the appointment and removal of federal magistrates;

(ii) that provision for appointment of federal magistrates should be the same as those for Justices of federal courts;

(iii) that removal of federal magistrates should be by the Governor-General in Council on a report from a superior federal court recommending such removal on the ground of proved misbehaviour or incapacity;

(iv) that the Parliament may prescribe additional conditions of removal;

(v) that the above provisions should take effect two years after they receive the royal assent.

Reasons for recommendation

6.215 The only magistrates that have been appointed by the Federal Government are in respect of Territories. These offices have been created under section 122 of the Constitution. There have been no federal magistrates. The Constitution makes no specific provision for the appointment of magistrates of federal courts, but only for 'Justices' of such courts. There would, however, be nothing to prevent the creation of an inferior federal court, like a court of petty sessions, consisting of members who are given the statutory title of magistrate and with jurisdiction similar to that exercised by State and Territorial magistrates' courts. The appointment, term of office, and removal of such magistrates would be governed by the provisions of section 72. The doctrine in the *Boilermakers' Case*[169] might prevent federal magistrates from exercising some of the non-judicial functions that are customarily exercised by State and Territorial magistrates.

6.216 The Report of the Advisory Committee[170] appears to assume that there is a federal power to appoint magistrates, but it is said that 'It is a moot point whether federal

169 *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HC); *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 (PC).

170 Judicial Report, 83, para 5.73.

magistrates, if appointed, would be entitled to the protection of section 71'. The Advisory Committee goes on to recommend that magistrates, as in the case of judges, be appointed by the Governor-General in Council until a prescribed age not exceeding 70, which is, at the time of the appointment, the maximum age for magistrates of the court to which the magistrate is appointed. It seems to us that section 71 makes it clear, as do the judicial decisions, that judicial power of the Commonwealth can be conferred only upon courts. Magistrates, therefore, can exercise such power only if they are members of a court. In that case their tenure must comply with section 72. While under the appropriate legislation they would have the title and status of magistrates, they would, under the Constitution, be 'Justices' of a court created by Parliament under the power that is implied in section 71.

6.217 The issue, therefore, as we see it, is whether the tenure and removal provisions in section 72 are appropriate for magistrates exercising federal judicial power. In the light of a submission from the Queensland Government it is, perhaps, necessary to emphasise that we are not suggesting, nor is it our function to recommend, the creation of magisterial courts by the Commonwealth. There is no doubt that State magistrates' courts have for decades well served federal judicial purposes, and it may be that they should continue to do so. That, however, is a very different issue from that which concerns the power of the Parliament to establish inferior courts if it so wishes.

6.218 Magistrates' courts perform much of the judicial work of this country, and their jurisdiction has grown considerably. As the Court of Appeal (NSW) said of the courts of Petty Sessions of New South Wales:

> The issues with which courts of Petty Sessions are concerned have in the last half century involved substantial rights and are of considerable complexity.[171]

Having regard to the impact of magistrates' courts on the operation of the legal system and on large numbers of the community, the principle of judicial independence clearly requires a degree of security of tenure to be provided for judicial officers of inferior courts.

6.219 The Advisory Committee acknowledges this, and recommends that the provisions for the term of office of federal magistrates and the grounds of removal be the same as those prescribed in section 72. As explained above,[172] we believe that these provisions at present would be applicable if federal magistrates' courts were established. But the Committee was of the view that it was impracticable, in the case of magistrates, for the Constitution itself to require a finding by a Judicial Tribunal and an address of both Houses of Parliament. They recommended instead that:

(a) the Governor-General in Council be empowered to remove a magistrate if a superior federal court finds that misbehaviour or incapacity warranting removal has been proved;

(b) that only the Attorney-General would be empowered to refer the matter to the court; and

(c) the decision of the judge would be subject to appeal [173]

171 *Bogeta Pty Ltd v Wales* [1977] 1 NSWLR 139, 149.
172 para 6.215.
173 Judicial Report, 83-4, para 5.75.

6.220 While we consider that there is no need to alter the provisions for appointment or term of office for federal magistrates, we are in agreement with the Advisory Committee in relation to the above[174] removal provisions. In all the circumstances we think it is preferable that there be a special provision in the Constitution providing for the appointment, term of office and removal of federal magistrates.

6.221 We recommend the alteration of the Constitution to insert the following provision:[175]

> 72A. (1) Federal magistrates:
>
> (i.) shall be appointed by the Governor-General in Council for a term ending upon the magistrate attaining the age fixed by the Parliament as the retiring age for federal magistrates (not being more than seventy years):
>
> (ii.) shall not be removed except by the Governor-General in Council, on a report from a superior federal court that the facts found by it could amount to misbehaviour or incapacity warranting removal:
>
> (iii.) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.
>
> (2) The Parliament may make laws prescribing additional conditions for the removal of federal magistrates.

State inferior courts

Recommendation

6.222 We *recommend* that the Constitution be altered to provide that the members of an inferior court of a State or Territory should be removable only on grounds and in accordance with procedures that have been recommended in respect of federal magistrates, substituting the appropriate vice-regal authority for 'the Governor-General in Council', and the Supreme Court of the State or Territory for 'a superior federal court'.

Reasons for recommendation

6.223 The Advisory Committee was of the view that no constitutional provision should be made for the removal of judicial officers of the inferior courts of the States or Territories, even though the Committee regarded it as desirable for all Australian judges to have protection from arbitrary removal. The reasons were as follows:

> The Committee would hope that District/County Court judges would by relevant legislation be given protection similar to that given to judges of superior courts, but it feels that the circumstances of such courts vary considerably and that the freedom of action of the States may be hampered unduly if the position of all judges were constitutionally entrenched.[176]

The Advisory Committee did not elaborate any further.

6.224 Earlier in this Chapter, a majority of us recommended, for largely practical reasons, that the Constitution should not be altered to make provision for the terms of office of State or Territorial judges or to confine judicial power to the ordinary courts. The practical reasons were the upheaval that might be necessary to the system of tribunals, of which there are a very large number of great variety. We indicated, however, that if State or Territorial tribunals were to exercise judicial power, it was desirable that a measure of independence be secured by making constitutional provision to prevent the arbitrary

174 para 6.215.
175 Sub-section (1) of this provision was recommended by the Advisory Committee. See Judicial Report, 126.
176 id, 82, para 5.67.

removal of members of those tribunals or courts. If judicial power is given to inferior courts (including magistrates' courts) and to tribunals that are not ordinarily considered to be part of the judiciary, but which have the powers of an inferior court, it is difficult to understand why they should not be protected from arbitrary removal prior to the expiration of their term of appointment. It seems incongruous, if the Advisory Committee's recommendations are followed, that provision be made for the removal of federal magistrates, but not, for example, of judges of the District and County Courts of the States and Territories.

6.225 In relation to removal we do not find the same difficulties arise in relation to the State and Territorial courts and tribunals that would arise if the Constitution required an alteration of the term of appointment. The removal provisions would automatically apply to the members of all inferior courts and all tribunals which were in fact 'courts'. Owing to the great number of inferior courts and the greater number of members of such courts, it would, as a practical matter, be too restrictive to require findings by a Judicial Tribunal and removal by an address of the Houses of Parliament. Our constitutional tradition, and that of England, in respect of a Parliamentary address for removal, has been confined to the superior courts. The same provisions that we have recommended in relation to federal magistrates should, we consider, apply to the members of the inferior courts of the States and Territories.

6.226 Some jurisdictions provide for the removal of judicial officers of non-superior courts by an address of both Houses of Parliament.[177] We do not wish to prevent the Commonwealth or a State or Territory from continuing such a requirement for removal. We recommend, therefore, that the provisions we have proposed should not prevent a law from providing additional conditions for the removal of a judge or magistrate.

6.227 We recommend the alteration of the Constitution to insert the following provisions at the end of proposed section 72B, which we earlier [178] recommended:

> (6) A judge or other member of a court, other than a superior court, of a State, or a magistrate of the State, shall not be removed except by the Governor of the State on a report from a superior court of the State that the facts found by it could amount to misbehaviour or incapacity warranting removal.
>
> (7) A judge or other member of a court, other than a superior court, of a Territory, or a magistrate of a Territory, shall not be removed except by the Administrator of the Territory or, if there is no Administrator, the Governor-General in Council, on a report from a superior court of the Territory that the facts found by it could amount to misbehaviour or incapacity warranting removal.
>
> (8) The Parliament of a State may make laws prescribing additional conditions for the removal of judges and other members of the courts other than superior courts of the State, and magistrates of the State.
>
> (9) The Parliament of the Commonwealth or a legislature of a Territory that is so empowered by a law of the Commonwealth may make laws prescribing additional conditions for the removal of judges or other members of the courts, other than superior courts, of the Territory, and magistrates of the Territory.

6.228 The insertion in the Constitution of the recommended removal provisions would operate to override any inconsistent provisions for removal in State or Territorial legislation. Those provisions would not affect the jurisdiction or constitution of any court. Nevertheless it would be desirable to permit the Commonwealth, the States and the

177 eg *Judicial Officers Act 1986* (NSW); *Court of Petty Sessions Ordinance 1930* (ACT).
178 para 6.213.

Territories a period of time to review their courts and tribunals and removal provisions at present applicable and to make such provisions they consider necessary in anticipation of the commencement of the recommended alterations to the Constitution.

6.229 We recommend that our proposed provisions relating to the judicial officers of the States and the Territories should come into operation three years after they receive Royal Assent.

Complaints against judges

6.230 The Advisory Committee examined the issue of whether there should be created an organisation to deal with complaints against judges. In our view this is a matter of policy for the Parliaments and Governments of Australia rather than an issue calling for constitutional amendment. We pass on to the Attorney-General the views of the Advisory Committee for consideration.

6.231 In our recommendation relating to the procedure for the removal of judges and magistrates, we have suggested that only the appropriate Minister for State (usually the Attorney-General) should have authority to refer a matter to the Judicial Tribunal. We adopt the reasoning of the Advisory Committee in this respect.[179]

FAMILY COURT OF AUSTRALIA

6.232 The Advisory Committee has examined at some length the problems, discussions and debates that have in recent times concerned the Family Court of Australia.[180] Some of these problems relate to the limitations on the legislative power of the Commonwealth in respect of family law. We deal with this aspect in Chapter 10.[181] Other issues concern the policies that should be adopted to deal with what the Advisory Committee has called 'the organisational' aspects of the Family Court.

6.233 Some of these problems are said to involve the isolation of the Family Court's judges from the remainder of the judiciary and the lack of variety of their work, as well as other matters of less significance. Various suggestions have been made for changing these organisational aspects. Some of the possible solutions to the difficulties are listed in the Advisory Committee's Report.[182] These include vesting federal jurisdiction in family law in State courts, creating a new court with jurisdiction in family law and other matters under, for example, the *Bankruptcy Act 1966* and the *Trade Practices Act 1974,* making the Family Court a division of the Federal Court, and providing some judges with common commissions as judges of the Family Court and the Federal Court.

6.234 Various other matters were referred to by the Advisory Committee as needing consideration, such as third party procedures, publication of court proceedings, the degree of formality in the court, affidavit evidence and the counselling service of the Court.[183]

6.235 The Advisory Committee came to no concluded view as to how the present difficulties should be resolved. It did, however, express its belief that it would be desirable to have only one federal superior court beneath the High Court so as to encourage the most efficient use of judges, to cope with changes in the case load and to provide a variety of judicial work. They refrained from making any recommendations regarding the

179 Judicial Report, 84-5, para 5.78-80.
180 id, 45-51, para 3.117-3.141.
181 See para 10.156-10.179A.
182 Judicial Report, 48, para 3.130.
183 id, 50, para 3.139.

Family Court, because they were of the opinion that the various proposals at present on foot to deal with some of the problems (which they described as 'the process of renovation') should be fully implemented before a final decision was taken.[184]

6.236 One thing is clear from the fairly extensive examination made by the Advisory Committee of the difficulties that beset the Family Court of Australia: any policy that is finally adopted can (apart from the issue of federal legislative power) be implemented within the present constitutional structure. As no alteration to Chapter III is required to enable any particular solution to be implemented, we make no recommendation. We refer to the Attorney-General the matters raised by the Advisory Committee for his consideration.

ADVISORY JURISDICTION

Recommendation

6.237 We *recommend* that the Constitution be altered to invest the High Court with jurisdiction to make a declaration on any question of law referred to it:

(i) by the Governor-General in Council relating to the manner and form of enacting any proposed law of the Commonwealth, including any proposed alteration to the Constitution;

(ii) by the Governor in Council of a State or the Administrator in Council of a Territory relating to the manner and form of enacting any proposed law of that State or Territory.

Current position

6.238 The High Court has held that the Parliament cannot confer on that Court, or on any other federal court, the power to give an 'advisory opinion' on a reference by the Governor-General of a question regarding the validity of an Act of the Commonwealth.[185] The reason given was that the federal jurisdiction in Chapter III was confined to 'matters' which referred to 'some immediate right, duty or liability to be established by the determination of the Court.'[186] It did not include a determination of 'abstract questions of law without the right or duty of anybody or person being involved.'[187]

6.239 The High Court, in that case, accepted that the statutory provision, in requiring 'an authoritative declaration of law', was attempting to confer judicial power. Some doubt on this proposition was raised in the *Boilermakers' Case* but the Court did not have to determine it.[188]

Issues

6.240 The main reason for conferring on the High Court jurisdiction to give authoritative answers to constitutional questions asked by prescribed authorities is the inconvenience and confusion that can arise from a cloud of doubt hanging over the validity of legislation. The legislation may involve the setting up of costly administrative machinery, such as the creation of statutory bodies with staff and equipment. If the legislation is declared invalid after a period of time a great deal of money and resources may be

184 id, 50, para 3.140.
185 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.
186 id, 265.
187 id, 267.
188 *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529, 541 (PC). See also (1956) 94 CLR 254, 272-4 (HC). In *Commonwealth v Queensland* (1975) 134 CLR 298, 325, Jacobs J followed the view expressed in *In re Judiciary and Navigation Acts.*

wasted. Even if the legislation is eventually upheld, threats or rumours of challenges to it can sap the vitality of those administering the scheme. Prior to, and during litigation, interim injunctions may bring much of the work of the administration to a standstill.

6.241 Private citizens and corporations may be put in a difficult position by the uncertainty of it all. It has been said that decrees relating to marital status, custody of children and division of marital property have been affected by a later decision of the High Court that legislation was beyond power.[189] It is possible, also, that a decision holding legislation beyond power may upset transactions and commercial planning that took place on the ordinary assumption that Acts of Parliament are valid laws. It may also be that Parliaments and governments might refrain from carrying out certain policies because of doubts about the constitutional position.

6.242 The arguments against advisory jurisdiction are many. Some of them are as follows:

(a) It would undermine the principle of the separation of the judiciary from the legislative and executive arms of government. It puts the judges into the position of advisers to the Government. Alternatively, it empowers the Court to interfere with executive and legislative processes.

(b) A reference for an advisory opinion results in the Court having to determine legal questions in the abstract instead of in a factual setting. Many issues can only be seen when facts are presented which bring them to light. Parties who will be affected by the legislation or Executive action, if it is upheld, may be denied an opportunity to present arguments.

(c) An advisory jurisdiction will encourage governments to refer many matters to the Court, so increasing the work of the High Court at the expense of other important functions, including its function as a final court of appeal laying down the general law for Australia.

Previous proposals for reform

6.243 ***Royal Commission on the Constitution.*** The Royal Commission recommended the insertion in the Constitution of the following provision:

> 80A. Notwithstanding any other provision of this Constitution the Parliament may make laws authorising the High Court to advise as to the validity of any enactment of the Commonwealth or of any State.[190]

6.244 ***Australian Constitutional Convention.*** At the Perth (1978) session, the Australian Constitutional Convention adopted a resolution that the Constitution be amended to include a new section 77A authorising:

(a) the Governor-General in Council to refer to the High Court any question of law relating to the validity of an enactment or proposed law of the Commonwealth or any question as to the interpretation of section 75 or section 128 of the Constitution, and

(b) the Governor in Council of the State to refer any question as to the validity of a State enactment or proposed law or as to the manner and form required for the passing of a proposed State law.[191]

189 Attorney-General's Department (Cth) submission to the Senate Standing Committee on Constitutional and Legal Affairs, 27 September 1977.
190 1929 Report, 255.
191 ACC Proc, Perth 1978, 203-4.

6.245 In October 1977, a report of the Senate Standing Committee on Constitutional and Legal Affairs recommended the conferring of advisory jurisdiction on the High Court.[192] Consultations took place between a Sub-Committee of the Judicature Committee of the Convention and the Senate Standing Committee. As a result of these discussions, a revised proposal was put to the Convention.

6.246 At the Adelaide (1983) session, the Australian Constitutional Convention revised its earlier recommendations. The principal changes were:

(a) to extend the subjects in respect of which an advisory opinion could be obtained by the Governor-General in Council to questions concerning sections 121-4 of the Constitution and questions relating to treaties,

(b) to empower a House of Parliament to refer questions concerning sections 44 or 45 of the Constitution, and

(c) to empower the Administrator in Council of the Northern Territory to refer issues of validity and manner and form for the passing of an enactment or proposed enactment of that Territory.[193]

6.247 In 1983 a Bill to alter the Constitution, which embodied much of the recommendations of the Australian Constitutional Convention was passed by both Houses of the Federal Parliament.[194] At the insistence of the Senate, however, it did not authorise the referral of a question as to the validity of a proposed law, until it had passed both Houses. (Except of course in those States or Territories where there was only one House). The proposal was not put to a referendum.

Advisory Committee's recommendation

6.248 The Advisory Committee recommended against conferring advisory jurisdiction on the High Court. The reasons were as follows:

> First, the rules as to standing in Australia are now sufficiently relaxed as not to shut out any plaintiff with a substantial interest or concern in testing constitutional questions. Secondly, it is undesirable to draw the federal judiciary too closely into the legislative process by having it express views upon bills or proposed bills before they have been tested by passage through both Houses of Parliament. Even if an advisory opinion might be sought only after the passage of a bill through both Houses, the objection to involving the High Court as adviser to the government of the day would remain. It may be observed that submissions to the Committee on the topic were overwhelmingly against the existence of such a jurisdiction.[195]

Advisory jurisdiction in other countries

6.249 ***Canada.*** The Supreme Court of Canada has had advisory jurisdiction, not limited to questions of constitutional law, since 1875.[196] The Court is required to exercise the jurisdiction when questions are referred. Questions can only be referred by the Governor-General in Council or, in the case of private Bills or petitions, by a House of the Canadian Parliament. Much of the judicial interpretation of the Canadian Constitution has occurred as a result of advisory judgments.

192 Advisory Opinions by the High Court, PP 222/1977.
193 ACC Proc, Adelaide 1983, vol I, 317-9.
194 *Constitution Alteration (Advisory Jurisdiction of the High Court) 1983.*
195 Judicial Report, 59-60, para 4.20.
196 See now *Supreme Court Act 1970,* sections 55 and 56.

6.250 ***India.*** The *Constitution of India* (Article 143 (1)) authorises the President to refer any matter of law or fact to the Supreme Court of India for an opinion. The Court is not, however, obliged to answer the questions referred.

6.251 ***United States.*** In the United States of America, the Supreme Court has, since the late 18th century, refused to give advisory opinions on the ground that the Constitution enables federal courts to have jurisdiction only in respect of 'cases and controversies'.

6.252 ***United Kingdom.*** Under section 4 of the *Judicial Committee Act 1833* (Imp.), the Queen is authorised to refer any matter to the Judicial Committee for advice. This provision was used in a number of cases to obtain advice regarding colonial legal issues.[197] It has, in modern times, only occasionally been resorted to in respect of matters concerning the United Kingdom.[198]

Reasons for recommendation

6.253 Subject to some exceptions which we discuss below, we agree with the view of the Advisory Committee that the High Court should not be invested with advisory jurisdiction, either generally or in respect of matters of constitutional validity.

6.254 We are conscious that the conferring of advisory jurisdiction relating to constitutional questions in one form or another has wide support, as evidenced by two resolutions of the Australian Constitutional Convention, a Report of the Senate Standing Committee and, more particularly, the passage of a Bill for constitutional alteration through both Houses of Federal Parliament. This large political support was of course principally motivated by a desire to make the governmental and legislative process work more smoothly, efficiently and speedily. The reports of the bodies concerned emphasised difficulties for government and the waste of resources that can occur as a result of having to await the challenge to legislation a considerable time after its enactment.

6.255 On the other hand, nearly all the submissions to the Advisory Committee expressed concern about the position of the High Court, and the proper and efficient consideration of constitutional issues by that Court, if advisory jurisdiction were conferred.

6.256 The question is one of balancing these conflicting interests. Experience in countries such as Canada and India make it clear that it is unlikely that the High Court would be seen as an arm of the Executive Government if jurisdiction of the nature proposed in, for example, the 1983 proposal were conferred on the Court. We do not see how the independence and freedom from Executive action of the High Court could be regarded as compromised merely by its determining referred questions relating to constitutional validity.

197 On 31 May 1973, three weeks after the *Seas and Submerged Lands Bill* was introduced in the House of Representatives, Queensland and Tasmania lodged at the Office of the Privy Council in London a Petition praying that the Queen should refer to the Judicial Committee certain questions relating to rights to the seabed adjacent to the respective States. On 28 February 1974, in opening the Parliament, the Queen stated: 'I have decided not to refer to the Privy Council petitions addressed to me by the State of Queensland and the State of Tasmania concerning rights to the seabed. My Australian and United Kingdom Ministers were agreed that the High Court of Australia is the appropriate tribunal to determine the issues raised in the petitions and, accordingly, that the petitions should not be referred to the Judicial Committee.' (Hansard, HR, 6). The *Appeals and Special Reference Act 1973* (Qld) declared it to be lawful for Her Majesty to refer to the Judicial Committee any question which the Supreme Court of Queensland had certified was a matter of great general and public importance. This Act was held invalid by the High Court on the ground that it conflicted with Chapter III of the Constitution: *Commonwealth v Queensland* (1975) 134 CLR 298.

198 *In Re Macmanaway* [1951] AC 161; *In re Parliamentary Privileges Act 1770* [1958] AC 331.

6.257 We certainly agree, however, with the views expressed by many members of the Federal Parliament as to the undesirability of invoking the jurisdiction of the Court before a Bill has been debated on policy grounds and passed by both Houses. While it would no doubt have advantages from the Government's point of view to have an authoritative opinion on the validity of a Bill at any stage of passage through the Houses, the possibility of abuse is obvious. It would, we believe, be an undesirable fetter on the political and legislative processes. It is clear that, even assuming an attempt were made to prevent an approach to the High Court several times in relation to one Bill, a member of the Parliament who wished to move an amendment could be met with the argument that it would be unwise, as it would risk upsetting the finding of validity made by the Court earlier in respect of the Bill. Without assuming that any Government would act irresponsibly, one could still conclude that an advisory opinion jurisdiction in relation to proposed laws could have an undesirable effect on legislative debates on matters of policy.

6.258 The case for advisory opinions in respect of Bills that have completed their passage through the legislative process does not suffer from the same defects. Yet, in another sense, the case is weaker. The High Court has been quite liberal in its use of the declaratory judgment in cases involving constitutional interpretation and in other respects. As the Advisory Committee indicated, the qualifications for standing have been broadened by the Court. There is little doubt that a State or its Attorney-General may challenge all, or practically all, federal legislation or Executive acts.[199] The Commonwealth probably has similar standing in respect of State laws and Executive action in relation to the Constitution.

6.259 The High Court has upheld action brought by a plaintiff before legislation has been proclaimed.[200] In these and other cases involving an application for a declaration the High Court has clearly had regard to the importance of the matter, the need for a quick decision and the social inconvenience that would result from delay. Past practice indicates therefore that the High Court would be willing to hear an action before an Act is proclaimed if that would obviate wasteful expenditure, or the dismantling of elaborate administrative machinery.

6.260 We consider that the proponents of advisory jurisdiction sometimes overstate its advantages so far as the achievement of certainty is concerned. For example, the 1983 Bill went to the extent of providing that if the judges were equally divided the judgment of the senior judge should prevail. A similar provision exists in section 23 of the *Judiciary Act 1903*. Some rule of this nature is necessary in respect of judgments in a suit between parties in order to produce an order of the court settling the dispute. But, in the case of an advisory judgment, there are no parties in the ordinary sense claiming rights. The sole purpose is to produce a precedent that it is hoped and expected will be followed. It has, however, been declared that a decision of an equally divided court is not regarded as binding for precedent purposes.[201] An equally divided court would not achieve the object of having an advisory jurisdiction, and therefore a provision of the nature of that in the 1983 Bill would be useless.

199 *Victoria v Commonwealth and Hayden (Australian Assistance Plan Case)* (1975) 134 CLR 338, 383, (Gibbs J), 401, (Mason J).

200 *Attorney-General (Vict.) v Commonwealth* (1945) 71 CLR 237; *Attorney-General (Vict.) v Commonwealth* (1962) 107 CLR 529; Z Cowen, 'Legitimacy, Legitimation' and Bigamy', 36 *Australian Law Journal*, 241.

201 *Tasmania v Victoria* (1935) 52 CLR 157, 173 (Rich J), 184 (Dixon J); *Western Australia v Hammersley Iron Pty Ltd (No.2)* (1969) 120 CLR 74, 82-3 (Kitto J); G Lindell, Consultant's Paper, Agenda; Item A2, ACC Proc, Adelaide 1983.

6.261 Also, it is not always the case that all the possible grounds of constitutional challenge will be present to the mind when an Act is passed. The fringe benefits tax legislation, for example, was challenged on two separate occasions on different constitutional grounds.[202] Constitutional cases relating to conciliation and arbitration legislation have been legion. It is impossible to accept that had there been an advisory jurisdiction all the appropriate issues would have been presented to the Court or, alternatively, that the Court would have been capable of answering all the questions in such a way that constitutional challenges could not have arisen in the future.

6.262 The argument that advisory opinions lead to abstract determinations unrelated to any factual setting has been answered (we think correctly) by the comment that many constitutional cases have been decided on demurrer in a manner as 'abstract' as any that one would find in an advisory opinion. Nevertheless, the fact remains that in many cases an answer to a question about validity would be of little assistance in the absence of an investigation of the factual setting. This is true, for example, of a number of cases relating to freedom of interstate trade.[203] The stating of hypothetical facts to the court can only alleviate this difficulty to some extent. In any particular case the undesirability of deciding an issue of validity in the absence of the factual situation must be weighed against the factors mentioned above[204] relating to the social desirability of a speedy decision. The present principles governing the declaration enable the court to adjust these conflicting interests in practical cases that arise before it. The High Court, we believe, is the appropriate institution to do that.

6.263 We consider that all these considerations offset those in favour of giving the High Court an advisory jurisdiction in relation to legislation.

6.264 There are other matters, mainly of a procedural nature, which we consider, however, call for a new type of declaratory judgment, which is not permissible under Chapter III, as it has been interpreted.

6.265 The need we have in mind is illustrated by events that occurred in 1974. In that year there was a double dissolution, under section 57, in respect of six Bills which, it was thought had complied with the procedures laid down in that section. The High Court held that that was not so in the case of one of those Bills[205] In the event that that Bill had been the only one that the Governor-General had relied upon to dissolve both the Houses, the Senate would have been wrongly dissolved. That would raise a question whether the subsequent election was void. The appalling nature of these consequences led the judges in that case to express the view that the validity of the dissolution (and therefore the election) could not have been challenged, at any rate where the action was brought after a proclamation of dissolution. This shows that the danger of an invalid Executive act taking effect is quite great. If the recommendations we make in Chapter 4 for the amendment of section 57 are adopted there will be less legal doubt.[206] We consider, however, that there is a case for a matter to be referred to the Court for an opinion where otherwise it might be too late to do so, because the damage would have been done.

202 *State of Queensland v Commonwealth* (1987) 69 ALR 207; *State Chamber of Commerce and Industry v Commonwealth* (1987) 73 ALR 161.

203 In a recent case the Court refused a declaration, relating to a question whether a number of State provisions were inconsistent with a Federal Act, because of the absence of any actual case in which the issue had arisen: *Commonwealth v Queensland* (1988) 62 ALJR 1.

204 See para 6.240-6.241.

205 *Victoria v Commonwealth and Connor (PMA Case)* (1975) 134 CLR 81.

206 para 4.613-4.685.

6.266 There are other occasions when the only way to spare considerable public expense would be to obtain a declaratory judgment in circumstances that the Constitution does not at present permit. This is the case where a question arises as to whether a referendum is necessary for the enactment of a law. Under State Constitutions, some provisions are 'entrenched' by requiring a referendum to achieve an alteration of the law. Whether such a provision is applicable to a particular proposed law may be difficult to answer. There could be occasions also, when as a matter of policy a government would not proceed with a Bill if the trouble and expense of a referendum was required. On the other hand, it might send a proposed law to a referendum when it was unnecessary, and so spend a considerable amount of public funds unnecessarily.

6.267 In the case of the Federal Constitution the difficulty, as we have discovered in considering our Report, is usually of a different order. It relates to the interpretation of the second last paragraph of section 128 which provides as follows:

> No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

6.268 There are numerous opinions, many of which conflict, as to the interpretation of this paragraph. Some of them are discussed in Chapter 13.[207] It is not always clear, therefore, whether a particular proposed alteration to the Constitution would be validly made if approved by a majority of electors in a majority of the States. If the second last paragraph of section 128 is applicable the alteration might require a majority of electors in all six States. There could be circumstances when the Government would not proceed if the latter requirement operated. This problem has occurred in our own consideration of the provisions of this paragraph, as it appears that an amendment of it probably requires the approval of the majority of the electors in all States. No-one can, however, be sure.

6.269 The words 'manner and form' have been judicially regarded as including all the conditions which are prescribed as essential to the enactment of a valid law.[208] We believe that all the issues we have discussed above [209] relate to the manner and form of enacting legislation and making alterations to the Constitution. Our recommendations would, in our view, extend to issues concerning the operation of sections 57, 123 and 128 of the Constitution and provisions of State and Territorial legislation which require a special procedure, such as a referendum, to enact or repeal a law.

6.270 In addition to these matters the Bill, *Constitutional Alteration (Advisory Jurisdiction of the High Court) 1983* also made special reference to sections 121, 122 and to treaties. It also provided for a request for an opinion by either House of the Parliament on questions relating to sections 44 and 45 of the Constitution. We do not consider that issues relating to the Territories power (section 122) or treaties are in essence different from those arising under any power of the Commonwealth. Sections 44 and 45 relate to disqualification of members of Parliament and vacancies following disqualification. Our recommendations in Chapter 4,[210] in our opinion, make appropriate provision for reference of these matters to the judiciary.

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207 para 13.186-13.198.
208 *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, 432-3.
209 para 6.240-6.242.
210 para 4.819.

6.271 This leaves the issue of section 121, which gives power to the Federal Parliament to establish and admit new States. Our recommendations on Chapter 7,[211] we believe, would clarify the constitutional position. For the general reasons we have given above,[212] we do not consider that the High Court should be asked to deal with the interpretation of this provision before policy is determined and a law enacted. Any State and any person specifically affected would have standing to challenge the legislation. A law of this nature would be the very situation in which the Court would agree to determine the matter before the legislation was proclaimed to commence.

RIGHT TO PROCEED

Recommendation

6.272 We *recommend* that section 78 of the Constitution be amended by deleting the words 'within the limits of the judicial power' and substituting the words 'referred to in sections seventy-five and seventy-six of this Constitution'.

Current position

6.273 Section 78 of the Constitution provides:

> The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

6.274 The operation of this provision is uncertain. It is clearly established that it authorises the Parliament to abrogate the immunities from suits (in the right of a Commonwealth or a State) granted to the Crown under common law in all suits that are within actual or potential federal jurisdiction. Beyond this, the effect of the section is doubtful. An issue that is in dispute is whether section 78 empowers the Parliament to prescribe the substantive law to be applied in suits against the Commonwealth or a State.

6.275 It is clearly established that the substantive law to be applied in all suits against the Commonwealth is within the power of the Parliament; but that is not to say that this power necessarily derives from section 78. Five judges of the High Court recently left this question open.[213] It seems clear that even without section 78, Federal Parliament is empowered to determine the liability of the Commonwealth, either as incidental to its express legislative powers or by a combination of section 61 (the executive power) and section 51(xxxix.) (the express incidental power). The same would seem to be the case, to some degree, where the Commonwealth is a plaintiff in a suit.[214] Section 78 of the Constitution can have nothing to say about the substantive law to be applied in a suit brought by the Commonwealth, where the defendant is a private individual or corporation.[215]

6.276 The question of whether section 78 authorises the Parliament to declare applicable substantive law is more relevant in cases relating to the liability of a State. It is generally agreed that section 78 can operate only in cases where actual or potential federal jurisdiction is exercised. In all cases where the Commonwealth is a party the court exercises federal jurisdiction (section 75(iii.)). Suits in which the State is a party will be within federal jurisdiction only where the matter is referable to one of the paragraphs in sections 75 and 76 of the Constitution. Federal jurisdiction will not be exercised where

211 para 7.1.
212 para 6.257.
213 *Commonwealth v Evans Deakin Industries Ltd* (1986) 76 ALR 412, 415.
214 *Maguire v Simpson* (1977) 139 CLR 362.
215 id, 404, (Jacobs J).

one of the parties is a State, the other party is a corporation or a resident of that State and the matter does not arise under federal law or the Constitution, involve the interpretation of the Constitution, is not within admiralty or maritime jurisdiction and does not relate to the same subject matter claimed under the laws of different States.

6.277 Apart from section 78, the Federal Parliament has, under its several legislative powers, power to confer rights and impose liabilities on the States. As a practical matter, therefore, the scope of section 78 in relation to the States is important only in suits that do not arise under federal law. In *Evans Deakin* a majority of the court doubted 'whether the Commonwealth Parliament has a general power to legislate to affect the substantive rights of the States in proceedings in the exercise of federal jurisdiction'.[216] It clearly does not have such power under section 78. On any view the latter provision could only empower the Parliament to provide for the substantive law in a suit where the State was a defendant (in the absence of the Commonwealth as a party). There can be no question of a general law under section 78, that lays down that the substantive rights of the States in *all* proceedings in federal jurisdiction.

Issues

6.278 In view of the uncertain state of the law in this area, the main issues that arise are whether section 78 should be amended so as to make it clear that it does extend to the legislative provision of substantive rights, or alternatively, provide clearly that it does not. There is also a drafting issue that is referred to below.[217]

Advisory Committee's recommendation

6.279 The Advisory Committee pointed out that the phrase 'within the limits of the judicial power' in section 78 was intended only to refer to matters within original federal jurisdiction. Taken literally it would extend to the appellate jurisdiction of the High Court in hearing appeals from decisions of the State Supreme Courts that arose within State jurisdiction. Quick and Garran pointed out that the use of this phrase was a drafting error.[218] Accordingly we recommend that the phrase should be omitted and that the words 'matters referred to in sections 75 and 76 of this Constitution' be substituted.

6.280 In relation to the more difficult issues referred to above,[219] the Advisory Committee recommended that there should be no change to the wording of section 78. After referring to the doubts expressed by the judges in *Evans Deakin Case* the Advisory Committee said:

> The Committee does not consider it appropriate to recommend revision of section 78 to deal with substantive rights and obligations of the States in matters of federal jurisdiction. This is because it believes that the doubts expressed in the above judgment should be resolved in favour of giving the expression "rights to proceed" the same meaning in respect to the States and the Commonwealth, namely, one which includes not only procedural but also substantive rights. However, the Committee does believe that the drafting infelicity apparent in the expression "within the limits of the judicial power" should be removed.[220]

Reasons for recommendation

6.281 We have some difficulty with the reasoning in the report of the Advisory Committee. It was clearly the view of the members of that Committee that the Federal Parliament should be empowered to provide for the substantive law to be applied in suits

216 (1986) 66 ALR 412.
217 para 6.279.
218 *Quick and Garran*, (1901) 806-7.
219 para 6.273-6.277.
220 Judicial Report, 63, para 4.30.

against States where those suits come within federal jurisdiction. In recommending no relevant change to the section they seem to have suggested that the doubts referred to in the Evans Deakin Case not only 'should be resolved' in the way they state, but that they will be so resolved. We are more uncertain about this. We are also uncertain about the desirability of such an interpretation of section 78. For the reasons given below, however, we agree with the Advisory Committee that no amendment should be made to section 78 other than that referred to above.

6.282 As we mentioned earlier,[221] the Federal Parliament has power to prescribe the rights and duties of States within the subjects of federal responsibility provided for in sections 51 and 52 of the Constitution. In respect of matters on which the Commonwealth does not have such legislative power, it is difficult to see what national purpose is served, at any rate in respect of a number of areas, by conferring a power to provide for the substantive liability of States, merely because the suit arises in federal jurisdiction. If Victoria is sued by a Queensland corporation or a Victorian resident in, say, contract, it is agreed that, in the absence of any federal or constitutional element, the rights and duties of the State can be provided only by State law. Why should the situation be any different if the plaintiff is a non-corporate individual resident in Queensland? The fact that in the first example, State jurisdiction will be exercised, and in the second example, it will be federal jurisdiction, does not seem a sufficient reason. It may be, of course, that issues in suits against States could arise that might be thought appropriate for federal legislative responsibility, such as where the suit involves rules of conflict of laws or admiralty and maritime law. In these matters we recommend in Chapter 10 the grant of new legislative power to the Commonwealth. These concerns, however, would hardly be adequately met by a conferral of power confined to suits where a State is a *defendant*, leaving State law to apply where the State is a plaintiff, when no other federal power to deal with the substantive law exists.

6.283 There is one area of jurisdiction where it might be argued that it is appropriate for the Commonwealth to provide the substantive law, and where the distinction between the State as a plaintiff and as a defendant is irrelevant. That area is in relation to suits between States. To some degree, though not entirely, our recommendation that the Federal Parliament should have power to make laws with respect to choice of law would cover this area.

6.284 Despite the difficulties we have with the broader view of section 78, both as a matter of law and as a matter of policy, we do not recommend any amendments to section 78 to deal with these issues. Our reasons are as follows:

(a) The High Court has not yet given an authoritative interpretation of this section. In particular, it has not had need to consider the extent of the provision in respect of rights to proceed against the States. In view of the problems of principle and policy to which we have referred, there is quite a strong case for confining the section to the removal or restriction of the State's immunity from suit. Any amendment of the provision should await judicial clarification.

(b) Should the broader view be taken by the High Court, the power given to the Commonwealth will be greatly reduced if our recommendation is adopted to omit diversity jurisdiction from Chapter III of the Constitution. The only occasions on which the section would then be likely to be relevant will be in suits by the Commonwealth against a State, between States and those relating to the Constitution.

221 para 2.32-2.44.

(c) Any *additional* power given to the Commonwealth, by a broad construction of section 78, would be further reduced if the recommendations we have made for new federal legislative powers are adopted, including those in respect of the principles of choice of law, admiralty and maritime matters and defamation. If our recommendation relating to rights and freedoms is approved, the States and the Commonwealth will incur liability for breach of those provisions under the Constitution itself.

(d) The present wording seems appropriate to cover the issue of abolishing or restricting the common law right of the Crown in the right of the Commonwealth or a State, to immunity from suit. To alter the words expressly to refer to this could be too restrictive. The phrase 'rights to proceed' could enable the Parliament to deal with attempts by governments, in ways not easy to foresee, to achieve the object of immunity from suit by devious or circuitous means.

6.285 We recommend that section 78 of the Constitution be altered so that it reads as follows:

> The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of the matters mentioned in sections seventy-five and seventy-six of this Constitution.

PROSPECTIVE OVERRULING

6.286 The Judicial Committee discussed briefly an issue referred to as 'Prospective overruling'. This was defined as meaning that 'the High Court could declare that the statement of the law in its reasons for judgment was effective only prospectively as regards persons other than the immediate litigants before it in the proceeding in question.'[222]

6.287 The problem arises because of the retroactive effect of judicial decisions. In legal theory, the court is declaring what the law is and has been. In fact, the case may establish a new rule of law, but, because of the theoretical assumption, it is deemed to have been the law before its creation. This might, at times, produce unfairness or undesirable social consequences. At other times, the existence of the presumption may prevent a court from developing the law in a manner thought desirable, because of the injustice that would otherwise be done to persons who acted on the basis of a different understanding of the law, which was generally accepted before the decision. The problem becomes most acute when the court is asked to overrule earlier court decisions.

6.288 These problems can arise in respect of cases involving constitutional validity, statutory interpretation or common law.

6.289 The courts of the United States, Canada and India have at times declared that a new interpretation of a constitutional provision should be given effect only prospectively or, alternatively, should have only a limited retroactive effect. As indicated above,[223] however, the matter is not confined to questions of constitutional validity.

6.290 The Judicial Committee recommended against any alteration to the Constitution in this regard. They took the issue to mean that the High Court should be empowered 'to render judgments that depart in a special sense from the generally accepted character (reflected in the terms of section 73 itself) of finality and conclusiveness.'[224] In our view,

222 id, 60, para 4.21.
223 para 6.288.
224 id, 60, para 4.21.

section 73 is concerned with the finality and conclusiveness of the judgment or order in relation to the parties and not with the declarations of law and reasoning that lead to the result. It is possible that the Committee recognised this distinction by its use of the phrase 'in a special sense'. We consider, however, that that 'sense' has nothing to do with section 73.

6.291 The Committee did not favour the application of a doctrine of prospective law making in matters of general law on the ground that it could lead to complaints that the law was operating in a 'discriminatory and capricious fashion' among different classes of litigants.[225] The Committee seemed to think that there might be a case for such a doctrine in respect of constitutional issues because of the principle of judicial review of legislation 'is largely judge-made'. It considered, therefore, that it was open to the High Court in that area to modify its approach and follow experience in other federal countries.

6.292 We find it difficult to understand why constitutional review is regarded as judge-made, while the common law is not. Nevertheless, the fact is that it is open to the Court to modify the retroactive effect of its decisions, if it became desirable for reasons of justice or social interest, in any areas of law. On the other hand, the judges might be inhibited from doing so because they regard existing doctrine as fundamental to the judicial process.

6.293 The issue is an important and complex one, which is relevant to the basic nature of the judicial and legislative powers. There are many arguments for and against 'prospective overruling' which are canvassed in legal literature and in some of the cases in other countries. For example, there are those who believe that any attempt expressly to invest a court with discretion to limit the retroactive effect of its rulings could all too easily be construed as an attempt to elevate the court to the position of a supra-legislature with more or less explicit legislative functions. In a matter as important as this, we feel unable to make any recommendations in the absence of submissions and discussions that focus on the problems. The Judicial Committee did not raise the matter in its issues booklet.[226] No submissions or comments were received, either on the policy or on the wording a new provisions should take if it was considered desirable. We therefore make no recommendation.

IMPRISONMENT OF FEDERAL OFFENDERS

Current position

6.294 Section 120 of the Constitution says:

> Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

Issues

6.295 Late in the course of the Commission's deliberations our attention was drawn to a recent Research Paper produced by the Australian Law Reform Commission which adverted to problems with section 120:

> There are many ambiguities concerning the scope of section 120 which have not yet been resolved. It is to be noted, first, that the parliament of the Commonwealth has not yet made laws specifically to give effect to this provision. State authorities act on the assumption that section 120, of its own force, imposes upon them an obligation to receive Commonwealth

225 id, 60, para 4.22.
226 It did, however, appear in the *Statement of Preliminary Views.*

prisoners into their prisons without financial recompense for so doing. It has never been decided whether the reference to 'detention in its prisons' extends to other forms of custody such as youth training centre detention orders, or facilities for forms of periodic detention. Nor is it clear whether the phrase 'and for the punishment of persons convicted of such offences' adds anything more to the obligation to make provision for detention in prison. Since imprisonment itself is the punishment, it is arguable that the additional reference imposes upon the states a wider obligation to attend to the punishment of persons convicted of federal offences, whether or not it involves detention in prison.[227]

6.296 Another paper of the Law Reform Commission describes the current situation this way:

> People convicted under Commonwealth laws are known as federal offenders. There are no federal prisons in Australia and all federal prisoners are held in State or Territory prisons. Federal prisoners are treated identically to their State or Territory counterparts in the jurisdiction in which they are located. The practice of holding federal prisoners in State prisons is provided for by section 120 of the Commonwealth Constitution, and the cost of accommodating them is met by the responsible State (although the Commonwealth notionally provides financial assistance through its untied general revenue grants). As at 1 December 1986 there were 424 federal prisoners in custody, an increase of 151 since December 1985. The federal component of Australia's prison population is likely to continue to increase.[228]

6.297 As at 1 April 1988 there were 529 federal prisoners in State prisons. The geographical distribution of federal prisoners was: New South Wales 244, Victoria 73, Queensland 68, Western Australia 87, South Australia 43, including 4 transferees from the Northern Territory, Australian Capital Territory 9, Northern Territory 4 and Tasmania 1.[229]

Reasons for recommendation

6.298 As this matter has been raised at such a late stage and it has not therefore, been possible to obtain submissions regarding it we are not in a position to make any recommendations. We can, however, comment on some of the legal issues arising out of section 120. These issues alone, do not, in our view, show any need for an amendment to the provision.

6.299 Section 120 imposes an obligation on the States in relation to two matters, namely, (a) detention in their prisons and (b)punishment, of persons convicted of federal offences. We have no doubt that the States are obliged to make provision for punishment regimes which provide an alternative to imprisonment such as community service or for detention in youth training centres, at any rate where the State has such provision for people convicted against the laws of the State.

6.300 There is an issue as to the operation of the constitutional obligation in the absence of federal legislation. Barwick CJ said that section 120 did not, inter alia, create any right in a person (a) to remove a prisoner from the Territory from which he was convicted or sentenced or (b), to hold another person prisoner. McTiernan and Windeyer JJ, in

227 'Sentencing Young Offenders' by Arie Freiberg, Richard Fox and Michael Hogan, Sentencing Research Paper No 11, Australian Law Reform Commission, 1988, 17 para 47.
228 Australian Law Reform Commission, Discussion Paper No 31, August 1987, para 1.
229 'Australian Prison Trends' No 143 (7 June 1988) compiled by David Biles.

dissent, took a different view. In any case it is clear that the matters referred to by Barwick CJ may be prescribed by federal legislation, as the Commonwealth has done in the case of persons convicted in the Australian Capital Territory.[230]

6.301 There might once have been some doubt as to whether section 120 applied to offences against the law of a Territory;[231] but in *Lamshed v Lake*[232] Dixon CJ (with whom three other judges agreed) said '[T]here seems no very strong reason why section 120 should not include offences created under section 122.' In *The Queen v Turnbull; Ex parte Taylor.*[233] the High Court seemed to accept that section 120 did apply to offenders against the law of a Territory.[234]

230 *Removal of Prisoners (Australian Capital Territory) Act 1988.* This Act was upheld in *Ex parte Freyer: re Grahame* (1988) 42 ALJR 358. See also *Transfer of Prisoners Act 1983 (Cth)* which makes provision for certain transfers of prisoners between the States and the Territories.

231 *The King v Bernasconi* (1915) 19 CLR 629.

232 (1958) 99 CLR 132, 143.

233 (1968) 123 CLR 28.

234 id, 37 (Barwick CJ), 39 (McTiernan J), 40 (Taylor J), 46 (Windeyer J), and 49 (Owen J).

CHAPTER 7

NEW STATES

Recommendations

7.1 We *recommend* that the Constitution be altered so as to provide more precise and simplified means for the creation of new States, in particular:

(i) to clarify the ways in which new States may come into existence; and

(ii) to establish the entitlement of a new State to membership of the House of Representatives and the Senate.

Current position

7.2 The procedure for the creation of new States is laid down in sections 121 and 124. These sections appear in Chapter VI of the Constitution. The title of the Chapter, 'New States', is in fact somewhat misleading, since it deals with other subjects as well, such as the government of Territories and the alteration of State boundaries. Sections 121 and 124 provide:

> 121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.
>
> 124. A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

The wording of these sections has given rise to considerable doubt and difficulty both as to their precise meaning, and as to their application to the various ways in which potential new States may originate. For instance, section 124 deals with two ways in which a new State might be created, namely:

(a) by separation of territory from a State;

(b) by the union of two or more States, or parts of States,

but the Chapter makes no explicit reference to the position of an existing self-governing polity (for example, New Zealand) nor to the position of Territories surrendered to, and accepted by, the Commonwealth under section 111 (for example, the Northern Territory and the Australian Capital Territory).

7.3 The Constitution in section 121 places in the hands of the Commonwealth the actual admission and establishment of new States, along with the power to impose terms and conditions of admission or establishment, including the extent of representation in either House of the Federal Parliament. But these deceptively simple provisions have given rise to a number of important problems of interpretation and application. We have been concerned to consider, for instance:

(a) the extent of the Parliament's power to impose terms and conditions on the admission or establishment of new States;

(b) the basis of the representation of new States in the Federal Parliament;

(c) whether the status of 'New State' implies parity with existing States and, if it does, in what respects; and

(d) whether the powers of a new State may be restricted in a manner different from that of existing States.

Issues

7.4 The only real issue is whether the Constitution should be altered so as to clarify the present difficulties in interpretation and to simplify the procedure for the admission of New States, and if it should, in what respects.

Previous proposals for reform

7.5 ***Australian Constitutional Convention.*** The procedure for the creation of new States was one of the items listed for discussion at the very first session of the Convention in Sydney in 1973. The reference of this matter to the Standing Committee for investigation was strongly supported by delegates from all States who drew attention to the many difficulties and uncertainties arising under the present Chapter VI of the Constitution.[1] The proposal was especially welcomed by delegates from the Northern Territory who submitted a long memorandum on the problems created by section 122 in their quest for full Statehood.[2]

7.6 Other delegates cited several attempts to create new States under the existing provisions of the Constitution and blamed the obscurities and inadequacies of Chapter VI in part for their failure. They listed, for example:

(a) 1910 Resolution by the Queensland Legislative Assembly, that Queensland be divided into three States;

(b) 1922 Resolution in the New South Wales Parliament that New England be created a separate State;

(c) 1934 Royal Commission in New South Wales which recommended the division of New South Wales into three States;

(d) 1948 New State movements in both New South Wales and Queensland; and

(e) 1967 Referendum in New South Wales on the proposed State of New England.[3]

7.7 At the Melbourne (1975) session of the Convention the subject of new States was again debated, this time at the instance of delegates from the Australian Capital Territory, who submitted two resolutions.

7.8 The first, which was carried unanimously, dealt with the position of Territories surrendered to the Commonwealth under section 111 (for example, the Australian Capital Territory and the Northern Territory) and with the doubts expressed by some authorities as to whether a Territory accepted by the Commonwealth under section 111 was in law capable of later becoming a State under section 121. The resolution was:

That this Convention recommends –

(a) that there be a constitutional alteration so as to resolve any doubts in law whether a Territory surrendered under section 111 and made in consequence subject to exclusive Commonwealth jurisdiction, may later pass from the Commonwealth so as to be admitted or established as a new State under section 121; and

1 ACC Proc, Sydney 1973, 294-8, 301-3, 313-4, 317-8, 322-3, 327-9, 340-1, 347-9.
2 id, 294-8, 322-3.
3 id, 302-3.

(b) that any other constitutional alteration necessary to enable a Territory to be constituted as a State with a status similar to but not more favourable than that of an original State be made.[4]

7.9 The second resolution, moved by a delegate from the Australian Capital Territory, sought to clarify the position with respect to senators representing Territories, but also sought in one clause to establish the principle that upon the establishment of a Territory as a new State it should be entitled to representation in the Senate. After discussion, debate on this resolution was adjourned.

7.10 At the Hobart (1976) session of the Convention, the resolution passed by the Melbourne (1975) session was further discussed, this time at the instance of delegates from the Northern Territory. Paragraph (a) was strongly supported and re-affirmed without dissent, but in respect of paragraph (b), Hon EG Whitlam pointed out that in its terms it would require any new State to have a minimum of 5 members in the House of Representatives, and a number of senators (then 10) equal to that of each State. This paragraph was negatived without a division.

Submissions

7.11 The Commission received relatively few submissions regarding new States. The majority of those, moreover, were concerned with specific issues regarding the admission of new States to the Commonwealth, rather than the constitutional provisions in that regard.

7.12 For example, some submissions urged the admission of the Northern Territory as a State.[5] E Wickham argued that the granting of Statehood to the Northern Territory would lead to greater unity within Australia in that it would discourage the northern parts of the nation from establishing ties with South East Asian countries.

7.13 However, as the Northern Territory Government acknowledged,[6] there is no constitutional bar to its admission as a State. Indeed, the Government opposed reform of section 121, particularly if such reform retards its objective of Statehood. It was especially concerned that its representation in the Senate may be fixed on the basis of population. The Territory said that it will only accept Statehood on equal terms, and that includes Senate representation equal to that of the Original States. It accepts, however, that its representation in the House of Representatives should be based on the same population quota as applies to the rest of Australia.

7.14 The Law Society of the Northern Territory submitted that:

> Northern Territory statehood without general equality as to powers, duties and representation with the other states would seriously disadvantage residents of the new state. The federal nature of the Australian Constitution should not be departed from in the case of the new state of the Northern Territory.[7]

4 ACC Proc, Melbourne 1975, 176.
5 AJ Smit S951, 11 February 1987; E Wickham, S3234, 16 February 1987.
6 S3693, 6 November 1986.
7 S3669, 6 November 1986.

7.15 One submission suggested a reform to make the Constitution more flexible in regard to the merger of existing Territories into existing States.[8] Another proposed a new scheme of electoral division whereby the States and Territories should all be divided up into counties, each county to have equal representation.[9] This would effect equality of representation as between the States and the Territories.

7.16 Several submissions advocated the abolition of the States.[10] This matter, however, does not fall within our Terms of Reference.

Other Material

7.17 At an early meeting of the Commission, we studied a report from the Joint Select Committee on Electoral Reform,[11] and the Minister's tabling statement in Parliament.[12] We also had before us relevant papers submitted at the conference on 'The Northern Territory of Australia and Statehood' in Darwin on 2 and 3 October 1986, comprising:

(a) Professor Colin Howard, 'Statehood on Conditions: Federal Representation and Residual Links';

(b) Hon LF Bowen, Federal Attorney-General, 'Northern Territory Statehood: the Commonwealth Perspective'; and

(c) Hon Mr Justice Toohey, 'New States and the Constitution: An Overview'.

7.18 Other reports and documents studied by the Commission were:

(a) 'Towards Statehood', Northern Territory Ministerial Statement, 28 August 1986;

(b) GR Nicholson, 'The Constitutional Status of the Self-Governing Northern Territory';[13]

(c) MH Byers, QC (Solicitor-General), Opinion 'Northern Territory Establishment as a State', 10 December 1980;

(d) MH Byers, QC (Solicitor-General) and Senator Peter Durack (Attorney-General), Joint Opinion 'Northern Territory Establishment as a State', 13 July 1978; and

(e) Hon Justice Michael Kirby, 'Australasia Revisited – Towards the Trans-Tasman Federation', April 1987.

7.19 To assist us further in our consideration of this important topic, we decided to commission papers by the Commission staff, in conjunction with Mr Justice Toohey, an original member of the Commission, as follows:

(a) 'New States – Constitution section 121';

(b) 'New States and the Constitution: an Overview'; and

(c) 'Working Paper on Territory Representation'.

7.20 The most obvious candidate for Statehood at present is the Northern Territory, which was originally surrendered by South Australia in 1907 under the terms of section 111, and accepted by the Commonwealth. According to section 111, that Territory then became subject to the exclusive jurisdiction of the Commonwealth. Considerable doub

8 DJ Bull S36, 25 February 1986.
9 RC Kershaw S1320, 23 March 1987.
10 New Economics Association, S1300, 10 April 1987; TW Tapp, S1352, 29 March 1987; MJR Brown, S1419, 1 April 1987.
11 Joint Select Committee on Electoral Reform, *Report No 1*, November 1985.
12 *Hansard*, House of Representatives, 17 September 1986.
13 (1985) 59 *Australian Law Journal* 698.

has been expressed whether the Northern Territory can thereafter be 'admitted' to the Commonwealth, or 'established' as a new State, under the terms of section 121. This question was dealt with by Byers in his opinion mentioned above [14], and also by Byers and Durack in their joint opinion, and the conclusion reached was that the Parliament does have power under the Constitution to establish the Northern Territory as a State. The question before us, therefore, is whether the Constitution should be altered so as to make that power explicit.

7.21 The Australian Capital Territory was surrendered by New South Wales in 1911[15] and accepted by the Commonwealth. Constitutionally, therefore, it is in a similar position to the Northern Territory.

7.22 A more difficult question arises as to the appropriate representation of such a new State in the Federal Parliament. Professor Colin Howard in his paper at the Darwin Conference pointed out that 61% of the Australian population lives in New South Wales and Victoria, 16% in Queensland, some 9% in both South Australia and Western Australia, and under 3% in Tasmania. The Northern Territory has well under 1%. Section 121 of the Constitution clearly gives the Parliament discretion to decide 'the extent of representation in either House of the Parliament', but the question arises whether there are any constraints on that decision, arising from the representation accorded to the existing States, or from the operation of other sections of the Constitution.

7.23 It seems reasonable that the representation of a new State in the House of Representatives should be determined in the same manner as that of the existing States under section 24, that is, by dividing the population of the new State by the quota. But this is a practical, rather than a legal result. Under the Constitution at present, the representation could be higher or lower, according to what the Parliament decides. And should the new State be accorded the same minimum representation of five members as the Original States?

7.24 And what of the Senate? Should the number of senators for the new State be related to the number of representatives? Should it be the same as for the existing States? Should any formula at all be laid down in the Constitution?

Reasons for recommendations

7.25 The very existence of so many doubts and difficulties in relation to the admission or establishment of new States of itself affords a powerful reason for the review of the present provisions of the Constitution on this matter, and encourages the attempt to clarify the procedure. In considering the various alternatives, we have been very much assisted by the opinions and reports mentioned above, and reinforced in the basic view which we hold of the intent and meaning of Chapter VI of the Constitution, namely, that it leaves the Federal Government with virtually unfettered discretion in the matter of the admission or establishment of a new State, and with respect to the 'terms and conditions' which it may impose upon its entry.

7.26 What those 'terms and conditions' may be will, in the end, be a political matter, dependent in part on the economic and geographical situation of the new State, as well as its population, degree of development, and other factors. We would expect that the

14 para 7.18.

15 *Seat of Government Acceptance Act 1909* (Cth) section 5(1); the proclaimed day was 1 January 1911, see *Gazette* 1910, 1851.

definition of those 'terms and conditions' would be achieved in every case primarily by close consultation between the Federal Government and the authorities in the proposed new State, and ultimately in consultation also with the existing States in the Federation.

7.27 We have reached the firm conclusion that the existing provisions of the Constitution with respect to the admission or establishment of new States are deficient and lack clarity on important points, and that it is time for alterations to be made to settle the doubts which have arisen and to facilitate the entry of new States into the Australian federation at the appropriate time.

7.28 We consider, in particular, that the Constitution should be much more precise than it is at present, on two important matters, namely:

(a) the possible origins of potential new States; and in that connection, it should be put beyond all doubt that a Territory surrendered by a State, and accepted by the Commonwealth under section 111, may become, at an appropriate later date, a new State in the Australian federation; and

(b) the entitlement of a new State to membership of the House of Representatives and the Senate respectively should be unequivocally established in the Constitution itself.

7.29 We *recommend* therefore that section 121 be altered to make it clear that the Federal Parliament has power:

(a) to create or establish a Constitution for a new State:

(i) established from a Territory;

(ii) formed by separation of territory from a State or by the union of two or more States, or parts of States; or

(iii) formed by the union of a part or parts of a State and a Territory, and

(b) to make its approval of the Constitution of an independent body politic a condition of the admission of that body politic as a new State.

7.30 We have already recommended in Chapter 4 that the Constitution be altered to provide firm formulas for the extent of representation of new States in the Federal Parliament, and in that respect to give effect to the substance of the recommendations made by the Joint Select Committee on Electoral Reform.[16]

16 See Chapter 4 'Composition of Federal Parliament', particularly para 4.317-4.322.

CHAPTER 8

CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT

Recommendation

8.1 We *recommend* that a new section 119A be added in the Constitution in the following terms:

> 119A. Each State shall provide for the establishment and continuance of local government bodies elected in accordance with its laws and empowered to administer, and to make by-laws for, their respective areas in accordance with the laws of the State.

The addition of the proposed new section 119A would give Local Government recognition for the first time in the Australian Constitution.

Current position

8.2 Local Government in Australia consists of 836 individual bodies, with about 8,000 elected members and some 170,000 employees. Local Government bodies are constituted exclusively in accordance with the laws of the relevant State or Territory. At present, there is no reference to Local Government in the Australian Constitution.

Issues

8.3 The real issues which arise from the total silence of the Constitution on the subject of Local Government are both constitutional and financial in character. Many of the financial questions are in our opinion best resolved at political level, for example:

(a) the coordination of loan raisings;

(b) the allocation of financial grants;

(c) Local Government taxation (rates, etc).

8.4 We have given consideration principally to those issues which concern the Constitution itself, namely:

(a) Should the Constitution be altered to give recognition to Local Government?

(b) Should the Constitution protect Local Government from abolition by the Commonwealth, or the States or Territories?

(c) Should inter-governmental financial arrangements have a constitutional basis?

Previous proposals for reform

8.5 ***Australian Constitutional Convention.*** Representatives of Local Government were members of the Constitutional Convention from its first session in Sydney in 1973, and it was the consistent aim of those representatives to advocate and secure the recognition of Local Government in the Australian Constitution as a third sphere of government.

8.6 That first session of the Convention noted that it should give attention to 'the financial provisions of the Constitution, with particular reference to . . . (e) the position of Local Government in relation to Commonwealth and State taxation and immunities' (Agenda Item 3), and to 'The place of Local Government under the Constitution' (Agenda Item 7).[1]

8.7 In 1974 the Federal Government submitted to a referendum four proposals, one of which would have given the Commonwealth power to borrow money for Local Government and to make grants directly to them. The proposal was defeated, with 46.8% of all electors approving it, with a majority in only one State, New South Wales (50.79%). The *Constitution Alteration (Local Government Bodies) 1974* would have inserted the following provisions into the Constitution:

> 51(ivA.) The borrowing of money by the Commonwealth for local government bodies:
>
> 96A. The Parliament may grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit.

8.8 The Melbourne (1975) session of the Convention recommended referendums on the same proposal with the addition of the words 'constituted under the law of a State or Territory' after the words 'local government bodies' and 'body'. The Convention also adopted a resolution recognising the fundamental role of Local Government in the system of government in Australia; recognising that the traditional sources of revenue available to Local Government are inadequate; and declaring that Local Government bodies should as a general principle be elected (Agenda Item S6(1)).[2]

8.9 The Convention further recommended that 'the Commonwealth and State governments should co-operate in investigating means by which local government bodies might be given access to sufficient financial resources to enable them to more effectively carry out their essential functions' (Agenda Item S6(1)).[3]

Federal finance and Local Government

8.10 Meanwhile, the Federal Government had begun to grant financial assistance to Local Government. Under the *Grants Commission Act 1973* (Cth) the Grants Commission was to inquire into and report upon applications by Local Government bodies for grants of assistance to a State to enable Local Government bodies to function, by reasonable effort, at a standard not appreciably below the standards of Local Government bodies in their own or other regions. The grants recommended by the Commission were paid under section 96 to the States pursuant to the *Local Government Grants Act 1974* (Cth) and the *Local Government Grants Act 1975* (Cth).

8.11 The 1973, 1974 and 1975 Budgets also made some specific purpose grants directly to Local Government bodies. A challenge to such direct payments was dismissed by the High Court in *Victoria v Commonwealth and Hayden (Australian Assistance Plan Case).*[4] Since 1976 all grants to the States for distribution to Local Government have been made under section 96 pursuant to the *Local Government (Personal Income Tax Sharing) Act 1976* (Cth), as amended, now the *Local Government (Financial Assistance) Act 1986* (Cth).

8.12 The Hobart (1976) session of the Convention unanimously passed a resolution that:

1 ACC Proc, Sydney 1973, xxxi, xxxvi.
2 ACC Proc, Melbourne 1975, 171-2.
3 id, 171.
4 (1975) 134 CLR 338.

this Convention, recognising the fundamental role of Local Government in the system of government in Australia, and being desirous that the fulfilment of that role should be effectively facilitated –

(a) invites the States to consider formal recognition of Local Government in State Constitutions;

(b) invites the Prime Minister to raise at the next Premier's Conference the question of the relationships which should exist between Federal, State and Local Government; and

(c) requests Standing Committee 'A' to study further and report upon the best means of recognition of Local Government by the Commonwealth.[5]

Thus the question was effectively to be handled in two phases; but there was no dissent from the view that a way should be found, if possible, to secure the recognition of Local Government in the Constitution of the Commonwealth.

8.13 The Brisbane (1985) session of the Constitutional Convention considered and adopted a report from its Structure of Government Sub-Committee, which advocated an alteration to the Australian Constitution in the following terms:

> Subject to such terms and conditions as the Parliament of a State or the Northern Territory or in respect of any other Territory the Parliament of the Commonwealth may from time to time determine every State and Territory of the Commonwealth shall provide for the establishment and continuance of Local Government bodies elected in accordance with such laws and charged with the peace order and good government of the local areas for which they are elected. Each such Local Government body shall have the power to make by-laws for the peace order and good government of its area to the extent and in accordance with the laws prescribed by the respective Parliaments in that behalf.[6]

This draft clause had been recommended by the Australian Council of Local Government Associations.

Recognition in State Constitutions

8.14 Victoria was the first State to formally recognise Local Government in its Constitution in 1979. The *Constitution (Local Government) Act 1979* (Vic) inserted a new Part IIA which specifically requires the existence of a system of elected local bodies, makes provision for the Local Government franchise, and declares that the suspension and dismissal of municipal councils may only take place by specific parliamentary enactment.

8.15 Victoria was followed by Western Australia (1979), South Australia (1980) and New South Wales (1986). Queensland and Tasmania are the only States which have not so far complied with the invitation of the Constitutional Convention.

Advisory Committees' recommendations

8.16 ***Distribution of Powers Committee.*** The Powers Committee received a large number of submissions, both oral and written, on this subject, from virtually all State Local Government associations, the Australian Council of Local Government Associations (ACLGA), the Council of Capital City Mayors and numerous other municipal authorities.[7] Almost all (including the ACLGA in its first submission to the Committee in

5 ACC Proc, Hobart 1976, 208.
6 ACC Proc, Brisbane 1985, vol I, 422.
7 Powers Report, 121-2, para 7.11-7.23.

November 1986) advocated recognition in the Australian Constitution in a form similar to that of the new section proposed by the Constitutional Convention in Brisbane.

8.17 The Local Government Association of New South Wales advocated a more expansive approach, namely, the inclusion in the Federal Constitution of a separate Chapter concerned with Local Government, which would provide for its existence, its exercise of certain powers, and protection of a council from dismissal except for just cause. It also proposed a redistribution of powers between the three levels of government.

8.18 The 1987 Annual Conference of ACLGA in Canberra endorsed this more expansive approach, and ACGLA made oral submissions to that effect to the Committee at a public hearing in Canberra and in a supplementary submission in January 1987. The ACLGA acknowledged that its new proposals entailed substantial changes, but argued that they were justified by the major political and economic changes which have occurred since Federation, including the increasing mismatch between responsibilities and resources, and the rapid expansion of Local Government functions in modern urban societies.[8]

8.19 Two groups, the Country Women's Association and the Environmental Law Commission, opposed the proposed recognition of Local Government on the ground that it would diminish the authority and responsibility of State Governments.[9]

8.20 The Powers Advisory Committee recommended, for the reasons summarised below, that Local Government should not be accorded recognition in the Federal Constitution.

(a) There is some uncertainty as to how the High Court would interpret a provision in the form proposed by the Constitutional Convention in Brisbane.

(b) Support for the proposals came almost exclusively from Local Government and appeared mainly to be based on a perceived need to increase the status of Local Government.

(c) The implications of a new Chapter on Local Government had not been canvassed in sufficient depth.

(d) Any entrenchment of the existence of Local Government should take place in State Constitutions under which it exists.

(e) The nature of any perceived threat to Local Government had not been made clear to the Committee.

(f) Some remote areas of Australia did not have Local Government and should not be compelled to have it.

(g) The proposed section 108A adopted by the Australian Constitutional Convention would cast upon Federal and State Parliaments a legal duty to establish Local Government – an unusual course.

(h) The appointment of administrators to carry on the affairs of Local Government bodies dismissed for misconduct might become more difficul.

(i) It would be undesirable to entrench in the Constitution another level of government which would be in competition with the States.[10]

8 Powers Report, 121, para 7.15-7.17.
9 id, 122, para 7.23.
10 id, 122-4, 7.24-7.35 and Appendix K, 237-40.

Trade and National Economic Management Committee. The Trade Committee also received numerous submissions on the status, powers, responsibilities and finances of Local Government.[11] These submissions naturally dealt primarily with the fiscal position of Local Government, but also involved comment and discussion on the recognition of Local Government. The Committee agreed that the tax base of Local Government is small, especially in relation to the rapidly increasing role of Local Government in human and social services, recreation and the environment. The Committee noted a strong consensus that the level of rate exemptions in favour of both Federal and State Governments and their instrumentalities, is a severe detriment to the finances of many municipalities.[12]

8.21 The Committee, however, took the view that the nature and scope of the tax base for Local Government basically involved policy decisions at an inter-governmental level, and that the need for constitutional change had not been demonstrated. It reiterated the conclusion, reached elsewhere in its report, that particular types of taxes, with the exception of customs duties, should not be exclusively allocated to specific levels of government.[13]

8.22 The Committee finally recommended that the Constitution be altered to include an appropriate recognition of Local Government, but it refrained from citing specifically the form which such recognition should take.[14]

Submissions

8.23 The Commission distributed Background Paper No 11 outlining the issues affecting Local Government, and the various proposals which had been made to recognise its status in the Constitution. We invited submissions on the subject from interested parties.

8.24 As is noted in the Powers Report [15] and Trade Report,[16] numerous submissions were received from local councils favouring the constitutional recognition of Local Government. Numerous further submissions to the Commission were received from councils in response to the Committees' reports. Without exception, these supported the constitutional recognition of Local Government.

8.25 The Department of Local Government and Administrative Services supported the granting of recognition to Local Government before the Trade Committee [17] on two grounds:

(a) Local Government is an elected and publicly accountable sector of government; and

(b) Local Government participates in the federal system of public administration.

8.26 ***Key Local Government bodies.*** Other responses came from the Federal Government's office of Local Government and from Local Government associations. The Office of Local Government of the Department of Immigration, Local Government and Ethnic Affairs (OLG),[18] the Australian Council of Local Government Associations

11 Trade Report, 229-232, 235-9.
12 id, 176, 178, 186.
13 id, 162, 240.
14 id, 239-41.
15 Powers Report, 121-2, para 9.11-9.23.
16 Trade Report, 229-39.
17 Trade Report, 236.
18 S3050, November 1987.

(ACLGA)[19] and the Council of Capital City Lord Mayors (CCCLM)[20] made submissions which renewed the call for constitutional recognition and, in some instances, took issue with assertions or conclusions of the Committees.

8.28 The OLG repeated the argument that recognition of Local Government as a party with which other spheres of government should consult and negotiate would accord Local Government a status commensurate with its rights and responsibilities as a democratically elected institution. Constitutional recognition would also lead to more effective public administration. The OLG argued that recognition was necessary to protect the democratic rights of Local Government – to guard against unwarranted dismissal of councils or failure to observe the rules of natural justice in the course of a dismissal.

8.29 The ACLGA argued, contrary to the conclusion of the Powers Committee, that recognition would not be a purely symbolic gesture. It pointed out that Australia has supported the International Declaration of Local Self-Government within the United Nations and said:

> In the absence of an appropriate form of Local Government recognition within the Australian Constitution it is difficult for the Commonwealth to espouse in international fora its belief in and support for local democracy.[21]

8.30 It also denied that local councils, if given constitutional recognition, would be permitted to impose any kind of taxation. They would still be ultimately subject to State or Territory law, and thus their tax base would be controlled to the extent that the State or Territory saw fit.

8.31 Like the OLG, the ACLGA saw an inevitable increase in the effectiveness of public administration as a result of the facilitation of direct negotiation between the Commonwealth and local councils.

8.32 The CCCLM submitted that recognition in State Constitutions is insufficient since these 'can be changed by a simple majority and thus fail to offer any real security'.[22] Recognition in the Federal Constitution would not be merely symbolic but would reflect the reality of the social, political and economic framework and would facilitate the guarantee of democratic rights in the local sphere.

8.33 The CCCLM made a series of quite specific recommendations including:

(a) clarification of the Commonwealth's power under section 81 to grant money to Local Government;

(b) a guarantee of democratic elections for Local Government;

(c) a guarantee of natural justice for councils when they are to be dismissed; and

(d) safeguards against long-term disruption to the democratic process consequent on such a dismissal.

8.34 All three of these bodies favoured recognition in the form of a new Chapter, purporting, in the words of the CCCLM, 'to ensure the "establishment and continuation" of a system of local government . . .'.[23]

19 S3055, 17 November 1987.
20 S2918, November 1987.
21 S3055, 17 November 1987, 9.
22 S2918, November 1987, 4.
23 S2918, November 1987, 4; a Chapter in substantially the same terms is set out in the Trade Report, 238-9.

8.35 The ACLGA argued that a new Chapter, rather than the proposed section 108A (as the Constitutional Convention's proposal has been called), would be in keeping with the structure of the Constitution and would be the form of recognition that would most accurately reflect the current situation. It would reassert the reality of the Australian federal system.[24]

8.36 Some submissions [25] would go even further, establishing a number of new, smaller States. As this proposal amounts to a substantial rearrangement of our federal system, it falls outside our Terms of Reference and we therefore make no comment.

8.37 ***State Governments.*** The Tasmanian Government opposed recognition of Local Government in the Federal Constitution, arguing that it is a matter to be dealt with in State Constitutions, since Local Government is a creature of State legislation.[26] The Queensland Government also opposed constitutional recognition of Local Government because, in its submission:

(a) The Constitution is a federal document concerned with granting specific heads of power to the Commonwealth, placing certain restrictions on their exercise, and leaving the residue of powers to the States. The entrenchment of a further sphere of government would cause problems as the Constitution is concerned with 'national or 'interstate' matters and not local concerns.

(b) The entrenchment of Local Government rights would legitimate a third tier of government thereby diminishing the authority and legislative competence of the States in this area.

(c) Constitutional recognition would encourage the Commonwealth to by-pass the States and deal directly with local authorities, encouraging unhealthy competition between the States and local authorities. This could lead to a weakening of federalism.

(d) It would be difficult to provide a provision which safeguards and enhances the interests of the variety of local authorities in Australia. Such a provision might be interpreted by the High Court contrary to the intention of the proponents and to the detriment of Local Government.

(e) Entrenched provisions would be difficult to alter (even if they became inappropriate, inadequate, outdated or even counter-productive) and so would need to be of a vague, simple and symbolic type.

(f) Local authorities already have a strong statutory basis and their continued existence is not under threat. It is difficult to justify an alteration to the Constitution which is only symbolic.

(g) Because local authorities are created by State Parliaments the appropriate place to recognise them is either in State Constitutions or other important State legislation.[27]

Reasons for recommendation

8.38 We were thus faced with conflicting recommendations from the two Advisory Committees. We have been assisted by the discussion of the issue in the Committee's reports, as well as by further oral and written submissions.

24 The OLG had supported the insertion of a new Chapter in its submission to the Powers Committee. Powers Report, 122, para 7.21.
25 eg JJ Bayly S342, 23 September 1986.
26 S1452, 7 April 1987; reiterated in letter of 9 March 1988.
27 S3172, 16 December 1987; S3674, 31 March 1988.

8.39 We recognise that the points made by the Powers Committee must be taken into consideration on this question, but we are not persuaded that they should outweigh the strong arguments before the Commission in support of recognition. In our view, the outcome should not depend upon any 'perceived threat to the continued existence of local government',[28] but, rather, on the need to accord it the status of an established part of the structure of government in Australia. We also believe that strong support for such recognition does exist, both through the Constitutional Convention and in submissions to the Commission and its Advisory Committees.

8.40 There is an obvious need for some flexibility in dealing with remote and undeveloped areas. But we believe that section 119A provides that flexibility. Further, it would be a matter for such legislatures themselves to make provision to avoid the kind of 'competition' between the two spheres of government which the Committee was concerned to avoid.[29]

8.41 We recognise, however, the force of the arguments by the Powers Committee relating to the varying degrees of constitutional development in the Territories (for example the Australian Capital Territory, Christmas Island or Norfolk Island) and the problem of remote and undeveloped areas in the Northern Territory. It could be argued that Local Government is not necessarily appropriate in some or all of such places, and that to impose a constitutional obligation to establish Local Government there is both unnecessary and onerous. On balance, we consider that it is impossible to treat the Territories as being in a comparable position to the States in this respect, and that it might well become one of the incidents of a Territory becoming a State that it incurred a legal duty in relation to the establishment and maintenance of Local Government. We therefore agree with the minority of the Powers Committee that the alteration which we *recommend* should be confined to the States.

8.42 ***Third sphere of government.*** We have come to the conclusion that it is time for the recognition of Local Government as a third sphere of government in the Australian Constitution. Local Government was in existence well before Federation, and it has grown markedly in scope and importance since then. In 1900, the role of Local Government lay almost entirely in the supply of services to property, particularly in roads, drainage and the collection and disposal of garbage.

8.43 In more recent times, however, that role has broadened to cover a wide range of services to people and to the community, especially in the provision of social services, of recreational and sporting facilities, in town planning, the arts, and the environment. Local Government has therefore become an increasingly important part of the structure of government in Australia, and has a legitimate right to be recognised and consulted in the allocation of responsibilities and resources within the public sector. It is important that the overlapping of functions between the different levels of government should be minimised as far as possible, and loan funding and financial assistance be directed in the most efficient and effective way. On the other hand, Local Government derives its existence, as well as its powers and responsibilities from State Constitutions and is legally and in practice a subordinate form of government.

8.44 We agree with the general thrust of the recommendation of the 1985 Brisbane session of the Constitutional Convention, as supported by a wide range of Local Government bodies before the Commission, and in principle by the Trade and National Economic Management Advisory Committee. We believe that recognition in the Australian Constitution in the form proposed will give Local Government the necessary

28 Powers Report, 124, para 7.34.
29 id, 124, 7.35.

status as a third sphere of government, and the necessary standing to enable it to play its full and legitimate role in the structure of government in Australia, and as an equal partner in consultations about the allocation of responsibilities and resources within that structure.

8.45 We also note the proposal by the Centre for Research on Federal Financial Relations, endorsed by the 1985 Brisbane Constitutional Convention, that a Federal Fiscal Council be formed with the task of facilitating joint discussions between the three spheres of government and informed decisions on all aspects of taxation, borrowing, expenditure and grants arrangements, in order to ensure equity and uniformity as far as possible in the provision of government services to Australian citizens regardless of their place of residence.

Effects of constitutional recognition

8.46 Local Government is recognised in Article 28 of the Constitution of the Federal Republic of Germany in somewhat similar terms to those which we propose, and we would expect the effects of such recognition to be broadly similar. Under the Canadian Constitution Local Government is expressly made the subject of the legislative power of the provinces.[30]

8.47 We believe that the proposed provision would require:

(a) that the people of each State are represented by an elected Local Government body;

(b) that Local Government bodies shall not be dismissed arbitrarily; and

(c) that, if a Local Government body in any area is lawfully suspended pursuant to a State law, it will be restored within a reasonable period by elections.

The proposed provision would not prevent the States from altering the boundaries of Local Government bodies, or from amalgamating Local Government areas; nor would it affect current provisions under State law about Local Government administration, allocation of functions and other details of the existing system.

8.48 We would expect that adoption of the proposed provision would mean:

(a) that Local Government will be consulted at national level in such forums as the Loan Council, economic 'summits' and similar consultations affecting the public administration of the nation, with proper acknowledgment of its significant role, as the Trade Committee pointed out.[31] Local Government accounts for some 6 per cent of public sector outlays, collects some 4% of total taxation revenue, employs some 9% of the total government civilian workforce, and shares to an important degree in the expenditure on a diversity of programs of some $1,000 million being passed through the States in general purpose and specific purpose grants under section 96 of the Constitution; and

(b) that Local Government will be consulted in removing overlapping and duplication of the increasing number of economic and social functions being undertaken by government at all levels.

30 Section 92(3) of the *Constitution Act 1867*.
31 Trade Report, 237.

CHAPTER 9

RIGHTS AND FREEDOMS

Introduction

9.1 In Chapter 4 of this Report we recommended that the Constitution be altered to include provisions to protect certain basic democratic rights, namely, the right to vote in parliamentary elections and the right of electors to have their votes in an election treated as being of equal value. In this Chapter we consider whether the guarantees of individual rights and freedoms already contained in the Constitution should be strengthened and extended. We consider also the question of whether the Constitution should be altered to guarantee a wider range of rights and freedoms.

9.2 At present the Constitution contains few provisions in the nature of guarantees of individual rights and freedoms. These provisions also have limited application.

9.3 The Federal Parliament's power under section 51(xxxi.) to make laws with respect to acquisition of property for any purpose in respect of which the Parliament may legislate is limited by the requirement that the laws provide for acquisition on just terms. No such limitation is imposed on acquisitions of property under State law or under laws made pursuant to the Territories power.[1]

9.4 The Federal Parliament's power under section 51(xxiiiA.) of the Constitution to make laws with respect to the provision of medical and dental services is also limited in that no such law may authorise any form of civil conscription. Again there is no corresponding constitutional limitation on State legislative power.

9.5 Section 80 appears to guarantee a right to trial by jury where a person is charged with a serious offence under federal law. But, as judicially interpreted, it does not have this effect.[2] In any case, there is no similar provision in relation to offences under State or Territorial laws.

9.6 Section 116 guarantees freedom of religion. But this guarantee too operates only against the Commonwealth.

9.7 Although the High Court of Australia has implied certain limitations on powers conferred by the Constitution, these limitations have been, in the main, confined to implications based on notions of responsible government and the federal character of the Constitution.[3] Justice Murphy suggested on a number of occasions that implications of a very different order could be made from the very nature of Australian society as a free and democratic society.[4] We are, however, inclined to think that the views of Murphy J in this regard would not be embraced by most members of the Court.

9.8 Later in this Chapter we recommend alterations to the Constitution to:

1 Section 122.
2 para 9.709-9.712.
3 See Chapter 2 under the heading 'Parliamentary government in Australia', para 2.175 and following.
4 For example, a prohibition of slavery and serfdom, freedom of movement and communication *(McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670), a prohibition on the exercise of federal legislative powers to produce 'arbitrary discrimination between the sexes' *(Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 267), on the making of laws providing for cruel or unusual punishment *(Sillery v R* (1981) 35 ALR 227, 234).

(a) extend the just terms requirement to acquisitions of property under State law and under laws made pursuant to the Territories power;

(b) strengthen the guarantee of jury trial and extend the operation of that guarantee to certain offences under State and Territorial laws; and

(c) strengthen the guarantee of freedom of religion and, again, extend its operation to the States and Territories.[5]

9.9 We have treated these proposed alterations of the Constitution separately from those which, if adopted, would involve introduction of entirely new provisions for protection of individual rights and freedoms. We have done so, not because the rights and freedoms presently protected by the Constitution are necessarily more important than rights and freedoms which are not so protected, but rather because we estimate that proposals to alter the Constitution to strengthen and extend existing guarantees are less likely to be misunderstood than proposals to incorporate in the Constitution guarantees of an entirely new kind. Certainly we do not contemplate any alterations of the Constitution to abrogate or diminish the existing guarantees.

9.10 The greater part of this Chapter is devoted to the much more difficult and contentious question of whether the Constitution should be altered to incorporate guarantees of additional rights and freedoms. As we explained in Chapter 4 of this Report,[6] we have construed our Terms of Reference as requiring us, at the very least, to make recommendations for alteration of the Constitution to ensure that democratic rights are guaranteed. We have, however, construed our Terms of Reference as also requiring us to consider and make recommendations on the desirability of including within the Constitution provisions protective of rights and freedoms beyond those which are distinctively democratic in character. We considered that this further inquiry was required of us not only because one of the Advisory Committees appointed by the Attorney-General was specifically appointed to advise on constitutional protection of individual and democratic rights, but also because we believed that, without it, our work would be incomplete.

9.11 The main questions we have considered in the course of this further inquiry are

(a) Should rights and freedoms not presently protected by the Constitution be so protected?

(b) If so, what rights and freedoms should be constitutionally guaranteed?

(c) In whose favour should the guaranteed rights and freedoms operate and against whom?

(d) How should the guarantees be expressed? For example, should they be in the form of grants of rights and freedoms or in the form of limitations on the exercise of governmental powers?

(e) Should the rights and freedoms to be constitutionally protected be incapable of abrogation or abridgment by parliaments except as authorised pursuant to formal alterations of the Constitution approved by electors voting at referendums? Or should it be possible for the parliaments to enact laws abrogating or abridging the declared rights and freedoms if, for example, those laws are approved by special Parliamentary majorities or contain an express provision to the effect that the laws are intended to override a constitutional provision?

5 para 9.703, 9.747, 9.794.

6 See under the heading 'Democratic Rights and Parliamentary Elections', para 4.8-4.15.

9.12 In considering these general questions, we have proceeded on the basis that inclusion in the Federal Constitution of further guarantees of individual rights and freedoms would necessarily entail judicial interpretation and enforcement of those guarantees. One option which we considered was inclusion within the Constitution of a set of directory or declaratory principles for the guidance of parliaments – principles which would not in any way inhibit Parliamentary or Executive powers or be judicially enforceable. We rejected this option because it seemed to us that alteration of the Constitution to include principles which are neither legally binding nor enforceable by the courts would not be effective to achieve the desired purpose.

9.13 We have decided to recommend that the Constitution be altered by the inclusion of an entirely new Chapter entitled 'Rights and Freedoms'. The draft Bill to effect that alteration, which is in Appendix K, is a modified version of the provisions in the *Canadian Charter of Rights and Freedoms 1982* and the draft Bill of Rights proposed for New Zealand in the Government's White Paper of 1985.[7]

Current position

9.14 As has already been mentioned, there is little in the Constitution by way of guarantees of individual rights and freedoms against interference by governments. This means that, for the most part, these rights and freedoms are legally protected only to the extent that the law-makers consider they should be protected.

9.15 Many of the rights and freedoms enjoyed by people in Australia are recognised and protected by the common law – the law developed by judges in the course of deciding cases that come before them. A basic principle of the common law is that private individuals are at liberty to do anything they please unless it is prohibited by law. Another basic principle is that there are certain things which governments and government officials cannot do except by authority of an Act of Parliament.

9.16 Although Australian Parliaments have almost unlimited powers to make laws impinging on rights and freedoms accorded under the common law, and although the courts are obliged to apply the laws as made by the parliaments, courts approach the interpretation of legislation on the basis that the legislature does not intend its legislation to have certain effects unless it clearly says so. It is presumed, for example, that the legislature does not intend to abridge personal freedoms,[8] to deprive persons of property without payment of compensation,[9] to restrict the liberty of persons to carry on the business of their choice,[10] or to restrict access to the courts. Statutes which confer powers on officials to make decisions affecting individual rights, entitlements and privileges are, to an increasing extent, interpreted by the courts as incorporating, by implication, a requirement that the powers conferred be exercised in accordance with the principles of natural justice.

9.17 It cannot be denied that a great deal of Australian legislation restricts rights and freedoms under the common law. It should not, however, be thought that the common law enshrines ideal principles or that legislation is always antipathetic to the rights and freedoms of individuals. In its exposure Report, *A Bill of Rights for Australia?*,[11] the

7 *A Bill of Rights for New Zealand.*

8 See *Watson v Marshall and Cacle* (1971) 124 CLR 621 (liberty of the person); *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206 (Higgins J) (freedom of assembly); *Bradley v Commonwealth* (1973) 128 CLR 557 (freedom of communication); *Sorby v Commonwealth* (1983) 152 CLR 281 (privilege against self-incrimination).

9 See cases cited in DC Pearce *Statutory Interpretation in Australia* (2nd edn, 1981) para 111.

10 *Commonwealth and Postmaster-General v Progress Advertising and Press Agency Co Ltd* (1910) 10 CLR 457.

11 PP 496/1985.

Senate Standing Committee on Constitutional and Legal Affairs drew attention to several aspects of the common law which might be regarded as deficient, among them the absence of any right to be assisted by counsel when on trial on a criminal charge,[12] denial to those convicted of capital felonies of the right to bring civil suits in the courts,[13] and absence of any general common law right of privacy. The Committee referred also to cases before the European Court of Human Rights in which actions which were lawful under English common law were held to be contrary to the European Convention on Human Rights and Fundamental Freedoms.[14]

9.18 Parliamentary contributions to the law protecting individual rights include legislation to provide for investigation of complaints against government agencies by Ombudsmen,[15] to strengthen procedures for seeking judicial review of administrative action,[16] to provide for appeals against administrative decisions,[17] and to confer legally enforceable rights of access to documents in the possession of government agencies.[18] Most Australian Parliaments have also enacted anti-discrimination legislation.[19]

9.19 One of the most significant legislative measures adopted in recent times for the better protection of individual rights was the enactment by the Federal Parliament in 1981 of the *Human Rights Commission Act.* This Act, which was to operate for five years only, has been succeeded by the *Human Rights and Equal Opportunity Commission Act 1986.* The Commission has a variety of functions. It may investigate complaints of discrimination contrary to the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984,* and, if attempts to resolve them by conciliation fail, may proceed to adjudicate.[20] It also reports on laws and practices which may be inconsistent with human rights, human rights being defined for the purposes of the Act as meaning the rights and freedoms recognised in the International Covenant on Civil and Political Rights and the Declarations on the Rights of the Child, the Rights of Mentally Retarded Persons and the Rights of Disabled Persons. Specifically the Commission may examine and report on existing federal and Territorial laws (other than laws of the Northern Territory), and at the request of the Minister, proposed federal laws. It may inquire into any act done or practice engaged in by or on behalf of the Commonwealth, or under federal enactment or in a Territory (other than the Northern Territory), and where it considers it appropriate to do so, endeavour to effect a settlement by conciliation. If settlement in this way is not thought appropriate, or if attempt at settlement is not successful, the Commission must report to the Minister.

9.20 Other functions of the Commission include:

12 *McInnis v The Queen* (1979) 143 CLR 575.
13 *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583.
14 Senate Standing Committee on Constitutional and Legal Affairs, *A Bill of Rights for Australia?* paras 2.25 – 2.41.
15 *Ombudsman Act 1976* (Cth); *Ombudsman Act 1974* (NSW); *Parliamentary Commissioner Act 1974* Q); *Ombudsman Act 1972* (SA); *Ombudsman Act 1978* (Tas); *Ombudsman Act 1973* (Vic); *Parliamentary Commissioner Act 1971* (WA); *Ombudsman (Northern Territory) Act 1977* (NT).
16 See eg *Administrative Decisions (Judicial Review) Act 1977* (Cth).
17 *Administrative Appeals Tribunal Act 1975* (Cth); *Administrative Appeals Tribunal Act 1984* (Vic).
18 *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 1982* (Vic).
19 *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Anti-Discrimination Act 1977* (NSW), *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (Vic); *Equal Opportunity Act 1984* (WA).
20 If, however, the respondent to a complaint does not comply with the Commission's determination the complainant's remedy lies with the Federal Court.

(a) on its own initiative, or when requested by the Minister, to report to the Minister as to the laws which should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;

(b) on its own initiative, or when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, or the Declarations or of any relevant international instrument;[21] and

(c) educational and promotional activities.

9.21 The Commission has no authority to inquire into State laws or practices, though provision is made whereby the Commission may, with State agreement, undertake functions relating to human rights or to discrimination in employment or occupation, on behalf of the State.

9.22 In considering the part played by Australian Parliaments in safeguarding individual rights and freedoms one should not overlook the activities of parliamentary committees and in particular those established to scrutinise subordinate legislation and Bills. Subordinate legislation committees exist in all of the Australian Parliaments except Western Australia's,[22] and the terms of reference of all of them require the committee to examine regulations and certain other forms of delegated legislation to ensure that they conform with certain standards. One such standard is that the regulations, etc, do not trespass unduly on personal rights and liberties. Where a regulation is found not to conform with the declared standards, the committee may recommend that the regulation be revised or that it be disallowed.

9.23 The only Australian Parliament which presently has a standing committee to review proposed legislation is the Federal Parliament. In November 1981, following the Report of the Senate Standing Committee on Constitutional and Legal Affairs on *Scrutiny of Bills,*[23] the Senate established a Standing Committee on Scrutiny of Bills with terms of reference modelled on those of the Senate Standing Committee on Regulations and Ordinances. Soon after its establishment, the new Standing Committee indicated that the kinds of clauses in Bills which it might regard as trespassing unduly on personal rights and liberties were clauses that:

(a) placed the onus of proof on a defendant in a criminal prosecution;

(b) conferred a power of entry on to land or premises other than by warrant issued according to law;

(c) conferred a power of search of the subject, land or premises other than by warrant issued according to law;

(d) conferred a power to seize goods other than by warrant issued according to law;

(e) purported to legislate retrospectively;

(f) affected the liberty of the subject by controls upon freedom of movement, freedom of association, freedom of expression, freedom of religion or freedom of peaceful assembly.

21 'Relevant international instrument' is defined to mean an international instrument in respect to which a declaration under section 47 is in force.

22 Western Australia's subordinate legislation review committee is an extra-parliamentary body established by statute.

23 PP 329/1978.

9.24 In the Bills examined by the Committee between 1982 and 1987, 966 clauses were identified as ones which deviated from the five standards which the Committee is required to apply. Of those 966 clauses found deficient, 427 (53% approx) were ones which the Committee regarded as trespassing unduly on personal rights and liberties. The reasons most commonly given by the Committee for adjudging clauses to be deficient on that ground were that a clause conferred powers to enter premises, and to search and seize, without a judicial or magisterial warrant, or reversed the onus of proof in criminal proceedings, or abrogated the privilege against self-incrimination, or violated the principle against retrospective laws.[24]

International obligations

9.25 Australia is party to a large number of international agreements which relate to human rights. In advice given to the Senate Standing Committee on Constitutional and Legal Affairs in 1985, the Attorney-General identified no less than 68 agreements as falling within this general category.[25] The major international instruments on human rights to which Australia is a party appear in Table 9.1. For present purposes, the most important of these agreements is the International Covenant on Civil and Political Rights 1966 which Australia signed on 18 December 1972 and ratified on 13 August 1980, subject to 13 reservations, 10 of which were withdrawn in October 1984.[26]

9.26 In addition, Australia is bound by customary international law. That law forbids, amongst other things, 'genocide, torture, imprisonment without trial, and wholesale deprivations of the right to vote, to work or to be educated'.[27]

9.27 As we explain more fully in Chapter 10 of this Report,[28] obligations which Australia assumes by becoming party to international agreements do not automatically become obligations which individuals may enforce under Australian domestic law. In other words, international agreements do not have the effect of changing domestic law. If, by an international agreement, Australia assumes obligations which can be fulfilled only by changes in domestic law, those changes will usually have to be brought about by legislation.

9.28 To some extent it is possible for the common law to be moulded with regard to international law, but obligations under international law are not regarded as providing judges with a mandate to overturn well established principles of common law which happen to be inconsistent with those obligations. To some extent also it is open to courts to construe domestic legislation to avoid breach of international obligations. Domestic legislation which is designed to implement international obligations will be construed with reference to the relevant international law.[29]

9.29 Where human rights obligations arise under international agreements, the manner in which they are to be fulfilled varies. Some such agreements require the nations which are parties to them to take positive measures to ensure that the rights are protected under domestic law. Article 2.2 of the International Covenant on Civil and Political Rights (ICCPR), for example, requires each party 'to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights

24 See the following reports of the Committee: *The Operation of the Australian Senate Standing Committee for the Scrutiny of Bills* 1981-85 (PP 317/1985); and *Annual Reports* for 1985-86 and 1986-87.
25 *A Bill of Rights for Australia?* PP 496/1985, 104-9.
26 id, 123-5. The remaining reservations relate to Articles 10, 14(6) and 20.
27 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 206 (Gibbs CJ).
28 Under the heading 'External Affairs', para 10.462-10.467.
29 See DC Pearce, *Statutory Interpretation in Australia* (2nd edn, 1981) para 23.

recognised in the present Covenant.'[30] Implementing legislation may be enacted by the Federal Parliament in exercise of the external affairs power.[31]

TABLE 9.1

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS TO WHICH AUSTRALIA IS A PARTY (as of 1 January 1988)
(Source: UNESCO Chart of Ratifications of Major Human Rights Instruments)

Instrument – General	*Enter into Force*
UN International Convention on Economic, Social and Cultural Rights 1966	3 January 1976
UN International Covenant on Civil and Political Rights 1966 [note 1.]	23 March 1976
UN International Convention on the Elimination of All Forms of Racial Discrimination 1965 [note 2.]	4 January 1969
UN Convention on the Prevention and Punishment of the Crime against Genocide 1948	21 January 1951
UN Slavery Convention 1926	1927
UN Protocol amending the Slavery Convention Signed at Geneva on 25 September 1926, 1953	7 December 1953
UN Slavery Convention 1926 (as amended)	July 1955
UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956	30 April 1957
UN Convention relating to the Status of Refugees 1951	22 April 1954
UN Protocol relating to the Status of Refugees 1966	4 October 1967
UN Protocol relating to the Status of Stateless Persons 1954	6 June 1960
UN Convention on the Reduction of Statelessness 1961	13 December 1975
UN Convention on the Political Rights of Women 1952	7 July 1954
UN Convention on the Nationality of Married Women 1957	11 August 1958
UN Convention on the Elimination of All Forms of Discrimination against Women 1979	3 September 1981
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949	21 October 1950
Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 1949	21 October 1950
Geneva Convention relative to the Treatment of Prisoners of War 1949	21 October 1950
Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949	21 October 1950
Unesco Convention against Discrimination in Education 1960	22 May 1962
Unesco Protocol Instituting a Conciliation and Good Offices Commission to be Responsible for Seeking the Settlement of any Disputes which may arise between States Parties to the Convention Against Discrimination in Education 1962	24 October 1968
International Labour Organisation Conventions	
No 11 – Concerning the Rights of Association and Combination of Agricultural Workers 1921	11 May 1923
No 29 – Concerning Forced Labour 1930	1 May 1932
No 87 – Concerning Freedom of Association and Protection of the Rights to Organize 1948	4 April 1950
No 98 – Concerning the Application of the Principles of the Right to Organize and Bargain Collectively 1949	18 July 1951
No 100 – Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value 1951	23 May 1953
No 105 – Concerning the Abolition of Forced Labour 1957	17 January 1959
No 111 – Concerning Discrimination in Respect of Employment and Occupation 1958	15 June 1960
No 122 – Concerning Employment Policy 1964	15 July 1966

Notes

1. Australia has made reservations to this Covenant. It has not ratified Declaration regarding Article 41 of the Covenant (which concerns the competence of the UN Human Rights Committee to receive communications by one State Party against another) which entered into force on 28 March 1979. Nor is it party to the optional Protocol to the ICCPR, which entered into force on 23 March 1976.
2. Australia is not party to the Declaration regarding Article 14 of this Convention (concerning the competence of the UN Committee for the Elimination of Racial Discrimination) which entered into force on 3 December 1982.

30 cf Article 2.1 of the International Covenant on Economic, Social and Cultural Rights.
31 See Chapter 10 under the heading 'External Affairs', para 10.463.

9.30 Part IV of the ICCPR provides for a Human Rights Committee. Under Article 41, nations which are party to the Convention may make declarations recognising the competence of the Committee to receive and consider complaints from other parties who recognise the competence of the Committee to decide that a nation is not fulfilling its obligations. The Committee may consider such complaints only if domestic remedies have been exhausted. If a complaint is made, the Committee may attempt resolution of it by conciliation, but otherwise may do no more than present a report.

9.31 Australia has not made a declaration under Article 41. Nor has it ratified the Optional Protocol to the Covenant to recognise the competence of the Human Rights Committee to receive complaints from individuals of violations of rights under the Covenant.

Position in other countries

9.32 Australia is one of the few democratic nations in the world whose Constitution does not include comprehensive guarantees of individual rights and freedoms. For the purposes of this Report it is not necessary to consider the position in other countries in detail. We nevertheless think it appropriate to draw attention to the situation in a number of the English-speaking nations whose legal and political systems are based upon, or which have been shaped by, the common law of England and English parliamentary traditions.

9.33 ***United States.*** The Constitution of the United States, which came into force in 1789, did not originally include many guarantees of individual rights and freedoms. The Bill of Rights, as it is commonly known, is made up of a series of amendments to the Constitution dating back to 1791. In the main, the provisions of the Bill of Rights are expressed in very general terms. The Bill of Rights is thus a flexible instrument, and one which allows its judicial interpreters considerable leeways of choice in deciding what the Bill of Rights means and requires. Many decisions of the Supreme Court on questions arising under the Bill of Rights have been controversial and have provoked spirited and continuing debate over the legitimacy and proper scope of the judicial review function which the Supreme Court performs.

9.34 Some salient features of the United States Bill of Rights are:

(a) Although most of the guarantees are expressed in absolute terms, they have been judicially interpreted as being subject to limitations which can be shown to be justifiable, for example, to protect competing rights and freedoms.

(b) The Ninth Amendment, ratified in 1791, makes it clear that 'The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.'

(c) Many of the Articles of the Bill of Rights, commencing with the Thirteenth Amendment ratified in 1865, include a provision which confers on the United States Congress a power to enforce a particular guarantee by appropriate legislation. These clauses have enabled the Congress to adopt extensive legislative measures for the protection and enhancement of civil rights.

9.35 We comment on particular provisions of the Bill of Rights in later parts of this Chapter.

9.36 ***United Kingdom.*** The United Kingdom remains one of the very few countries within the Commonwealth of Nations without a constitution which limits the power of Parliament to make laws derogating from certain declared rights and freedoms. The United Kingdom's constitution is still largely an unwritten one and its cardinal principle is that the enactments of the Parliament are the supreme laws. Those enactments, it is true, include statutes which are regarded as landmarks in the history of endeavours to impose legal constraints on the powers of governments to direct what people shall and shall not do. But these enactments have, in the main, been concerned only with powers exercisable by the Crown and its agencies. None truly inhibits the powers of the Parliament.

9.37 In theory, the principle of parliamentary supremacy still operates in the United Kingdom and is upheld by its judges. In reality, that principle is now substantially qualified by reason of the United Kingdom's subscription to the European Convention for the Protection of Human Rights and Fundamental Freedoms and its submission to the enforcement provisions of that Convention.

9.38 The European Convention was adopted by the Council of Europe in 1950. The United Kingdom played a major part in its drafting and was the first nation to ratify it (on 18 March 1951). On 23 October 1953, the Government of the United Kingdom gave notice, pursuant to article 63 of the Convention, of its intention to extend its obligations under the Convention to 42 overseas territories for whose international relations it was then responsible. Then, in December 1965, the United Kingdom Government announced that it had decided to accept the right, allowed for under the Convention, of individual petition to the international agencies established thereunder in respect of alleged infringements of the declared rights and freedoms. Broadly, this right of individual petition is a right to complain to the European Commission, after exhaustion of remedies under domestic law, and to have the complaint investigated by the Commission. If the Commission finds the complaint admissible, the complaint can then be adjudicated by the European Court of Human Rights at Strasbourg.

9.39 The United Kingdom Government has regularly extended its five-yearly acknowledgments of the right of individual petition to these international agencies. It has also had the distinction of being the European nation most often cited as respondent to alleged infringements of the Convention, and most often respondent to causes before the European Court. Over the period 1953-1984, the Court of Human Rights, the Council of Ministers and the Commission between them dealt with 205 cases arising from 13 party nations. Of the 57 cases in which it was held that violations of the Convention had occurred, 18 came from the United Kingdom. Of the 596 individual applications received in 1985, 112 came from the United Kingdom.[32]

9.40 Adjudications by the European Court have, in a number of cases, pronounced actions which were lawful under the common law, or United Kingdom statute law, to be contrary to the European Convention. The cases against the United Kingdom which have come before the European Court and which have resulted in adverse findings have included complaints about restrictions on the correspondence of prisoners,[33] inhuman treatment in Northern Ireland of suspected terrorists,[34] birching by judicial order,[35] a decision of the House of Lords that a newspaper was in contempt of court in publishing

32 The relatively large number of cases involving the United Kingdom is due partly to the fact that, where a complaint arises from the application of United Kingdom statute law, there will often be no effective domestic remedy. This contrasts with the position in countries where the Convention has been incorporated into domestic law. See below, fn 40.

33 *Golder v United Kingdom* (1975) 1 EHRR 524 (Articles 6(1) and 8); see also *Silver v United Kingdom* (1983) 5 EHRR 347 (Articles 6(1), 8, and 13).

34 *Republic of Ireland v United Kingdom* (1978) 4 EHRR 25 (Articles 1, 3, 5, 6, 14 and 15).

35 *Tyrer v United Kingdom* (1978) 2 EHRR 1 (Articles 3, 50, 63(3)).

comments on pending litigation brought on behalf of thalidomide children,[36] criminal laws prohibiting homosexual acts between consenting adults,[37] the inadequacies of the procedure available on an application for habeas corpus for judicial review of the justification for continued confinement of a patient in a mental hospital,[38] and telephone tapping by police.[39]

9.41 Neither the European Convention, nor decisions of the European Court on petitions under that Convention, are binding under the domestic law of the United Kingdom.[40] Nevertheless, decisions of the European Court which have been adverse to the United Kingdom have, in many cases, prompted that Government to procure changes in legislation or in practices to secure conformity with the European Court's pronouncements.[41] In at least one case, the House of Lords, sitting as the highest court of appeal in the United Kingdom, resolved an unsettled issue of common law in the light of an earlier decision of the European Court which had condemned the relevant corpus of English common law as being unduly restrictive of freedom of speech.[42]

9.42 Since 1969 almost twenty Bills have been introduced in the United Kingdom for the better protection of human rights. Most of the Bills have originated in the House of Lords and several have been passed by that House. The most recent Bills have been designed to incorporate the European Convention into domestic law, but not to entrench it. Parliament would still be able to enact overriding legislation, but only if it expressed its intention to do so.[43]

9.43 The present Government of the United Kingdom is, however, opposed to incorporation of the European Convention into the domestic law of that country.[44]

9.44 ***Canada.*** Canada's first general legislation on human rights, the *Canadian Bill of Rights 1960,* was no more than an ordinary statute. Its effect was to render inoperative any prior federal legislation which was inconsistent with the declared rights and freedoms. It was also provided:[45]

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights,* be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized . . . .

In *R v Drybones*[46] a majority of the Supreme Court held that this section rendered inoperative any future Federal Act which was inconsistent with the declared rights and freedoms unless the Act was expressed to operate despite the *Bill of Rights.*

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36 *The Sunday Times v United Kingdom* (1979) 2 EHRR 245 (Articles 10 and 14); see also (1980) 3 EHRR 317 (Article 50).

37 *Dudgeon v United Kingdom* (1981) 4 EHRR 149 (Article 8); see also (1983) 5 EHRR 573 (Article 50).

38 *X v United Kingdom* (1981) 4 EHRR 188; see also (1982) 5 EHRR 192 (Articles 5 and 50).

39 *Malone v United Kingdom* (1984) 7 EHRR 14 (Articles 8(1) and (2) and 13).

40 This is in contrast with the position in many other nations which are parties to the European Convention, eg Austria, Belgium, Cyprus, the Federal Republic of Germany, France, Greece, Iceland, Luxemburg, the Netherlands, Portugal, Spain, Switzerland and Turkey.

41 Examples are cited in the report of the Senate Standing Committee on Constitutional and Legal Affairs, *A Bill of Rights for Australia?* PP 496/1985, para 6.6.

42 *Attorney-General v British Broadcasting Corporation* [1981] AC 303.

43 The Bills introduced between 1969 and 1985 are described in M Zander, *A Bill of Rights?* (3rd edn, 1985). See also *Human Rights and Fundamental Freedoms Bill 1985; Human Rights Bill 1987;* Northern Ireland Standing Advisory Commission on Human Rights, *The Protection of Human Rights by Law in Northern Ireland,* Cmnd 7009 (1977); *Report of the Select Committee on a Bill of Rights* (HL No 16 of 1978).

44 *Hansard* HL, vol 49 col 725, 16 December 1987.

45 Section 2.

46 (1967) 64 DLR 2d 260.

9.45 The impact of the *Canadian Bill of Rights* was slight. The same cannot, however, be said of the *Canadian Charter of Rights and Freedoms 1982* which has constitutional force and which binds all spheres of government. The *Charter* 'guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'[47] Rights and freedoms not included among the guaranteed rights and freedoms are, however, not affected (section 26). There is an override clause whereby legislatures may expressly declare an Act or provision shall operate notwithstanding a section of the *Charter*. Such a declaration may operate for no longer than five years. A number of sections, including those conferring democratic and mobility rights, are not subject to the power of override.

9.46 We comment on particular provisions of the *Charter* in later parts of this Chapter.

9.47 ***New Zealand.*** New Zealand still lacks constitutionally entrenched guarantees of rights and freedoms. Following the adoption of the *Canadian Bill of Rights 1960,* there were proposals for adoption of a similar measure by the New Zealand Parliament.[48] In 1985 the Minister of Justice tabled a White Paper proposing adoption of a Bill of Rights modelled on the *Canadian Charter of Rights and Freedoms 1982,* but excluding any provision for legislative override.[49] The proposed Bill of Rights would be entrenched and not capable of amendment except with the approval of electors voting at a referendum or, alternatively, by the vote of 75% of the members of the House of Representatives. It is still before a Select Committee of the New Zealand Parliament. We comment on particular provisions of the proposed Bill of Rights in later parts of this Chapter.

9.48 ***India.*** Agitation for constitutional protection of human rights in India dates back as far as 1895. The Indian National Congress pressed for it from 1918. In the 1930s, however, two official bodies advised against it.[50] The Constituent Assembly formed to frame a new constitution for an independent India took a different view. The Constitution, which came into force in January 1950, contains[51] extensive, judicially enforceable, guarantees of fundamental freedoms.

9.49 In a landmark decision handed down in 1967[52] the Supreme Court of India held that the article in the Constitution providing for amendments of the Constitution (Article 368) did not permit amendment of the provisions guaranteeing fundamental freedoms. Four years after the decision, Article 368 was altered to make it clear that these provisions could be amended. Notwithstanding this change, the Supreme Court has held that the power of constitutional amendment does not allow amendments which destroy the basic structure of the Constitution. Basic structural features, it has been suggested, include a democratic form of government, the freedom and dignity of the individual, equality of status, separation of the powers of government and judicial review.[53]

9.50 ***Other Commonwealth countries.*** As has already been mentioned, on 23 October 1953, the United Kingdom Government gave notice extending the European Convention of Human Rights to 42 overseas territories for whose international relations the United Kingdom was then responsible. In 1957 it was agreed that human rights should be included in the Constitution for Nigeria. The clauses which were drafted to give effect to this agreement, and which were eventually incorporated in the Nigerian Constitution of

47 Section 1.
48 KJ Keith (ed), *Essays on Human Rights* (1968), Chapter 8.
49 *A Bill of Rights for New Zealand: White Paper.*
50 Report of the Indian Statutory Commission, Cmd 3569 (1930), Vol II, 22-3; Report of the Joint Parliamentary Select Committee on Indian Constitutional Reform, PP (UK) 1933-4, vol 7, 216.
51 In Part III.
52 *Golak Nath v State of Punjab,* AIR 1967 SC 1643.
53 See *Kesavananda Bharati v State of Kerala,* AIR 1973 SC 1461; *Indira Nehru Ghandi v Raj Narain,* AIR 1975 SC 2299; *Minerva Mills Ltd v Union of India,* AIR 1980 SC 1789.

1960, were modelled on the European Convention. This became the model for the clauses on human rights which were incorporated in the constitutions of other countries which later attained independence within the Commonwealth of Nations.[54] These countries are more numerous than those who are formally parties to the Convention. 'The Parliament of Westminster has thus exported the fundamental rights and freedoms of the Convention to the new Commonwealth on a scale without parallel in the rest of the world.'[55]

9.51 The Constitution of Australia's former Territory, Papua New Guinea, also incorporates guarantees of fundamental rights and freedoms.[56]

Previous proposals for reform

9.52 ***Constitutional referendum.*** In August 1944 a referendum was held on the *Constitution Alteration (Post-war Reconstruction and Democratic Rights)* Bill. The alterations to the Constitution proposed in this Bill included extension of the freedom of religion guarantee to the States, and adoption of an entirely new section prohibiting the Commonwealth and the States from making laws 'abridging the freedom of speech, or of the Press'. The proposals were defeated by 2,305,418 votes (54.01%) against, compared with 1,963,400 votes (45.99%) in favour. Majorities were obtained only in South Australia and Western Australia.[57]

9.53 ***Joint Committee on Constitutional Review 1959.*** A number of submissions made to this Committee supported constitutional entrenchment of rights and freedoms. The Committee was not, however, persuaded by their arguments. 'The absence of constitutional guarantees in the Commonwealth Constitution', it said, 'had not prevented the rule of law from characterizing the Australian way of life.' It was satisfied 'that as long as governments are democratically elected and there is full parliamentary responsibility to the electors, the protection of personal rights will, in practice, be secure in Australia.' But to make this protection secure, the Committee recommended 'a constitutional amendment to protect the position of the elector and the democratic processes essential to the proper functioning of the Federal Parliament.'[58]

9.54 ***Bills to implement the ICCPR.*** Bills have been introduced in the Federal Parliament to implement the International Covenant on Civil and Political Rights (ICCPR), first in 1973 and then in 1985.[59]

9.55 Clause 8 of the Bill for the *Australian Bill of Rights Act 1985* set out the proposed Australian Bill of Rights in terms similar to those of the Convention. The operation of this clause was to be postponed to a date to be proclaimed. Federal and Territorial (but not State) legislation made before the Act which was inconsistent with the Bill of Rights would, to the extent of its inconsistency, have been repealed, but the repeal would not have taken effect until five years after the commencement of the Bill of Rights.[60] Federal

54 See A Lester, 'Fundamental Freedoms: The United Kingdom Isolated?' [1984] *Public Law* 46, 55-6.
55 id, 56.
56 There was also pre-independence legislation on the subject.
57 See para 9.811.
58 1959 Report, 47, para 328. In his reservations to the Report, Senator Wright said that he was 'strongly of the opinion that' the Committee's recommendations 'fail to supply most important amendments' to the Constitution 'needed to' deal with three matters, one of them being to 'guarantee fundamental individual liberties,': id, 210, para 10.
59 The 1973 Bill lapsed on the dissolution of the Federal Parliament in 1974.
60 Clauses 2(3) and 11.

and Territorial legislation made subsequent to the Act which was in conflict with the Bill of Rights would be inoperative unless it provided, by express words or plain intendment, that its provisions were to prevail.[61]

9.56 There was a further provision[62] whereby, if a court found that federal or Territorial legislation, whensoever made, conflicted with the Bill of Rights, the Court could make a declaration that grave public inconvenience or hardship would be caused by the general rule that the Bill of Rights was overriding. Such a declaration would have no effect on the proceedings before the courts, but as regards other proceedings its effect would be as follows:

(a) In the case of legislation that came into force before the commencement of the Bill of Rights, the legislation would be deemed to have been in force from before the commencement of the Bill of Rights up to the day of the declaration;

(b) In the case of legislation that came into force after the enactment of the *Australian Bill of Rights Act,* the legislation would be deemed to have been in force from its commencement to the day of the declaration.

9.57 The court making the declaration could also make a determination the effect of which would be to suspend the application of the Bill of Rights to the offending legislation for a certain period. Such a determination could be made if the court found that grave public inconvenience or hardship would be caused unless the legislation remained in force until it was repealed or amended, or until the expiration of three months from the date of the declaration of inconsistency, whichever happened first.

9.58 The Bill also made provision for investigation by the Human Rights and Equal Opportunity Commission of complaints of acts or practices infringing rights or freedoms set out in the Bill of Rights, and for settlement of those complaints by conciliation. This jurisdiction would have extended to acts and practices by or on behalf of the Commonwealth, a State or a Territory or their authorities.[63] Clause 17 of the Bill, however, stated that infringements of the Bill of Rights did not of themselves confer any right of action or render a person criminally liable.

9.59 The Bill for the *Australian Bill of Rights Act* was introduced in the House of Representatives on 9 October 1985 and was passed by that House on 14 November 1985.[64] The Bill was received by the Senate on 2 December 1985 and was there debated at length during February and March 1986.[65] Debate, in committee, was not resumed until late November at which time the Minister representing the Attorney-General moved that further consideration of the Bill be postponed.[66]

9.60 Within the Parliament the Bill was criticised both as regards its general tenor and as regards its particulars. Its opponents questioned the need for the proposed measure and many of them suggested that there was no public support for it. Letters from constituents objecting to the Bill or particular aspects of it were quoted. Petitions in the

61 Clause 12.
62 Clause 14.
63 Acts and practices of private persons and organisations would not have come within this jurisdiction.
64 *Hansard,* House of Representatives, 9 October 1985, 1705-11; 14 November 1985, 2745-73, 2822-99.
65 *Hansard,* Senate, 14 February 1986, 351-77, 389-98; 17 February 1986, 448-74; 18 February 1986, 507-56; 19 February 1986, 572-93, 641-5; 11 March 1986, 775-817; 12 March 1986, 850-65, 895-915; 18 March 1986, 1137-84; 20 March 1986, 1311-23, 1369-73.
66 *Hansard,* Senate 25 November 1986, 2724; 26 November 1986, 2754-8.

same vein were numerous. Some members were also critical of the use of the external affairs power to achieve a purpose which, in their view, should not be sought to be achieved except by formal constitutional amendment.[67]

9.61 Concern was expressed about the provisions of the Bill which were designed to inhibit exercise of legislative powers in the future. Enactment of the Bill would, it was further suggested, involve a significant transfer of power from the Parliament to the judiciary and would result in the courts having to make decisions which were more political than legal in character. The provision which would enable a court to decide that a law which, prima facie, was inconsistent with the Bill of Rights was nonetheless a valid law because it imposed 'reasonable limitations' on the declared rights and freedoms which were 'demonstrably justified in a free and democratic society'[68] was said by one Senator to be 'a bonanza for the Bars'.[69] There was also criticism of the nature and extent of the powers proposed to be given to the Human Rights Commission to enable it to carry out its functions.

9.62 Particular aspects of the Bill which were criticised and which, in some cases, were the subject of motions for amendment, included:

(a) application of the proposed law to Norfolk Island, contrary to concerns expressed by the Government of that Territory about the effects of certain provisions;[70]

(b) the absence of any provision which would allow the Human Rights and Equal Opportunity Commission to investigate complaints about acts by or on behalf of trade unions and bodies corporate;[71]

(c) limitation of the benefits of the Bill of Rights to natural persons;[72]

(d) the absence of any provision which would make it clear that the declared rights of natural persons extended to children in embryo,[73] and that the right to life guarantee also applied to the unborn;[74]

(e) the absence of any provision to make it clear that the right to freedom of association[75] included a right not to associate, and in particular, a right not to be compelled to join a trade union;[76]

(f) the absence of provision to ensure that parents are entitled to decide how their children should be educated;[77] and

(g) the absence from the proposed Bill of Rights of any provision to secure a right to dispose freely of property, to be protected in the right to hold private property, and to be compensated on just terms if that property is acquired compulsorily by or on behalf of any government.[78]

67 But many provisions of the proposed law did not depend on the external affairs power.
68 Clause 8, Article 3(1).
69 *Hansard,* Senate, 14 February 1986, 354 (Senator Durack).
70 See letter from the Chief Minister quoted in *Hansard,* Senate, 18 February 1986, 520-1. A motion in the Senate to exclude Norfolk Island from the operation of the proposed Act was defeated by a majority of seven.
71 See *Hansard,* House of Representatives, 14 November 1985, 2877-79.
72 See id,2895-6.
73 See id,2880.
74 id, 2893.
75 Clause 8, Article 11.
76 See *Hansard,* House of Representatives, 14 November 1985, 2889-90.
77 id, 2891-2.
78 See id,2894.

9.63 ***Senate Committee on Constitutional and Legal Affairs.*** Several months prior to the introduction of the Bill for the *Australian Bill of Rights Act 1985* in the House of Representatives, the Senate resolved to refer to its Standing Committee on Constitutional and Legal Affairs, for inquiry and report, 'the desirability, feasibility and possible content of a national Bill of Rights for Australia.' The resolution expressly precluded the Committee from considering the provisions of any government Bill on the subject unless the Bill had been introduced into the Parliament and the Senate had authorised consideration of the provisions of the Bill by the Committee.[79] The Committee's Report was completed and tabled on 5 November 1985 and dealt mainly with questions of general principle.

9.64 The Report, entitled *A Bill of Rights for Australia ? An Exposure Report for the Consideration of Senators,*[80] traversed the arguments which are customarily advanced for and against constitutional entrenchment of individual rights and freedoms. We have derived considerable assistance from that Report in our enunciation of the issues and arguments. The Committee concluded that:

(a) 'There is no prospect in the foreseeable future of' any proposal for constitutional entrenchment of a Bill of Rights passing the 'onerous requirements' of section 128 of the Constitution for formal alteration of the Constitution.[81]

(b) 'Even if there were a prospect of amending the Constitution and entrenching a Bill' of that kind, 'members would still not incline to such a course.'[82] They counselled, rather, the passage of ordinary federal legislation to implement the International Covenant on Civil and Political Rights on the ground that this expedient would allow for trial of a regime which, in Australia, would be novel.[83]

9.65 ***States.*** In the States, Bills have been introduced from time to time to entrench certain rights and freedoms by means of special requirements as to the manner in which the provisions might be altered in the future.

9.66 In December 1959 the Premier of Queensland, Hon GFR Nicklin, introduced *The Constitution (Declaration of Rights) Bill* to entrench democratic rights, the independence of the judiciary, and rights on arrest or detention. The Bill also limited the power to acquire property (other than products of primary industry) by a requirement that any acquisitions be on just terms.[84] The proposal was opposed by the Opposition parties and eventually the Government decided to abandon it.

9.67 In September of 1972, a private member of the House of Assembly of South Australia (Robin Millhouse MP) introduced a Bill for a *Bill of Rights* for South Australia. This Bill declared certain rights and liberties and provided that the declared rights and freedoms were not to be overridden by future statutes unless the Parliament expressly declared that the statute was to be overriding. It was further provided that no law of the State should be construed or applied so as to have certain defined effects, for example, 'impose or authorise the imposition of cruel and unusual treatment or punishment'. Similar Bills were introduced in 1973-74 and 1974-75, but none passed into law.

79 *Hansard,* Senate, 19 April 1985, 1224-30. The reference to the Committee was in response to the known intention of the Government to introduce a Bill which had already been prepared for the Attorney-General.
80 PP 496/ 1985.
81 id, para 3.3.
82 id, para 3.4.
83 id, paras 3.5, 3.13 and 6.13.
84 *Hansard,* 9 December 1959, 1982-2007.

9.68 In 1987 the Legal and Constitutional Committee of the Victorian Parliament presented a comprehensive *Report on The Desirability or Otherwise of Legislation Defining and Protecting Human Rights.* While the Committee concluded 'that Parliament and the Courts were simply unable to adequately discharge their obligations as the protectors of human rights',[85] there was a division of opinion on what should be done to remedy the situation. Some members favoured the adoption of an entrenched and judicially enforceable Bill of Rights, subject to an override clause of the Canadian type; but other members were opposed to a system that entailed judicial enforcement.[86]

9.69 As a compromise the Committee recommended that the *Constitution Act 1975* be amended to incorporate a new part declaring certain rights and freedoms. These rights and freedoms should not be legally enforceable. They should rather be in the nature of directory principles for the guidance of Parliament. The Committee also recommended the establishment within the Parliament of additional review machinery. There should be a joint investigatory committee to investigate and report on whether Bills introduced in either House were consistent with the declaration of rights, and, when requested to do so by resolution of either House or order of the Governor in Council, whether the common law and actions of the Executive arm of government were consistent with the declaration. It was further proposed that the terms of reference of the Legal and Constitutional Committee be expanded so that it would have functions akin to those of the Senate's Standing Committee on Scrutiny of Bills and could be required, by resolution of either House or by order of the Governor in Council, to undertake similar inquiries into existing legislation.

9.70 A Bill to implement the Committee's recommendation for alteration of the *Constitution Act 1975* was introduced by the Government on 5 May 1988. The Bill proposes that a new part, entitled 'Declaration of Rights and Freedoms', be inserted in the *Constitution Act.* This part would include the following section:

> 74AB. It is hereby recognised and declared that in Victoria everyone possesses the following human rights and fundamental freedoms without discrimination on the basis of race, colour, language, national or social origin, sex, religion, political or other opinion, disability or otherwise:
>
> (a) The right to life, liberty, security of the person and the enjoyment and ownership of property and the right not to be deprived thereof except by due process of law;
>
> (b) The right to equality before the law and the protection of the law;
>
> (c) Freedom of thought, conscience, religion, expression and opinion;
>
> (d) Freedom of peaceful assembly and freedom of association;
>
> (e) The right to vote and to be elected in free and genuine elections in accordance with accepted democratic principles;
>
> (f) The right to privacy;
>
> (g) The right to marry and to found a family;
>
> (h) The right not to be arbitrarily arrested, detained or imprisoned or to be subjected to unreasonable search or seizure;
>
> (i) The right, if arrested, detained, tried upon a criminal charge, or convicted of such a charge, to be dealt with at every stage according to the principles of fundamental justice;
>
> (j) The right, in the determination of any criminal charge or suit at law, to a fair and public hearing by an impartial and independent tribunal;

85 April 1987, 113.
86 id, 114-15, 117.

(k) The right not to be convicted of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it occurred; nor, if convicted of a criminal offence, to be liable to a heavier penalty than was applicable at the time the offence was committed; nor, if acquitted or convicted of a criminal offence, to be tried or punished again for the same, or substantially the same, offence;

(l) The right, if deprived of liberty, to be treated with humanity and with respect for the inherent dignity of the person;

(m) The right not to be subjected to cruel or unusual punishment, or to medical or scientific experimentation.

9.71 The proposed new part of the *Constitution Act* also contains provisions to make it clear that the above declaration of rights and freedoms is directory only, does not limit the supremacy of the Parliament, is not legally enforceable and creates no right of action. It is also provided that the recognition in the declaration of certain rights and freedoms is not to be 'construed as denying the existence of any other rights and freedoms that exist in Victoria.'

9.72 The recommendation of the Legal and Constitutional Committee that there be a parliamentary committee to scrutinise Bills to ensure that they comply with the standards set out in the declaration has not been accepted by the Government of Victoria.

Advisory Committee's recommendations

9.73 The Rights Committee recommended a series of alterations to the Constitution for the better protection of individual and democratic rights. A number of its recommendations have been dealt with in previous Chapters of this Report. Its recommendation that there be a new preamble to the Constitution was considered in Chapter 3.[87] Its recommendations on voting and elections, on citizenship, on parliamentary privileges, and on qualifications and disqualifications of members of the Federal Parliament were considered in Chapter 4. Some other of the Committee's recommendations will be considered in later Chapters.[88] In this Chapter we deal with the remainder of the Committee's recommendations – those appearing in its list of proposed alterations of the Constitution under the heads of legal procedures, limitations on powers of governments, private property, and the power to 'opt out'.[89]

9.74 The Committee proposed, first, that a number of the existing guarantees in the Constitution be extended, as regards their scope, or so as to bind States as well as the Commonwealth, or both. Specifically, it recommended extension of the right to jury trial (section 80), of the guarantee of freedom of religion (section 116), of the prohibition against persons on the ground of residence in a State (section 117), and of the requirement that laws with respect to the acquisition of property be on just terms (section 51(xxxi.)). We deal with these recommendations later in this Chapter.[90]

9.75 In addition, the Committee recommended that the Constitution be altered to impose a number of entirely new limitations on the powers of governments, federal and State. In each case these would be expressed as prohibitions, that is, in the form 'The Commonwealth or a State shall not . . .'. Specifically the Committee proposed that the Constitution be altered to provide that the Commonwealth and States shall not:

87 para 3.2-3.46.

88 The 'races' power conferred by section 51(xxvi.) in Chapter 10 (para 10.374-10.460) and section 128 of the Constitution in Chapter 13.

89 Rights Report, 101-3.

90 para 9.715, 9.814, 9.464 and 9.767 respectively. Section 117 is also discussed in Chapter 2, para 2.82-2.91.

(a) 'deprive any person of liberty or property except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice';

(b) 'diminish the presumption that all persons are innocent until proved guilty according to law';

(c) 'compel self incrimination';

(d) 'twice put a person in jeopardy for the same offence';

(e) 'impose excessive bail';

(f) 'cause or carry out unreasonable search or seizure';

(g) 'impose cruel or degrading treatment or punishment';

(h) 'deny to any person . . . access to the courts';

(i) 'deny to any person . . . a speedy trial';

(j) 'deny to any person . . . reasonable access to legal representation and to an interpreter';

(k) 'deny to any person . . . reasonable information to enable any proceedings to be understood';

(l) 'deny to any person . . . an appeal from a final verdict or judgment';

(m) subject to section 51(vi.) – the federal defence power – 'impose any form of civil conscription';

(n) subject to section 51(vi.), 'restrict freedom of movement of citizens and permanent residents of Australia into and out of Australia or within and between the States and Territories' (with the qualification that the Federal Parliament might make 'special provisions with respect to residence in a Territory other than the Northern Territory, and the Australian Capital Territory');

(o) subject to section 51(vi), 'restrict freedom of expression concerning government, public policy, administration and politics';

(p) subject to section 51(vi.), 'restrict any person from engaging in peaceful assembly or from participating in the culture, religion or language of a cultural, religious or linguistic group to which they belong';

(q) subject to section 51(vi.), 'unreasonably withhold information'; or

(r) 'deny equality before the law to all of the citizens and to all of the permanent residents of Australia and in particular . . . unfairly discriminate between any of them on any grounds'.[91]

9.76 The Committee proposed that these alterations be accompanied by a section to preserve existing freedoms[92] and that all of the alterations recommended by it should not take effect 'for a period of two years after the referendum' approving them, so as to 'enable Federal and State Parliaments to make appropriate amendments to existing legislation.'[93]

9.77 Finally, the Committee proposed that the Federal and State Parliaments be empowered to enact legislation which would override all of the new limitations on the powers of the Commonwealth and the States, set out above, and also the proposed new provisions on jury trial and freedom or religion. This power of override, which the Committee referred to as a 'power to opt out', was modelled on section 33 of the

91 These proposals appear in several draft sections in the Committee's Report. See Rights Report, 101-2.
92 Proposed section 116B – Rights Report, 102.
93 Rights Report, 40.

Canadian Charter of Rights and Freedoms. Its exercise would require a Parliament to declare expressly that a law was to 'operate notwithstanding a provision included in' specified sections of the Constitution. A law expressed to be overriding would operate for no longer than three years, but could be re-enacted.

Submissions

9.78 The constitutional entrenchment of rights and freedoms attracted a large number of submissions. These reflected a variety of views and perceptions, with the arguments for and against entrenchment reflecting divergent philosophical and political standpoints.

9.79 Organisations and institutions supporting the constitutional guarantee of rights and freedoms included the Australian Federation of Business and Professional Women,[94] the Uniting Church of Australia,[95] Citizens for Democracy,[96] the Australian Institute of Multicultural Affairs,[97] the Queensland Council for Civil Liberties,[98] LAWASIA (Human Rights Sub-Committee Australian Support Group),[99] Public Interest Advocacy Centre,[100] the United Nations Association of Australia,[101] the Western Australian Society of Labor Lawyers[102] and the Republican Party of Australia.[103]

9.80 Organisations and institutions opposing the constitutional entrenchment of rights and freedoms included the Council for a Free Australia,[104] the Confederation of Australian Industry,[105] ACT Right to Life,[106] Conservative Action and Victory Fund,[107] the Country Women's Association[108] and the Returned Services League.[109]

9.81 Of the States, only the Queensland[110] and Tasmanian[111] Governments presented submissions. Both these opposed entrenching individual rights and freedoms in the Constitution, as did the Northern Territory Government.[112]

9.82 The Report of the Rights Committee generated great interest and many submissions, some very detailed, were received in response to it. A few of these dealt with every aspect of its recommendations, others with either a particular issue or with a limited range of issues. A majority of the submissions welcomed the Report as an important contribution to the debate on the constitutional protection of human rights in Australia. Also, a majority of the submissions supported the general principle of extending the constitutional guarantee of rights and freedoms. Each recommendation of the Rights Committee was the subject of considerable comment and analysis, with many

94 S2057, 23 March 1987.
95 S9203, 13 February 1987.
96 S3270, 16 October 1987.
97 S298, 25 September 1986.
98 S3363, 23 March 1988.
99 S956, 16 February 1987.
100 S3098, 24 November 1987.
101 S375, 12 December 1986.
102 S775, 19 December 1986.
103 S3382, 25 October 1986.
104 S3676, 4 November 1986.
105 S3662, 23 September 1986.
106 S452, 22 November 1986.
107 S157, 16 May 1986.
108 S3090, November 1987.
109 S3695, 14 November 1986.
110 S3069, 17 November 1987.
111 S1361, 30 March 1987.
112 S2493, 12 September 1987.

submissions offering alternative formulations of proposed provisions. Very few submissions found nothing to praise in the Report, though many remained steadfast in opposing the constitutional entrenchment of rights and freedoms.

9.83 Submissions opposing entrenchment often incorporated into their arguments their objections to the *Australian Bill of Rights Bill 1985.* A number of submissions assumed that the recommendations of the Rights Committee would follow the approach adopted in that Bill.[113] Many people emphasised, with reference to the controversies attending the *Australian Bill of Rights Bill 1985,* that any proposals affecting human rights should be put to referendum. In particular, it was argued that it was not the place of governments to confer rights upon individuals.[114] Others cautioned that if a proposal to introduce a general catalogue of rights and freedoms were to be submitted to referendum and were not to be approved, further legislative measures for the better protection of human rights might be jeopardised.[115] A common concern expressed in the submissions was that the constitutional entrenchment of a 'Bill of Rights' would somehow subordinate Australia's legal system to an alien international law.[116] It was said by some that Australia should not be bound by the dictates of the United Nations.[117]

9.84 In general, divisions of opinion on the desirability of constitutionally guaranteeing rights and freedoms turned on different perceptions of certain key issues. Foremost among these was the debate as to whether individual rights are protected adequately under existing arrangements, primarily in relation to the common law but also under the Constitution and in terms of Australia's tradition of parliamentary democracy.

9.85 On one side, a large number of individuals and organisations were adamant that the existing protections are inadequate. This was the theme connecting the submissions of, for example, those organisations representing minority ethnic groups[118] and those seeking to overcome the disadvantages suffered by women in our society.[119] This is not, however, to suggest that the argument was by any means exclusive to such organisations. Summing up this point of view, Citizens for Democracy submitted:[120]

> We believe that a Bill of Rights is essential to the well being of all Australian people. The people who have been deprived of rights are generally those most in need of them.

9.86 Other people were equally sure that no constitutional guarantees are needed by men and women who enjoy the traditional freedoms protected by the common law and our parliamentary system of government.[121] The Northern Territory Government submitted:[122]

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113 J Richards, S3067 16 November 1987; R Allison, L Strahan and R Cannon S724, 8 December 1986; WE Darley S576, 28 January 1987; J Budd S738, 15 December 1986; H Hall S678, 12 October 1986; A Owen S425, 23 October 1986; HJ Symons S598, 24 November 1986.

114 N Sharp S3457, 15 November 1986; M Roche S1393, 30 March 1987; P Martin S393, 17 October 1986; C Hamilton S1121, 9 March 1987.

115 PH Bailey S3473, 22 November 1986; B McMillan S252, 10 September 1986.

116 eg H Hall S678, 12 October 1986; J Bennett Australian Civil Liberties Union S158, 11 October 1986; FA Pearce S3210, 16 February 1987; R Plant S4240, 30 November 1986.

117 eg A Yerxa S1185, 31 October 1986.

118 eg Ethnic Affairs Commission of NSW S3362, 8 January 1987; Ethnic Communities' Council of Queensland Ltd S3278 8 February 1988; Italian Federation of Migrant Workers and their Families S1241 7 March 1987; Maltese Guild of Australia Human Rights Group S1035, 27 February 1987; G Nettheim and L Beacroft (Aboriginal Law Research Unit, NSW) S2532, 15 December 1986.

119 National Women's Consultative Council S2542, 11 December 1987; NSW Women's Advisory Council to the Premier S3207, 29 January 1988.

120 J Symonds S3392, 25 October 1986.

121 eg L Burton, S1333, 8 February 1987; AC Collier S340, 13 October 1986; P Orton S581, 18 November 1986; FA Pearce S3210, 16 February 1987.

122 S273, 11 September 1985.

> It is undeniable that Australians enjoy more of the 'fundamental rights and freedoms' than the vast majority of the world's population. This fortunate situation has, to date, been safeguarded by the maintenance of a strong and independent judiciary administering justice according to well-established principles of the common law and the application of statutes enacted by democratically elected Parliaments.

9.87 A standard rider to this argument was that experience in other countries, the United States and the USSR in particular, shows that constitutional entrenchment has not proved an effective means of protecting rights and freedoms in practice.[123]

9.88 Another subject of controversy was the appropriate relationship between legislatures and judiciaries in a democracy. What effect would the constitutional guarantee of rights have on that relationship, it was asked? While some people did not want to extend the political power of judges,[124] others sought to establish proper limits on the powers of governments.[125]

9.89 Opinion was also divided on what should be included in any catalogue of entrenched rights and freedoms. Wide-ranging suggestions were received in this respect, for example, that certain economic and social rights should be constitutionally guaranteed, including the right to work,[126] to an adequate standard of living,[127] and the right to education.[128] The right to life was also the subject of numerous submissions.[129]

9.90 Some submissions opposed entrenchment generally on the ground that it establishes an arbitrary hierarchy of rights which is imposed by one generation upon future generations.[130] It was said that the rights that are omitted from the Constitution will be looked down upon as somehow sub-standard.[131] More generally, while many submissions claimed that by constitutionally entrenching rights we merely establish the legal framework appropriate to a liberal democratic order, a few maintained that, on the contrary, entrenchment would be anti-liberal in spirit, constituting nothing less than an attempt by the state to impose its vision of the 'good society' upon its citizens.[132]

9.91 Other commonly expressed concerns in the submissions included the observation that all previous attempts to introduce a Bill of Rights in Australia had failed,[133] which led some to the conclusion that such Bills are only desired by a vocal minority[134] and that any further attempt to entrench rights and freedoms in the Constitution would prove divisive.[135] Others submitted that constitutional guarantees of rights and freedoms make for uncertainty in the law and promote litigation.[136] Those concerned about the politicisation of the judiciary argued that:

123 eg J Bennett Australian Civil Liberties Union, S158, 11 October 1986; AC Collier S340, 13 October 1986.
124 eg Associate Professor PJ Hanks S3625, 11 October 1986.
125 C McDonald S3428, 8 November 1986.
126 eg PC Bingham S1138, 5 March 1987; LAWASIA Human Rights Sub-Committee Australian Support Group S956, 16 February 1987.
127 eg Australian Pensioners' Federation S498, 11 November 1986.
128 J White S274, 24 September 1986.
129 eg Knights of the Southern Cross S464, 11 November 1986; Right to Life Australia S3432, 8 November 1986.
130 eg S Bastick, Right to Life Association of NSW, S3380, 25 October 1986, K Harrigan S267, 18 September 1986.
131 eg H Hall S678, 12 October 1986; J J Conway S3560, 3 December 1986.
132 eg Professor H J McCloskey S373, 11 October 1986.
133 Returned Services League S3695, 14 November 1986.
134 eg G Verhoeven S486, 17 November 1986.
135 eg P Orton S581, 18 November 1986.
136 eg Associate Professor PJ Hanks S3625, 11 October 1986; Tasmanian Government S1361, 30 March 1987; AC Collier S340, 13 October 1986.

> the best security – but not a guarantee – for respect for rights is an educated, informed, concerned community to which its legislators are not simply answerable but know themselves fully to be answerable.[137]

9.92 Some submissions maintained that the constitutional entrenchment of rights would infringe States' rights[138] and would, therefore, be contrary to the spirit of federalism. The vast majority of submissions, on the other hand, believed that this argument shifted the question away from the real issue of the adequacy or otherwise of existing civil rights protections under Australian law.

Constitutional entrenchment of rights and freedoms?

9.93 ***General.*** 'The question whether a Bill of Rights should be included in a constitution, and if so how it may effectively be entrenched,' a former Chief Justice of the Australian High Court has observed,[139] 'raise issues of political science and of law which are of fundamental importance.' The issues include not only what the functions and purpose of a constitution should be, but also the more fundamental issue of what is an appropriate and desirable relationship between institutions of government and the people subject to the exercise of governmental power.

9.94 Constitutions are primarily about the ordering of institutions of government and about the delimitation and allocation of governmental powers. Constitutional protection of individual rights and freedoms denotes a constitutional regime under which certain rights and freedoms are assured to individuals and secured against impairment by acts of government, including by laws to regulate the conduct of individuals in their dealings with one another, except where that impairment can be justified. The rights and freedoms which are so guaranteed, and likewise the grounds on which those rights and freedoms may be abridged, vary from constitution to constitution. But to the extent that these guarantees prohibit the exercise of the coercive powers of the state to prevent people doing what they would like to do, or to require them to do what they do not or may not want to do, they have this much in common: they proceed from the premise that freedom from coercion is prima facie desirable and that those who have authority to coerce bear the onus of justifying any constraints they wish to impose upon a freedom.

9.95 Put another way, there is an assumption that individuals are capable of deciding for themselves how they want to live and what is good for them, that maximum autonomy should be allowed to all individuals to choose how they live and that each individual has a moral right to be treated with equal respect and concern. The primary purpose of constitutional guarantees of individual rights and freedoms is to provide institutional safeguards of the capacity of individuals to select and pursue courses of action of their own choosing.

9.96 The question with which we are here concerned, namely whether the Australian Federal Constitution should be altered to incorporate further guarantees of rights and freedoms, cannot and will not be resolved by appeals to general and abstract theories about the virtues and vices of constitutional entrenchment of rights and freedom. As recent debate on the abortive Bill for an Australian Bill of Rights and the Victorian Parliamentary Committee's consideration of a Bill of Rights for Victoria shows, public debate about the desirability of constitutional entrenchment of rights and freedoms is more likely to turn on:

137 Professor H J McCloskey S373, 11 October 1986.
138 Queensland Government S3069, 17 November 1987; Tasmanian Government S1361, 30 March 1987; Returned Services League S3695, 14 November 1986.
139 Sir Harry Gibbs, 'The Constitutional Protection of Human Rights' (1982) 9 *Monash University Law Review* 1, 3.

(a) whether there is perceived to be any need for such entrenchment;

(b) whether it can be shown that constitutional guarantees will produce tangible benefits;

(c) what rights and freedoms should be selected for constitutional entrenchment;

(d) in what way the chosen rights and freedoms should be entrenched; and

(e) whether entrenchment would alter the present distribution of powers between the courts and the parliaments and, if so, whether it would do so in an acceptable way.

9.97 In the ensuing pages we summarise and comment upon the main arguments which are advanced for and against constitutional entrenchment of rights and guarantees, and explain generally why we have decided to recommend that the Federal Constitution be altered to incorporate a new Chapter entitled 'Rights and Freedoms'. Before doing this, there are, however, some general observations which should be made about our approach to the matter.

9.98 First, we have taken the view that if the electors were to agree that certain rights and freedoms are sufficiently important to merit constitutional protection, they are unlikely to accept that the protective provisions should be capable of alteration otherwise than in accordance with the present procedures which apply to alterations of other provisions of the Constitution.

9.99 Secondly, we have also considered it unrealistic to suppose that electors would wish to have rights and freedoms guaranteed under the Constitution, but then denied the facility to seek enforcement of the constitutional guarantees to the same extent as they can presently seek enforcement of other provisions of the Constitution. In other words, we have proceeded on the basis that constitutional entrenchment of further rights and freedoms would attract the processes of judicial review evolved since Federation. We do, however, acknowledge that inclusion of further guarantees of rights and freedoms in the Constitution could lead to, and may be even require, some refashioning of the general principles which courts apply in the exercise of their constitutional review function.

9.100 ***Are constitutional guarantees needed?*** A commonly expressed view is that Australia is already a free and democratic society in which the kinds of rights and freedoms which are guaranteed under the constitutions of many other countries – a number of them less free and democratic in practice than Australia – are already well recognised and protected under the ordinary law of the land. Alteration of the Constitution to provide further guarantees of rights and freedoms would, it is argued, achieve little that has not already been achieved.

9.101 An associated argument, which was made in a number of submissions to the Rights Committee and also to the Senate Standing Committee on Constitutional and Legal Affairs in the course of its inquiry into the desirability of an Australian Bill of Rights, is summed up in the often quoted remark, attributed to Sir Harry Gibbs, that 'If society is tolerant and rational, it does not need a Bill of Rights. If it is not, no Bill of Rights will preserve it.'[140] We agree with the Senate Committee that 'this neat aphorism is not in itself sufficient to deny the desirability' of constitutional protection of rights and freedoms.[141]

140 *Sydney Morning Herald*, 12 December 1984. See also 'The Spirit of Liberty' in I Dilliard (ed), *Spirit of Liberty: Papers and Addresses of Learned Hand* (1952) 181.

141 *A Bill of Rights for Australia?* (1985) para 1.4.

9.102 While we agree also that Australians owe many of the freedoms they currently enjoy to the common law, we think that the faith which many people appear to have in the common law as a safeguard of their freedoms is misplaced. The common law affords some freedoms, but much of it is inhibitory. The common law is also subordinate to Acts of parliaments, many of which make inroads upon it.

9.103 One of the most important functions of constitutional guarantees of rights and freedoms is to place limits on the kinds of laws the legislators can make. The mere presence of those guarantees in the Constitution must make legislators and those responsible for proposing legislation more sensitive to issues about individual rights and freedoms than they might otherwise be. The protection afforded by such guarantees is certainly far greater than that which can be provided under a voluntary system under which Bills for legislation are regularly scrutinised by a parliamentary committee charged with deciding whether the proposals unduly trespass on rights and freedoms.

9.104 Constitutional guarantees of rights and freedoms operate not merely to constrain the exercise of legislative powers. They operate also on the common law. They may require it to be revised in some particulars, and they will often provide a foothold for its development in ways that would be less likely to occur in the absence of such guarantees. The existence of those guarantees also operates as a significant check on the manner in which the increasing number of statutory discretions reposed in government officials are exercised. Individuals affected by the exercise of those powers may, because of those guarantees, have much greater prospects of obtaining redress for legitimate grievances than they would under existing law which restricts the grounds on which remedy may be sought from a court of law. Legislation would have to be read consistently with the guarantees.

9.105 Constitutional guarantees of rights and freedoms also perform an educative function. They are more readily understood by most people than other parts of written constitutions and are provisions of a kind that they can readily recognise as being relevant to their day to day lives. If their purpose is understood, their incorporation in the constituent instrument of government serves, Harold Laski wrote, 'to set the people on their guard.' A Bill of Rights 'acts as a rallying point in the State for all who care deeply for the ideals of freedom.' [142]

9.106 ***What rights and freedoms merit constitutional protection?*** There are bound to be considerable differences of opinion about this question. The question is also one which cannot be completely divorced from that of who is to enforce the guaranteed rights and freedoms. If the guarantees are to be enforced by the courts, some may take the view that although a particular right or freedom is an important one, it is not suited, for one reason or another, to judicial enforcement.

9.107 Concerns which have been commonly expressed are that constitutional entrenchment of certain rights and freedoms may inhibit the legal recognition and protection of other rights and freedoms which are not entrenched, and may encourage the view that the entrenched rights and freedoms are, somehow, of greater importance than unentrenched rights and freedoms and must therefore take priority over them.[143] These concerns may be met by a constitutional provision in terms such as those of the Ninth Amendment to the United States Constitution and section 26 of the *Canadian Charter of Rights and Freedoms* which make it clear that unentrenched rights and freedoms are not affected.[144]

142 *Liberty and the Modern State* (3rd edn, 1948) 75.
143 See para 9.90.
144 See proposed section 124D in Appendix K.

9.108 A further concern is that what one generation considers to be sufficiently important to elevate to the status of constitutional guarantees may not be regarded in the same light by subsequent generations who may have different views about what rights and freedoms are most deserving of constitutional protection.[145] In this connection, attention is sometimes drawn to the fact that the sorts of rights and freedoms which have been guaranteed in constitutions have sometimes reflected reactions to recent historical events of some moment. The right to bear arms guaranteed in the United States Constitution is a frequently cited example.

9.109 Any constitution will, to a degree, tie the hands of future generations. The extent to which it does will depend in part on the way in which its provisions are expressed and are interpreted, and in part on the ease with which it may be amended. Rights and freedoms which are guaranteed in fairly general terms may be adapted, by judicial interpretation, according to changes in community values and needs. Indeed, it can be argued that open-textured formulations are to be preferred, particularly if the processes prescribed for formal amendment of the Constitution make formal change difficult to achieve.

9.110 In considering what rights and freedoms deserve constitutional protection, attention needs to be given to international obligations in relation to human rights. Certainly it is important to ensure that provisions of the Constitution do not conflict with those obligations or make their fulfilment more difficult. And if, under international law, the nation has submitted itself to the jurisdiction of an international tribunal in respect of alleged violations of the international obligations, and has permitted individuals to petition that tribunal, there would be something to be said for constitutional entrenchment of rights and freedoms in terms similar to those of the relevant international agreement. This is one of the reasons why those moving for a Bill of Rights for the United Kingdom have tended to prefer the expedient of incorporating the European Convention on Human Rights and Fundamental Freedoms into domestic law.

9.111 But Australia is not in this situation, and its international obligations certainly do not require it to have a constitution which incorporates, say, the International Covenant on Civil and Political Rights. Constitutional guarantees may be framed with regard to the Covenant, but they can be framed in terms which are adapted to the country's legal and constitutional traditions. That is less easy to accomplish by ordinary federal legislation enacted in reliance on the external affairs power. Legislation in reliance on that power would need to follow the terms of the Covenant fairly closely. The Parliament's power to enact the legislation would also be subject to implied governmental immunities.[146]

9.112 An important factor which cannot be ignored in assessing what rights and freedoms are appropriate for inclusion in the Australian Federal Constitution is that the question of whether the Constitution should be altered to include further guarantees of rights and freedoms will be decided ultimately by the electors voting at referendum. The rights and freedoms selected for entrenchment in the Constitution must, therefore, be ones which are recognised by a significant majority of Australians as being of enduring value, of importance to their well-being and worthy of constitutional protection.

9.113 Our reasons for selecting certain rights and freedoms, but not others, as appropriate for constitutional entrenchment are set out later in this Chapter.[147]

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145 See Associate Professor PJ Hanks S3625, 11 October 1986; Professor HJ McCloskey S373, 11 October 1986.

146 Doubts were expressed about the constitutionality of provisions in the *Australian Bill of Rights Bill 1985* (Clause 8, Articles 3(1) and 4(2)) which, it was suggested, deviated significantly from the ICCPR which it was meant to implement – 21 *Australian Law News,* March 1986, 10.

147 para 9.147-9.155.

9.114 ***The costs?*** A further worry about the introduction of constitutional guarantees of rights and freedoms is that it would make for much more uncertainty about the law, would increase the volume of litigation before the courts and thus add to the overall costs of administering the legal system.[148] There can be little doubt that the introduction, at this stage of Australia's legal development, of more comprehensive guarantees of rights and freedoms would create doubts about the validity and permissible sphere of operation of many existing laws, doubts which would not be resolved except by litigation before the courts. Insofar as all courts within the federation would be bound to have regard to the constitutional guarantees in deciding cases before them, there would be a real possibility of different courts taking different views about what the guarantees meant and required in particular instances, thereby adding to the uncertainty. But ultimately it would be for the High Court to decide what the guarantees meant and required.

9.115 The volume of cases raising constitutional issues which the High Court would be asked to decide would probably increase, but this is not to say that the additional case-load could not be managed. The Parliament may regulate appeals to the High Court from lower courts, for example, by requiring special leave to appeal be sought and obtained from the Court. In matters coming within the original jurisdiction of the High Court, the cause (or part of it) may be remitted to a lower court for determination.

9.116 There is undoubtedly force in the argument that 'the effect which the words of a bill of rights will ultimately have is completely unpredictable' and that '[t]he history of the application of bills of rights shows that it is difficult to prophesy the manner in which any particular provision will be applied.'[149] The unpredictability of its effects will be greater the more open-textured the provisions are. Canadian experience with the *Charter of Rights and Freedoms* also suggests that, at least for a period of time, the volume of constitutional litigation would increase, though it needs be added that some of this litigation would occur in any event and would merely present a constitutional dimension which it would not otherwise have. Many criminal cases would fall into this category. After the initial settling-in period, the volume of litigation raising the new constitutional issues could be expected to decline.

9.117 The degree of uncertainty about the effect new constitutional guarantees would have on existing laws and practices would, we think, be significantly reduced if the expression of them conformed fairly closely with those of guarantees in the constitutions of other countries whose legal systems and constitutional traditions are similar to Australia's. This is one of the reasons why we have decided to recommend that the additional rights and freedoms to be underwritten by the Australian Federal Constitution should be modelled on the *Canadian Charter of Rights and Freedoms.* While decisions of Canadian courts on the *Charter* are not, of course, binding on Australian courts, Canadian precedents on the *Charter* would, we imagine, be looked to for guidance on how the corresponding Australian constitutional provisions might be interpreted, and would also be regarded by Australian courts as relevant.

9.118 We also believe that some of the unsettling effects of introducing new constitutional guarantees could be avoided by postponement of the commencement of the new provisions to a date subsequent to the relevant alteration of the Constitution. We accordingly *recommend* that the proposed alteration be expressed not to commence to operate until three years from the date of the royal assent. We would expect that, during that time, governments would take the opportunity to review laws and practices which

148 See para 9.91.
149 Sir Harry Gibbs, op cit, 6 and 7.

might possibly be held to violate the new constitutional standards and would take measures to revise them. That process of review could, of course, be an on-going one and could include internal parliamentary scrutiny of proposed legislation.

9.119 We have not, however, thought it appropriate to include in the Constitution a provision like that contained in clause 14 of the *Australian Bill of Rights Bill 1985* which would allow a court to make declarations the effect of which would be to suspend the operation of any constitutional guarantee for a certain period of time.[150]

9.120 We have concluded that, on balance, the benefits which would accrue from constitutional entrenchment of the rights and freedoms, in the way we suggest in this Chapter, would far outweigh their social costs.

9.121 ***Guarantees of rights and freedoms and democracy.*** Some people object to constitutional entrenchment of rights and freedoms of individuals on the ground it runs counter to what they understand a democratic system of government to be about. A constitution which guarantees rights and freedoms and does so in a way which places limits on the powers of democratically elected and representative legislatures does, of course, diminish the power of the majority to decide what laws and public policies are required or justified in the collective interest.

9.122 On the other hand, there are certain individual rights and freedoms without which a representative democratic system cannot really exist or be maintained, for example the right to vote in free and regular elections, and freedom of speech, of assembly and association.[151] So there is no necessary conflict between constitutional protection of rights and freedoms and democracy.

9.123 But those who defend constitutional guarantees of rights and freedoms of individuals often do so on the ground that there are some things which even democratically elected governments should not be permitted to do in the name of the majority or the common good. This point of view was summed up by Professor HLA Hart in his lectures on *Law, Liberty and Morality*[152] 'It seems fatally easy' he wrote,

> to believe that loyalty to democratic principles entails acceptance of what may be termed moral populism: the view that the majority have a moral right to dictate how all should live. This is a misunderstanding of democracy which still menaces individual liberty . . . .
>
> The central mistake is a failure to distinguish the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with that power is beyond criticism and must never be resisted. No one can be a democrat who does not accept the first of these, but no democrat need accept the second.

9.124 Professor Hart went on to note that John Stuart Mill and others 'have combined a belief in the democracy as the best – or least harmful – form of rule with the passionate conviction that there are many things which even a democratic government may not do'.

9.125 In our view, a constitution cannot be said to be anti-democratic merely because it limits the powers of popularly elected, representative legislatures. We doubt whether it is even true to regard the concept of democracy as being concerned only with rule by elected majorities. As the present Chief Justice of Australia recently observed:[153]

150 See para 9.99 above.
151 See Chapter 4, para 4.8-4.15; also J Ely, *Democracy and Distrust* (1980).
152 (1963) 79.
153 'Future Directions in Australian Law' (1988) 13 *Monash University Law Review* 149, 163.

> Our evolving concept of democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will. It embraces a notion of responsible government which respects fundamental rights and dignity of the individual and calls for the observance of procedural fairness in matters affecting the individual. The proper function of the courts is to protect and safeguard this vision of the parliamentary process.

9.126 ***Constitutional guarantees and judicial review.*** We have previously stated[154] that we have accepted that, were the Constitution to be altered to guarantee further rights and freedoms, it would have to be on the basis that the meaning, application and enforcement of those guarantees would devolve on the courts of law.

9.127 Many of those who oppose, or have grave doubts about the wisdom of, entrenching rights and freedoms in the Constitution do so because they question whether the courts should perform this role.[155]

9.128 Some maintain that the courts will be transformed, arguing that in the past, they have sought to deal with controversial matters by what Sir Owen Dixon described as 'a strict and complete legalism'.[156] By conferring rights in abstract terms and leaving it to the High Court to determine whether those rights have been infringed, the Constitution would generate a more activist or interventionist role for the courts. They would be brought more into the political arena, potentially as an unelected third Chamber.[157] The High Court of Australia would thus find itself embroiled in political controversy to an extent previously unknown here. By way of warning, NJ Perry writes, 'in America the status of constitutional human rights is almost wholly a function, not of constitutional interpretation, but of constitutional policymaking by the Supreme Court.'[158] Although that comment may be thought an extreme formulation of the case, it does point clearly to the possible consequences of entrenching rights in the Constitution.

9.129 The argument is that, although the desire to protect individual rights is laudable in its way, it has unfortunate consequences. In particular, judicial review has undesirable implications for democracy. Judges are not elected, nor are they accountable to the electors in any strict sense. Why, it is asked, should judges be the ultimate arbiters of constitutional propriety? Some commentators point out that, with the constitutional entrenchment of rights, judges must give consideration to issues which they have been trained to ignore. Some judges doubt whether this new role is right and proper. The Chief Justice of the High Court, Sir Anthony Mason, has commented that judges are concerned that with entrenchment, they will be plunged into 'deciding questions better left for political rather than judicial determination.'[159] This concern was underlined by the Chief Justice of Victoria, Sir John Young, in evidence before the Victorian Parliamentary Committee on Legal and Constitutional Affairs.[160] Sir John said:

> In the case of vague, general rights, how else could one decide [their meaning] except according to one's own prejudice. I use 'prejudice' not in a pejorative sense, but in the sense of according to one's own lights. Freedom of expression is an example. One judge may think that the laws of defamation are tiresome and old fashioned and that the right of freedom of expression ought to override them. Another judge might think that personal

154 See para 9.114.

155 See para 9.91

156 Sir Owen Dixon quoted in Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation', (1986) 16 *Federal Law Review* 1, 4.

157 J McMillan, G Evans and H Storey, *Australia's Constitution* (1983) 335. We should not underestimate the role the High Court has played in politically controversial matters since Federation. See B Galligan, *The Politics of The High Court* (1987).

158 MJ Perry, *The Constitution, The Courts and Human Rights* (1982) 2.

159 Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation', (1986) 16 *Federal Law Review* 1, 12.

160 *The Desirability or Otherwise of Legislation Defining and Protecting Human Rights* (1987), 86-7.

reputation is a priceless commodity which ought to be protected by the law and he might say that he cannot possibly see that the right of freedom of expression could possibly be intended to overcome the laws of defamation. If you take that decision or individual decisions to an appellate court of three judges you may get one or other result, or somewhere in between.

9.130 There is a fear too that, as judges are drawn more into the arena of political controversy, respect for their decisions will diminish.

9.131 The case against the judicial forum as a locus for the protection of the rights of individuals and minorities is made on various grounds. It is said that the judicial method is inadequate and inappropriate for this purpose:

(a) The judiciary are not well equipped in terms of background and experience for this new function since as a group they are unrepresentative of the people (having been selected primarily from those persons with professional legal experience, of middle-to-old age, conservative and male).[161]

(b) The courts in coming to decisions take explicit account of only a limited range of facts and values, the resources available to them being limited by practice and procedure. A court, unlike a legislative body, is not able to entertain arguments from all the parties and groups which may have a special interest in the outcome.[162] Court processes also do not lend themselves to discovery of social facts which may be highly relevant in determining, for example, whether laws or practices which prima facie infringe a guaranteed right or freedom are justified in a free and democratic society.[163]

(c) Because of their unfamiliarity with administering comprehensive guarantees of rights and freedoms, and their long standing acceptance that, subject to existing limitations on the legislative powers of Australian Parliaments, courts should defer to the will of Parliaments and not impugn their choice of means, Australian judges may be reluctant to disagree with parliamentary assessments about what laws are consistent with constitutional standards.[164]

(d) The substitution of law for politics, implicit in the process of entrenchment, is an impossible goal.

9.132 There emerges, therefore, the problem of the legitimacy of judicial review. At its broadest, the argument is that the attempt to transfer controversial issues relating to rights from the sphere of politics to the more benign realm of law is mistaken in principle. As Professor JAG Griffith wrote in 1979, 'law is not and cannot be a substitute for politics'. In his view, such devices as the constitutional entrenchment of rights 'merely pass political decisions out of the hands of politicians and into the hands of judges or other persons. To require a Supreme Court to make certain kinds of political decisions does not make those decisions any less political'.[165]

9.133 Griffith writes from a radical standpoint. However, the critique of judicial review is by no means the exclusive property of the Left. Liberal Party politician, Mr JM Spender QC, MP, speaking at a conference on Human Rights in 1986, noted 'the immense

161 AF Bayefsky, 'Parliamentary Sovereignty and Human Rights in Canada: the Promise of the Canadian Charter of Rights and Freedoms', (1983) 31 *Political Studies* 239, 242.

162 E Campbell, 'Pros and Cons of Bills of Rights in Australia', (1970) *Justice* no 3, 1, 5.

163 See Chapter 6 (para 6.75-6.94) and Appendix M, 'Fact Finding in Constitutional Cases'.

164 Opponents of entrenched rights in the United Kingdom have suggested that English judges are too executive and Establishment minded to be trusted with a Bill of Rights. For a discussion of this assertion, see M Zander, *A Bill of Rights?* (3rd edn, 1985) 52-7.

165 JAG Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review*, 1, 16.

difficulties that can be encountered when you pass laws dealing with rights which are so vague in content that the interpreters and the creators of the rights become the courts'. In his view:

> If you want the courts to be creators of rights in a very general sense, that is one thing, but that is very different from our system, and I'm not at all sure that I want that to happen. I believe that the creators of rights should be Parliaments, clearly expressing their intent in statutes which are as precisely drawn as possible.[166]

9.134 The point is not to deny legitimacy to the judiciary, but to decide upon the appropriate judicial functions in the protection of human rights. Even their sternest critics sometimes admit that the courts present a valid forum for reasoned debate on matters of principle, very different in nature to that offered by Parliament. Amongst other things, the courts provide a forum in which the circumstances of individual cases are of paramount concern. This does not dispel the distrust of the judicial review function held by many of those who are in broad sympathy with the objects of entrenched rights and freedoms, but who, nevertheless, are opposed to the idea of entrenchment.

9.135 What case then is there to support the legitimacy of judicial review as an integral part of constitutional guarantees?

9.136 We have already stated that fundamental to liberal democracy is the attempt to reconcile the principle of majority rule with a concern for individual rights. Democracy in this respect is designed not only to reflect the will of the majority, but also to protect the rights of minorities and to ensure that there are adequate checks and balances against the misuse of official power.[167] It can be argued that an independent judiciary determined to interpret the Constitution generously, avoiding 'the austerity of tabulated legalism', is essential to this scheme.[168] The following points can be made in support of the judiciary's role in enforcing constitutionally entrenched rights:

(a) The Australian judiciary has the confidence and trust of the people and it will be seen popularly as the appropriate body to act as a human rights 'watchdog'. Historically, the High Court has acted in an independent and responsible manner. There is no reason to suppose that in the new circumstances, it will abandon this approach or that it will compromise its impartiality in any way.

(b) The judicial process itself has many advantages in relation to the function of a human rights 'watchdog'. For example, the publicity which will inevitably accompany litigation involving human rights will ensure that the moral and educative purpose of entrenching rights in the Constitution will be realised. The doctrine of binding precedent will further ensure that a declaration made in one case will benefit many other people whose cases will not need to be litigated.[169]

(c) It is an effective system for the protection of rights because politicians and administrators will be restrained from formulating policies and laws which they know will be contested in the courts.

(d) While it is accepted that the new role envisaged for the courts involves a change in our constitutional arrangements, the extent of the change involved needs to be kept in perspective. To claim that judges, in enforcing constitutionally entrenched rights, will be performing a function essentially

166 John Spender 'Politics, Power and a Bill of Rights', L Spender (ed) *Human Rights: the Australian Debate* (1987) 246, 251-2.
167 J McMillan et al, op cit, 335.
168 *A Bill of Rights for New Zealand*, 44-5.
169 J McMillan et al, op cit, 333.

different from that which they now perform is to overstate the case. According to the Victorian Parliament's Committee on Legal and Constitutional Affairs, in Australia generally 'we are comparatively used to judicial review being used as a means to keep our legislatures and executives within the limits of their constitutional powers'. In its view, the use of judicial review to prevent these bodies from 'adversely affecting human rights would probably not involve the same degree of intellectual trauma as might be experienced in a legal system where Parliament enjoys unbounded sovereignty, such as that of the United Kingdom'.[170] Indeed, since Federation, the High Court has often engaged in judicial review of politically controversial matters, for example, in its interpretation and application of section 92 of the Constitution. Furthermore, in interpreting legislation and applying the common law, judges generally do adjudicate questions of civil liberties.[171] To some extent, judges already make evaluative choices and influence the shape and content of the laws.[172] With the constitutional entrenchment of rights, they would have more opportunity to do so, but there is no suggestion that judges will approach the task in an irresponsible or naive way.

(e) In Australia, the power of judicial review will only be granted to the judges if the people so decide at referendum. Any argument which holds that judicial review is undemocratic would be severely weakened if the Constitution is amended. It could be argued, indeed, that the courts would only be enforcing the will of the people.

(f) Similarly, if the argument that the protection of individual and minority rights is a fundamental aspect of liberal democracy is accepted, then the case for the legitimacy of judicial review is further strengthened. This is especially so if it also agreed that the judiciary is an appropriate forum for the adjudication of hard cases involving conflicts between individual rights and social policies or collective interests.

(g) The judiciary will often be in a better position to decide these hard cases in a principled and rational way than a legislature. A judge of an independent judiciary is insulated from the demands of a political majority whose interest the asserted right would affect and so is in a better position to make an impartial evaluation of the arguments.[173] 'Because they are not compelled by electoral self-preservation simply to reflect existing community moral values and prejudices, judges are free to move forward to a more enlightened viewpoint on a controversial subject. They can stake out a position that the people may well accept once they see it spelled out, but that an electorally accountable body would have been loath to risk proposing in the face of current attitudes.'[174] Furthermore, howsoever it decides, a court is expected to offer reasoned justification for its decision.

(h) When courts come to decide issues arising under constitutional guarantees of rights and freedoms, they are concerned primarily with the circumstances of individual cases. Parliaments, in contrast, are concerned with the making of general rules, and in formulating them may not always appreciate how

170 *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights,* 92.

171 J McMillan et al, op cit, 335.

172 Consider, for example, the manner in which courts have, in recent times, re-shaped the principles according to which they review administrative action, and, in particular, extended the application and scope of the principles of natural justice.

173 R Dworkin, *Taking Rights Seriously,* (1977) 85.

174 PC Weiler, 'Rights and Judges in a Democracy: A New Canadian Version' (1984) 18 *University of Michigan Journal of Law Reform* 51, 71-2.

they will work out in practice. Parliaments may, by inadvertence rather than design, enact legislation which trespasses unduly on individual rights and freedoms. Judicial review of parliamentary legislation in the context of concrete cases will often prompt parliaments to revise their legislation in the light of the judicial findings.

(i) Finally, the ability of parliaments to perform a 'watchdog' function with respect to legislation and administrative action is far more restricted in fact than the theories of parliamentary sovereignty imply. Problems of time, complexity and the domination of legislatures by executives generally are among the factors which mitigate against a parliament closely monitoring such things.

9.137 Were the courts to be required to undertake the function of interpreting and enforcing new constitutional guarantees, some modifications in their approach to the judicial review function might well be considered desirable. For example, a more liberal approach to appearance of persons as *amici curiae* might be thought desirable;[175] likewise, changes in rules regarding what facts may be judicially noticed and established.[176]

A NEW CHAPTER FOR THE CONSTITUTION

Recommendations

9.138 We *recommend* that the Constitution be altered by inserting Chapter VIA – Rights and Freedoms, as set out in *Appendix K*.

9.139 The effect of the proposed new Chapter would be:

(a) to guarantee specified rights and freedoms against acts done by the arms of government of the Commonwealth, States and Territories, and by persons and bodies performing public functions, powers or duties, but subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society;

(b) to confer on persons whose guaranteed rights and freedoms have been infringed a right to apply to a court of competent jurisdiction for such remedy as the court considers just and appropriate in the circumstances; and

(c) to ensure that guaranteed rights and freedoms do not abrogate or restrict any other rights and freedoms that persons may have.

9.140 We further *recommend* that Chapter VIA come into operation at the expiration of three years after it receives the Royal assent.

Forms of guarantees

9.141 The Rights Committee recommended a series of alterations of the Constitution to place further limitations on the powers of governments, federal and State. For the most part the recommended alterations were provisions commencing with the words 'The Commonwealth or a State shall not . . .'.[177] The Committee did not favour limitation by way of enunciation of rights and freedoms. Its reasons were:

175 See Australian Law Reform Commission, *Standing in Public Interest Litigation* (1985) 153-5, 159-61.
176 See Appendix M, 'Fact Finding in Constitutional Cases'.
177 See proposed sections 80, 80A, 116, 116A, 117: Rights Report, 101-2.

(a) '[T]he concept of a "Bill of Rights" in the European or U.S. sense has never formed part of the Australian constitutional framework'[178] and 'does not readily fit within the Australian Constitutional tradition . . .'.[179]

(b) '[T]he people of Australia are not granted any "rights" by any government or by any instrument, and they are not dependent upon a grant of permission or "the right" to conduct their ordinary affairs.' Rather 'the people are free to do as they wish' but 'have in turn agreed that certain powers should be conferred upon governmental institutions of various kinds, for the purpose of regulating community life. Those powers so conferred have included within defined limits, the power to restrict the freedoms which the people may otherwise exercise'.[180]

(c) '[T]he concept of restraints on governmental power to intrude on the rights of individuals is a familiar part of our Constitution . . .'[181]

9.142 It seems to us that, legally, there is no difference between a constitutional provision which prohibits the use of governmental powers in a certain way and one which positively guarantees a right or freedom against impairment by acts of government. Legally, both types of provision place limits on governmental powers. Positive guarantees of rights and freedoms do not imply that the rights and freedoms guaranteed are, somehow, the gift of government. They, as much as prohibitions on the exercise of governmental power, signify rather that the authors of the guarantees – in Australia, the electors – have resolved that the powers of government be limited so as to protect individual interests considered worthy of constitutional protection.

9.143 We are not persuaded by the argument that prohibitions on the exercise of governmental power fit more readily within Australian constitutional tradition than do positively expressed guarantees of rights and freedoms. While it is true that the Framers of the Constitution favoured the language of prohibition, the fact remains that the issues of substance which are raised by the Committee's recommendation are the same as those raised by our own. What the Committee has proposed is no less a constitutional Bill of Rights than the new Chapter in the Constitution we have proposed.

What is to be guaranteed?

9.144 ***Recommended guarantees.*** In discussing the general question of whether the Constitution should provide for more ample protection of individual rights and freedoms, we referred to the problems which attend identification of the rights and freedoms which merit that protection. We also alluded to the considerations we have taken into account in determining what rights and freedoms are appropriate subjects of constitutional guarantees.[182]

9.145 The new Chapter in the Constitution which we recommend would guarantee:[183]

(a) freedom of conscience and religion;

(b) freedom of thought, belief and opinion; and of expression;

(c) freedom of peaceful assembly and of association;

(d) the right of every Australian citizen to enter, remain in and leave Australia;

178 id, 30.
179 id, 32.
180 id, 30.
181 id, 32.
182 See para 9.147-9.154.
183 See Appendix K, below.

(e) freedom of movement and residence in Australia for everyone lawfully within Australia;

(f) freedom from discrimination on the ground of race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief;

(g) the right not to be subjected to cruel, degrading or inhuman treatment or punishment, or to medical or scientific experimentation without the subject's consent;

(h) the right to be secure against unreasonable search or seizure;

(i) the right not to be arbitrarily arrested or detained, and certain other rights when a person has been arrested or detained;

(j) the rights of a person arrested for an offence and the rights of a person charged with an offence; and

(k) that no one shall be liable to be convicted of an offence on account of any act or omission which did not constitute an offence when it occurred.

9.146 We comment on each of these guarantees later in this Chapter. Here we are concerned only with the principles and considerations which have informed our selection of the rights and freedoms which we have nominated in our proposed new Chapter of the Constitution. We also explain why we do not recommend inclusion of some other rights and freedoms in the list of constitutional guarantees.

9.147 ***Criteria for selection.*** The rights and freedoms we have nominated as appropriate subjects of constitutional guarantees are, in the main, rights and freedoms recognised in the International Covenant on Civil and Political Rights, though, for reasons we explain presently, not all of the rights and freedoms declared in the Covenant have been included. We have not always adopted the precise wording of the Covenant. The recommended guarantees of freedoms have, for example, been expressed with greater brevity, in the style of the *Canadian Charter of Rights and Freedoms.*

9.148 It seemed to us that, at the very least, the rights and freedoms to be constitutionally protected should extend to those which are commonly regarded as fundamental to the maintenance of a democratic system of government and which the Australian legal system already supports, for example, freedom of expression, association and peaceful assembly. We also considered it desirable that the guarantees should establish minimum standards to be applied in the criminal justice system.

9.149 The two types of constitutional guarantee are not unrelated. Justice Black of the United States Supreme Court once observed, that, in erecting 'a Constitutional shelter for the people's liberties of religion, speech, press and assembly', the First Amendment to the United States Constitution 'reflects the faith that a good society is not static but advancing, and that the fullest possible interchange of ideas and beliefs is essential to the attainment of that goal.' But, as the proponents of the First Amendment recognised,

> history teaches that attempted exercises of the freedoms of religion, speech, press, and assembly have been the commonest occasions for oppression and persecution. Inevitably such persecutions have involved secret arrests, unlawful detentions, forced confessions, secret trials and arbitrary punishments under oppressive laws.[184]

9.150 It was not surprising, therefore, that the proponents of the First Amendment also insisted on additional constitutional guarantees which were 'designed to protect all individuals against arbitrary punishment by definite procedural provisions guaranteeing fair public trials by juries' and to ensure that 'no person could be punished except for a

184 *Feldman v United States,* 322 US 487, 501-2 (1944).

violation of definite and validly enacted laws of the land, and after a trial conducted in accordance with the specific procedural safeguards written in the Bill of Rights'. These were contained in the Fifth, Sixth and Eighth Amendments.

9.151 We have deliberately omitted from the recommended guarantees rights and freedoms which, in our judgment, are likely to be controversial or whose aptness for constitutional protection is a matter on which there are likely to be sharp differences of opinion. It is largely for these reasons that we have not included an open-ended guarantee of a right to life[185] or a right to hold and freely dispose of property,[186] a right to freedom of contract,[187] a general right to privacy[188] or family rights.[189] In our view, the Constitution should not be regarded as a vehicle for entrenchment of values or ideologies on which there are still legitimate differences of opinion.[190]

9.152 We have been concerned also that rights and freedoms which are constitutionally guaranteed should be ones which are apt for judicial enforcement. Courts in Australia are accustomed to interpreting and applying of negative limitations on governmental power. They also have power to enforce performance of duties which have been imposed on governmental officers and agencies by legislation. But widely expressed statutory duties have generally been held not to be susceptible to judicial enforcement.[191] Broadly expressed social, economic and cultural rights of the kind expressed in the International Covenant on Economic, Social and Cultural Rights, such as 'the right to work', the right 'to the enjoyment of just and favourable conditions of work', the right 'to an adequate standard of living', 'to the enjoyment of the highest attainable standard of physical and mental health' and 'to an education', are clearly not rights which are readily susceptible to judicial enforcement against governments.[192] The correlative duties they impose on governments are of a kind quite different from the specific duties which would be imposed by constitutional provisions which, for example, give to a person who is arrested or detained the right to be informed of the reason and to be informed of the right to consult and instruct a lawyer without delay, or the right of a person who arrested for an offence to be informed of the right not to make a statement. Courts are well able to determine whether obligations of this type have been performed and to enforce them by judicial sanctions. In contrast, constitutional guarantees of general economic and social rights, such as those mentioned above, would impose duties on governments in relation to indeterminate classes of individuals and on occasions which could not be precisely

185 cf ICCPR Article 6, section 1.

186 eg CJ Byers S2809, 26 October 1987; PC Bingham S1138, 6 March 1987; WG Nicoll S2608, 28 July 1986.

187 eg LAWASIA Human Rights Sub-Committee Australia Support Group S956, 16 February 1987; PC Bingham S1138, 6 March 1987.

188 Cf ICCPR Article 17 and eg Republican Party of Australia S3382, 25 October 1985; M Carter S3071, 17 November 1987; AR Williams S1011, 24 February 1987; EJ Nicholson S453, 3 November 1986; L Hutchinson S4219, 6 October 1986; J Nolan NSW Privacy Committee S490, 25 October 1986.

189 Cf ICCPR Articles 17, 23 and 24 and eg J White S274, 24 September 1986; RGH Cotton S48, 5 March 1986; LAWASIA Human Rights Sub-Committee Australian Support Group S956, 16 February 1987; Soroptimist International of Cooma S843, 20 January 1987; AR Williams S1011, 24 February 1987.

190 It was remarked in a number of submissions that the 'intangible' nature of rights causes considerable controversy whenever attemps are made to embody them either in constitutions on in Acts of Parliament – see Confederation of Australian Industry S2511, 11 October 1986; Professor HJ McCloskey S373, 11 October 1986; J McMillan S3475, 22 November 1986; PH Bailey S3473, 22 November 1986; ACT Right to Life Association S3480, 22 November 1986.

191 See eg *Ex parte Cornford; Re Minister for Education* [1962] SR (NSW) 220.

192 A number of submissions favoured constitutional guarantees of some such rights. Submissions on the right to work, the right to an adequate standard of living and to an education are cited in para 9.89.

ascertained. 'Rights of recipience' from governments, as Professor HJ McCloskey termed them,[193] simply 'do not lend themselves to effective protection' by means of constitutional safeguards.[194]

9.153 It was, however, suggested by the Australian Support Group of the Human Rights Committee of LAWASIA that there would be value in incorporating the economic, social and cultural rights mentioned in the International Covenant on Economic, Social and Cultural Rights, or some of them, in the Constitution in the form of directive, non-justiciable provisions.[195] There are, we recognise, precedents for including statements of directive principles in constitutions,[196] but, for the reasons we have already given,[197] we do not recommend this kind of addition to the Australian Federal Constitution.

9.154 The Rights Committee recommended that the Constitution be altered to incorporate a number of guarantees which have no counterpart in the proposed new Chapter VIA of the Constitution which we recommend. For example, the Committee recommended that the Constitution should include provisions which would prevent the Commonwealth or a State:

(a) depriving 'any person of liberty or property except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice';

(b) denying to any person 'access to the courts';

(c) imposing 'any form of civil conscription';

(d) unreasonably 'withholding information'; and

(e) restricting any person from 'participating in the culture, religion and language of a cultural, religious or linguistic group to which they belong'.

9.155 We explain why we have decided not to support these recommendations of the Committee later in this Chapter.[198]

Preservation of existing rights

9.156 We recommend that the proposed new Chapter of the Constitution on rights and freedoms include a savings clause as follows:

> The rights and freedoms guaranteed by this Chapter do not abrogate or restrict any other right or freedom that a person may have.

193 S373, 11 October 1986.
194 Prof A Blackshield S688, 11 October 1986.
195 S956, 16 February 1987.
196 See for example, the Constitutions of India, Ireland and Papua New Guinea.
197 See para 9.99.
198 Under the heading 'Other rights and freedoms' at para 9.834-9.926.

9.157 This provision is modelled on section 26 of the *Canadian Charter of Rights and Freedoms,* Article 22 of the draft New Zealand Bill of Rights 1985 and Article 2 of the proposed Australian Bill of Rights of 1985.[199]

9.158 The purpose of the provision we recommend is to make it clear that the fact that a right or freedom, which is already recognised and protected by law, is not included among the rights and freedoms which are constitutionally protected does not of itself operate to detract from those existing rights and freedoms. We recommend inclusion of such a provision, not because we think it is necessary, but rather to allay fears expressed in a number of the submissions that constitutional entrenchment of some rights and freedoms would downgrade or destroy unentrenched rights and freedoms.[200]

9.159 We agree with the Rights Committee that the existence of certain constitutional protections has not, so far, appeared to have 'a deleterious effect upon other traditional rights and privileges.'[201] It might, however, be said that constitutional entrenchment of certain rights and freedoms is to give those rights and freedoms a primacy over rights and freedoms not so protected so that, if there is direct conflict between the constitutionally protected and the constitutionally unprotected, the former must prevail.

9.160 Experience indicates that, in practice, conflicts in that stark form do not arise. The kind of problem which is more likely to arise for judicial decision is one in which some law, act or practice prima facie violates one or more constitutional guarantees and in which the party defending the law, act or practice then seeks to persuade the court that what was done was done pursuant to a law prescribing reasonable limits on the entrenched rights and freedoms, which limits are demonstrably justified in a free and democratic society. There could, for example, be a question as to whether legal restrictions on publication of comments on cases which are *sub judice* are a justifiable limitation on freedom of expression, having regard to the competing claim of the parties to a fair trial.

9.161 The reasonable limitations clause which we recommend – and comment on later in this Chapter[202] – is the anvil on which the judges would have to forge the inevitable modifications of the enunciated rights and freedoms, whether for the protection of the same rights and freedoms of persons other than those asserting them in the instant case, or to accommodate other competing and legitimate individual or collective interests.

9.162 The terms of the constitutional provision recommended by Rights Committee to preserve existing rights are very different from those of the corresponding provision we recommend. The Committee recommends adoption of the following provision:

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199 Section 26 of the *Canadian Charter of Rights and Freedoms* provides that:

> The guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Article 22 in the draft New Zealand Bill of Rights 1985 provides that:

> An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not guaranteed or is guaranteed to a lesser extent by this Bill of Rights.

Article 2 of the proposed Australian Bill of Rights 1985 provided that:

> A right or freedom existing under, or recognised by, any other law shall not be taken to have been diminished or derogated from by reason only that the right or freedom is not set out in this Bill of Rights.

200 Rights Report, 23. See under the heading 'Submissions' at para 9.90.

201 ibid.

202 See para 9.200.

Nothing in the Constitution shall deny, diminish or disparage the existence of the democratic freedoms, customs, protections and privileges retained by all Australians under the Common Law nor diminish their traditional status as people of the Commonwealth owing allegiance to the Queen and sharing English as a common language.[203]

9.163 The reasons given by the Committee for recommending this formulation were:

(a) Many submissions considered by it showed that many people believe that what they understand to be principles of common law are already embodied in the Constitution.

(b) It believed there 'is a need to meet the objection that the enumeration of any "rights" or the expression of rights by way of a restriction upon governmental power might impliedly suggest that other rights have been ignored, or overridden'.[204]

(c) 'It is also desirable to refer to the status of the Australian people as owing allegiance to the Queen of Australia, and to refer to the English language' because '[t]hese are regarded by a large section of the community as fundamental Constitutional precepts, although they have never been written into the Constitution.'[205]

9.164 We consider that the section recommended by the Committee would raise more problems than it would resolve. We therefore do not endorse it.

9.165 The particular difficulties we have with the section proposed by the Committee are these:

(a) It is not clear whether the word 'democratic' qualifies only 'freedoms' or also the following three words, 'customs, protections and privileges'.

(b) The common law has little to say about matters democratic.

(c) Literally construed, the proposed provision would prevent federal legislative powers (and possibly State legislative powers as well if sections 106 and 107 of the Constitution have the effect of incorporating State constitutions) being used to 'deny' or 'diminish' various 'freedoms, customs, protections and privileges' arising under the common law. It could be argued, for example, that no legislature could abolish the common law action of negligence in favour of a statutory compensation scheme, or the protection given to employers by the rule that they are not liable to their employees for the negligence of fellow employees, or in any way alter, say, the common law of defamation, whether by restriction of liability or restriction of immunities from liability.

(d) The reference to the 'traditional status' of Australians as 'people of the Commonwealth owing allegiance to the Queen' is otiose, and really the stuff of preambles rather than of substantive provisions. The monarchy is already established under the Constitution.

(e) It is by no means clear how the reference to English as a common language might be interpreted.

9.166 We note that the section proposed by the Committee appears to have been drawn in part from the Ninth Amendment to the United States Constitution, but it clearly goes beyond it. The Ninth Amendment, which was ratified in 1791, states that 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or

203 Rights Report, 58.
204 id, 57.
205 ibid.

disparage others retained by the people'. Although Justices of the United States Supreme Court have, on occasions, referred to this provision to justify judicial protection of rights not expressly guaranteed in the Constitution,[206] it has not been regarded as a source of constitutional rights or as a basis for invalidating legislation. We would expect the section we propose would be similarly interpreted.

Who is to be bound by the guarantees?

Recommendation

9.167 We *recommend* that the rights and freedoms mentioned in the proposed new Chapter of the Constitution be guaranteed against acts done:

(a) by the legislative, executive or judicial arms of the Commonwealth, States or Territories; or

(b) in the performance of any public function, power or duty conferred or imposed on any person or body by law.

9.168 The object of this provision is to make it clear that the guaranteed rights and freedoms operate only as constraints on the exercise of governmental powers, whether they be legislative, executive or judicial in character, and on the activities of governments, regardless of whether they happen to be essentially governmental in character.

9.169 The section we propose has been framed with regard to interpretations of section 32(1) of the *Canadian Charter of Rights and Freedoms,* to Article 2 of the draft New Zealand Bill of Rights 1985 and relevant provisions of the Bill for the *Australian Bill of Rights Act 1985.* Regard has also been had to the United States doctrine of state action.

Position in other countries

9.170 ***Canada.*** Section 32(1) of the *Canadian Charter of Rights and Freedoms* defines the bodies which are subject to the provisions of the *Charter* as the legislatures of and governments of the provinces 'in respect of all matters within the authority of' the respective legislatures.

9.171 Actions which have been held to be subject to the *Charter* have included actions of municipalities;[207] exercise of prerogative powers;[208] exercise of disciplinary powers by a statutory law society for breach of a non-statutory code of professional conduct;[209] exercise of citizens' powers of arrest;[210] contracting by a body established, controlled and funded by government;[211] detention by a school principal of a pupil of a government school run by a statutory board;[212] court-imposed bans on the publication of court proceedings;[213] exercise of contempt of court powers;[214] and court action restricting access to courts.[215]

206 See *Griswold v Connecticut* 381 US 479, 484, 485 (1965); *Roe v Wade,* 410 US 113, 153, 210 (1973).

207 *Re McCutcheon and City of Toronto* (1983) 147 DLR 3d 193 (Ont HCJ); *Re Hardie and District of Summerland* (1985) 24 DLR 4th 257 (BCSC).

208 *Operation Dismantle Inc v The Queen* (1985) 18 DLR 4th 481 (SCC).

209 *Re Klein and Law Society of Upper Canada* (1985) 16 DLR 4th 489 (Ont Div Ct).

210 *R v Lerke* (1986) 25 DLR 4th 403 (Alta CA).

211 *Re Lavigne and Ontario Public Service Employees Union* (1986) 55 OR 2d 449 (Ont HCJ).

212 *R v H,* 24 Oct 1985, Edmonton Youth Court, cited in AA McLellan & BP Elman 'To Whom Does the Charter Apply? Some Recent Cases on Section 32' (1986) 24 *Alberta Law Review* 361, 371.

213 *Re Global Communications Ltd and A-G, Canada* (1984) 44 OR 2d 609 (Ont CA); *Canada Newspapers Co v Attorney-General for Canada* (1985) 16 DLR 4th 642 (Ont CA).

214 *R v Cohn* (1984) 13 DLR 4th 680 (Ont CA).

215 *Re Southam Inc and the Queen (No 1)* (1983) 41 OR 2d 113 (Ont CA).

9.172 The fact that a body has been created by statute or has some statutory powers does not of itself make that body governmental and thus subject to the *Charter.* Nor is a body considered governmental merely because it is subject to legislative regulation.[216] In determining whether a statutory body is governmental for the purposes of section 32(1) of the *Charter,* courts have had regard to the extent to which government controls the activities of the body and the nature of the activities of the body which are alleged to contravene the *Charter.* The *Charter* has been held not to apply to the exercise of disciplinary powers by an estate agents board incorporated by a special Act of Parliament;[217] a university's decision to allow the South African ambassador to speak on campus;[218] and the retirement policies and employment contracts of universities.[219]

9.173 In the university cases, the courts have held the universities not to be of government, mainly because of their independence, but also because their functions do not involve the exercise of governmental authority. The fact that the universities were publicly funded, and that their governing bodies included government nominees, were held to be irrelevant.

9.174 On the other hand, the Supreme Court of British Columbia has held[220] that a regulation made by a hospital, the effect of which was to deprive doctors, once they attained the age of 65 years, of the privilege of admitting patients, was subject to the *Charter.* The hospital had been established by government to provide services to the public. It was subject to government control and the regulation in question had been approved by a Minister. Hospital services were considered to be governmental in character.

9.175 There have also been several cases in which it has been assumed that the *Charter* applies to the taking of blood samples by hospital personnel.[221]

9.176 The activities of private persons and bodies are, generally, not subject to the *Charter.* Activities held to be beyond the operation of the *Charter* have included procurement by a private individual of the seizure of another's goods by police;[222] action by a public sector union;[223] private contracts;[224] treatment of a child by a doctor with the consent of a children's aid society;[225] exclusion of a child from participation in a sporting team pursuant to rules of a voluntary association regulating the sport;[226] and confinement by a psychiatrist of a patient in a mental institution.[227]

9.177 While the courts are subject to the *Charter* in the exercise of certain of their powers, the Supreme Court of Canada has held that the *Charter* does not apply to the making of court orders in litigation between private parties if the plaintiff's case is not based on any governmental action.[228]

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216 *Re Madisso and Bell Canada* (Ont HCJ 2 Oct 1985).
217 *Re Peg-Win Real Estate Ltd and Winnipeg Real Estate Board* (1985) 19 DLR 4th 438 (Man QB).
218 *Bancroft v Governing Council of the University of Toronto* (1986) 24 DLR 4th 620 (Ont HCJ).
219 *Re McKinney and Board of Governors of the University of Guelph* (1986) 32 DLR 4th 65 (Ont HCJ); *Harrison v University of British Columbia* (1986) 30 DLR 4th 206 (BCSC).
220 *Stoffman v Vancouver General Hospital* (1986) 30 DLR 4th 700 (BCSC).
221 *R v De Coste* (1983) 60 NSR 2d 170 (NSSC).
222 *Cat Productions Ltd v Macedo Ltd* (1985) 5 CPR 3d 71 (FCTD).
223 *Re Baldwin and British Columbia Government Employees Union* (1986) 28 DLR 4th 301 (BCSC).
224 *Re Bhindi and British Columbia Projectionists Local 348 of International Alliance of Picture Machine Operators of US and Canada* (1986) 29 DLR 4th 47 (BCCA).
225 *Re Children's Aid Society of Hamilton-Wentworth and Burrell* (1986) 56 OR 2d 40 (UFCt).
226 *Re Blainey and Ontario Hockey Association* (1986) 26 DLR 4th 728 (Ont CA).
227 *Kohn v Globerman; Kohn v City of Winnipeg* (1986) 27 DLR 4th 583 (Man CA).
228 *Retail Wholesale and Department Store Union Local 580 v Dolphin Delivery Ltd* (1986) 33 DLR 4th 174 (SCC).

9.178 ***New Zealand.*** Article 2 of the draft Bill of Rights 1985 provides:

> This Bill of Rights guarantees the rights and freedoms guaranteed in it against acts done
>
> (a) by the legislative, executive, or judicial branches of the government of New Zealand; or
>
> (b) in the performance of any public function, power or duty conferred on any person or body by or pursuant to law.

9.179 The comment accompanying this draft section indicates that the intention was to make it clear that the proposed Bill of Rights would apply only to public action. Bills of Rights, it was pointed out, are generally 'thought of as documents which restrain the great powers of the State. They are not seen as extending to private actions. Such actions are rather to be controlled by the general law of the land; that law will be adequate to deal with private action or can be made so.'[229] It was nonetheless conceded that the line between public and private action is sometimes a fine one. The proposed section, it was said,[230] 'can only be a first step in drawing of the line between public action, which would be caught by the Bill, and private action, which would not be.'

9.180 ***United States.*** Some of the provisions of the United States Bill of Rights are expressly declared to bind only governments. Others do not expressly limit their application in this way. The courts have nonetheless taken the view that the guaranteed rights are enforceable only against governments, and against persons and bodies exercising governmental functions or engaging in activities commanded or encouraged by governments.

9.181 Whilst many of the actions of private persons and bodies have been regarded as not constrained by the Bill of Rights, the fact that the actor is a private party is not conclusive of whether the Bill of Rights is applicable. When the actions of private parties are in issue, regard will be had to whether the activity is, traditionally, governmental in character, the extent to which the action in dispute is connected with decisions of government or involves active support from government or participation of agents of government. The fact that the actor happens to be licensed by government and its activities are subject to government regulation does not bring its activities under the Bill of Rights.[231] Nor are its activities subject to the Bill of Rights because it happens to be subsidised by government.[232] The actions of private persons and bodies have, however, been regarded as relevantly actions of the State, and thus subject to the Bill of Rights, (a) if they have been done as delegates of government and involve the exercise of functions which are peculiarly governmental; (b) if they are actively supported, encouraged or commanded by governments; or (c) depend for their efficacy on active participation by officers of government.

9.182 It should be said that the interpretations and applications of the state action concept by the United States Supreme Court have not been entirely consistent, and that there is a great deal of critical literature on the subject. While the Court has enunciated factors which it considers to be relevant in deciding whether action is state action for the purposes of the Bill of Rights, there have been differences of judicial opinion about the weight to be attached to those factors. The Court has repeatedly said that it must proceed on a case-by-case basis, 'sifting facts and weighing circumstances'.[233] But, according to many of its critics, it has failed to enunciate statements which are indicative of the criteria which have been applied when the hard decisions have had to be made.

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229 *A Bill of Rights for New Zealand: White Paper* (1985) 69.

230 id, 71.

231 See *Jackson v Metropolitan Edison Co* 419 US 345 (1974); *Columbia Broadcasting System v National Democratic Committee* 412 US 94 (1973).

232 See *Blum v Yaretsky* 457 US 991 (1982); *Norwood v Harrison* 413 US 455 (1973).

233 *Burton v Wilmington Parking Authority* 365 US 715, 722 (1961).

Previous psoposals for reform

9.183 ***Bill for Australian Bill of Rights Act 1985.*** The main features of this Bill have been summarised earlier in this Chapter.[234] As we there pointed out, the proposed Bill of Rights would have overridden inconsistent legislation of the Commonwealth and the Territories, but not inconsistent State legislation. Provision was, however, made for investigation by the Human Rights and Equal Opportunity Commission of complaints of acts violating the Bill of Rights by or on behalf of the Commonwealth, a State or Territory, or by or on behalf of their authorities.

9.184 The expression 'act' was defined to include 'a reference to a refusal or failure to do an act'.[235] The term 'authority' was also defined.[236] Authorities, for the purposes of the Act, were to mean:

(a) bodies (incorporated or unincorporated) established for a purpose of the Commonwealth, a State or Territory by or under an enactment;

(b) incorporated companies over which the Commonwealth, a State or the Administration of a Territory is in a position to exercise control;

(c) persons holding or performing the duties of an office or appointment established or made under an enactment or by executive act;

(d) local government bodies in States;

(e) bodies and persons declared by regulation to be authorities.

Advisory Committee's recommendations

9.185 The recommendations of the Rights Committee for alterations of the Constitution were framed on the assumption that the Federal Constitution is, and should continue to be, concerned only with the definition and delimitation of governmental powers, and powers peculiarly governmental.[237] Thus the Committee's proposals for alteration of the Constitution were formulated mainly in terms of prohibitions directed against governments, that is, in the form of 'the Commonwealth and States shall not' do such-and-such.

9.186 The Committee did not 'consider that purely private interference by one individual with another's freedom should be provided for in the Constitution . . .'.[238]

Submissions

9.187 Those who favoured further constitutional guarantees of rights and freedoms were unanimous in proposing that the guarantees should bind all spheres of government.[239] Several suggested that the guarantees should bind individuals and governments as well.[240]

234 para 9.54 to 9.62 above.
235 Clause 4(3)(a).
236 Clause 4(1).
237 Rights Report, 39.
238 ibid.
239 eg Citizens for Democracy S165, 15 July 1986; Vince Martin and Co S573, 19 November 1986 Senator M Reynolds S3572, 4 December 1986; Soroptimist International of Cooma S843, 20 January 1987; J McMillan S3475, 22 November 1986; PH Bailey S584, 4 December 1986; D Buckley S3585, 5 December 1986; A Fenbury Criminal Law Association S3437, 15 November 1986; W Lane S3519, 2 December 1986.
240 eg Uniting Church of Australia S923, 13 February 1987; GMG McIntyre S781, 5 December 1986; E Coleman S440, 18 October 1986.

9.188 The Queensland Government, which generally opposed further constitutional guarantees of rights and freedoms, submitted that the States should not be bound by any such guarantees. It found what it described as the 'Committee's pre-emptory and cursory dismissal of "States' rights"' as 'totally unsatisfactory as it failed to address any of the real issues and concerns of those persons who believe in our federal system'. No 'compelling reasons', it was suggested, had been adduced as to 'why the constitutional competence of the States should be limited by the insertion of ill-defined "rights" in the Commonwealth Constitution.'[241]

9.189 The Government of the Northern Territory thought that 'if there are to be any entrenched constitutional rights . . . they should be included in a Territory constitution.'[242]

9.190 A submission on behalf of the RSL[243] also argued against the application of constitutional guarantees to all spheres of government. 'The intention of having a system of rights which applies uniformly throughout Australia is', it was stated, 'a laudable one'. But:

> this does not obscure the fact that significant local differences exist within a vast country such as Australia. It would thus be much better for community standards to evolve to determine these questions of individual rights, rather than have an arbitrarily imposed central standard, which in the courts would not necessarily be interpreted in accordance with the local circumstances.

9.191 In a commentary on the Queensland Government's submission on the Committee's Report, the Queensland Council for Civil Liberties drew issue with that Government's reliance on the concept of States' rights in the context of what rights and freedoms, if any, should be constitutionally guaranteed.[244] In its view 'the fundamental flaw of the 'state rights' argument . . . is that it shifts debate away from the real question: the inadequacy of existing civil rights protections under Australian law.'

Reasons for recommendation

9.192 The section we propose is designed to delimit the range of actions the legality and legal effectiveness of which would fall to be determined by reference to the guaranteed rights and freedoms. It primary object is to make it clear that the guarantees operate as constraints only in relation to the activities of governments and the exercise of public functions, powers and duties. We have no doubt that, in the absence of a section such as that we propose, the High Court would construe the guarantees as applying only to acts of government. We nonetheless think it desirable to place the matter beyond doubt and, at the same time, to make it clear that the status of the actor is not always determinative of the application of the guarantees.

9.193 Our reasons for recommending that the proposed constitutional guarantees should apply to all spheres of government in the Australian federation, and to the arms of government in the Territories are, briefly stated, these:

(a) The reasons for affording constitutional protection of certain rights and freedoms against the actions of governments apply to all levels of government. There is no point in erecting a constitutional fence to exclude governmental intrusions on those rights and freedoms if that fence is a barrier only against the Commonwealth. Indeed, the subject matters within

241 S3069, 17 November 1987.
242 S3916, 21 August 1986.
243 S1096, 2 October 1986.
244 S3363, 23 March 1988.

the legislative domain of the States are such that the risk of States trespassing unduly on these rights and freedoms is probably greater than it is in the case of the Commonwealth.

(b) Arguments opposing the application of constitutional guarantees of rights and freedoms to the actions of States, on the ground that the legitimate rights of States will be impaired, are misconceived. These arguments presuppose that the application of the guarantees to governmental action at all levels will somehow result in an alteration of the 'balance' of 'real' governmental power as between the Commonwealth and the States. In fact all spheres of government will be equally constrained. To invoke the concept of 'States' rights' to justify exemption of States from the operation of constitutional protections of rights and freedoms is to suggest that there is some immutable federal principle which ordains that States shall be accorded a facility to impair the protected rights and freedoms which is not accorded to the arms of the national government. There is no such principle and the constitutions of a number of the great federal democracies – in particular, those of the United States of America, Canada, the Federal Republic of Germany and India – belie it.

(c) The adoption of a set of constitutional guarantees binding all spheres of government does not mean that there is no scope for differences between the laws of the several States and Territories. It is true that the guarantees would ensure that certain minimum standards were to be observed, but the limitations clause we propose[245] would provide ample scope for jurisdictional variations which could be defended on the ground of peculiar local circumstances.

(d) The only possible basis for opposing exemption of States from the operation of constitutional guarantees of the kind we propose is that it is, somehow, illegitimate for States, and the people of States, to be bound by constitutional provisions which, although they have been approved by the Federal Parliament and by the electoral majorities prescribed by section 128 of the Constitution, have not been approved by a majority of electors in a particular State. Our answer to that argument is that section 128 of the Constitution already legitimates majoritarian rule when it comes to alterations of the Federal Constitution, including alterations which are designed to bind all spheres of government. Section 128 also ensures that majorities in the most populated States cannot override majorities in the less populated States. In short, we are confident that no referendum to give effect to our proposal has any prospect of success without substantial support from the electors.

9.194 In recommending that the guarantees should control the legislative, executive and judicial arms of the Commonwealth, States and Territories, we intend that all actions attributable to those governments should be subject to the guarantees, regardless of whether those actions involve the exercise of powers or functions which can be said to be peculiarly governmental. The guarantees should, we think, operate as inhibitions not merely on the exercise of legislative powers, prerogative powers and judicial powers, but also on those of the activities of governments which are carried out under, and depend for their legal effect on, the institutions of private law. There is, in our view, no defensible basis for differentiating between, say, discrimination on the ground of sex in the exercise of statutory discretions to grant subsidies, and discrimination on the ground of sex in decisions regarding employment and promotion within a government-owned company

245 Discussed at para 9.200.

incorporated under general companies legislation. Equally, it does not make sense to us to differentiate between a statutory corporation which has been created to exercise powers which are distinctively governmental, for example, to grant licenses to carry on an activity which is prohibited except under licence, and a statutory corporation which has been established to engage in trade and commerce in competition with private corporations. In our view, all authorities of the Commonwealth, States and Territories should be bound.[246]

9.195 Under the section we propose, private persons and bodies would be bound by the guarantees when performing public functions, public powers or duties conferred or imposed by or pursuant to law. A company, incorporated under companies legislation, which provides a public utility for profit could thus be bound by the guarantees when exercising statutory powers given to it to enable it to carry on its undertaking, for example, when exercising statutory powers to enter private premises. The exercise of citizens' powers of arrest could also be controlled by the guarantees. The distinction between public functions, powers and duties and private functions, powers and duties is not, we recognise, clear-cut but it is, nonetheless, a distinction which is already made for certain legal purposes, notably in determining the availability of the prerogative writs of certiorari, mandamus and prohibition and like statutory remedies.

9.196 Finally, we draw attention to an important difference between the section we propose and section 32(1) of the *Canadian Charter.* The latter section refers to the Parliament and Government of Canada and the legislatures and governments of the provinces in respect of all matters within their respective authorities. The Supreme Court of Canada has held that the word 'government' in this context means the executive branch. The *Charter,* it has also been held, does not apply to the common law as between private parties. It applies to the common law only insofar as that law is the basis of some governmental action which is alleged to infringe some guaranteed right or freedom.[247] The section we here recommend, unlike section 32(1) of the *Canadian Charter,* includes an express reference to the judicial arms of the Commonwealth, States and Territories. The proposed new Chapter of the Constitution might require, in some cases, modification of the common law, for example, the law relating to contempt of court.

Who is to benefit?

9.197 For the most part, the proposed rights and freedoms are guaranteed to 'everyone'.[248] In some cases the rights and freedoms are, of their very nature, ones which would apply only to natural persons. Others could, however, be asserted by legal persons such as corporations.

9.198 We have not considered it necessary to include a provision, along the lines of Article 24 of the draft New Zealand Bill of Rights 1985, declaring that the guaranteed rights and freedoms 'apply so far as practicable and unless they otherwise provide for the benefit of all legal persons'. The *Canadian Charter of Rights and Freedoms* contains no such provision. Many of its provisions refer to the rights and freedoms of 'everyone', but there are some which deal only with the rights of Canadian citizens and the equality rights[249] are the rights of 'every individual'. The equality rights, it has been held, are guaranteed only to natural persons. Although the question has yet to be finally resolved by the Canadian Supreme Court, the right of 'everyone . . . to life, liberty and security of

246 On the concept of a governmental authority see *Committee of Direction of Fruit Marketing v Australian Postal Commission* (1980) 144 CLR 577.

247 *Retail Wholesale and Department Store Union Local 580 v Dolphin Delivery Ltd* (1986) 33 DLR 4th 174 at 194-9 (SCC).

248 The right to enter and remain in Australia is, however, guaranteed only to Australian citizens.

249 Section 15.

person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'[250] seems also to be confined to natural persons.[251] The right of 'everyone . . . to be secure against unreasonable search or seizure', on the other hand, may be asserted by corporations as well as by natural persons.[252]

9.199 The New South Wales Council for Civil Liberties submitted that constitutional guarantees of rights and freedoms should operate only in favour of natural persons.[253] We see no good reason for so confining the guarantees. To limit the rights and freedoms of corporations may sometimes limit the rights and freedoms of natural persons as well. Censorship of corporate-owned newspapers, for example, cannot but inhibit the freedom of speech of persons who use the press to ventilate their opinions.

Justified limits

Recommendation

9.200 We *recommend* that the proposed new Chapter of the Constitution on Rights and Freedoms include a section to provide that the rights and freedoms guaranteed by the Chapter 'may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

9.201 This section is modelled on section 1 of the *Canadian Charter of Rights and Freedoms,* Article 3 in the draft New Zealand Bill of Rights 1985 and Article 3(1) of the proposed Australian Bill of Rights 1985.

Reasons for recommendation

9.202 The Rights Committee did not recommend the adoption of any such general qualifying provision. Its view seems to have been that a provision such as that in the *Canadian Charter* would 'inevitably' draw the courts 'into policy evaluations of a great range of enactments . . .'.[254] Our view, however, is that the Constitution should state explicitly that the guaranteed rights and freedoms are subject to limitations and that standards for adjudging permissible limitations should be articulated. As judicial interpretations of the United States Bill of Rights and of sections 92 and 116 of the Australian Federal Constitution demonstrate, guarantees of rights and freedoms expressed in absolute terms will not be interpreted by the courts as unqualified. We agree that it 'is misleading (and could be thought irresponsible) to suggest' that guaranteed rights and freedoms are unlimited.[255]

9.203 We also consider a single qualifying provision preferable to a series of qualifying provisions specific to particular guarantees, as in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms, and the constitutions of Commonwealth countries which guarantee rights and freedoms in terms similar to the European Convention. We note that the approach we recommend was preferred by the Senate Standing Committee on Constitutional and Legal Affairs[256] and was also the approach adopted in the proposed Australian Bill of Rights 1985. Our reasons for preferring a single limitation provision are essentially those

250 Section 7.

251 *Home Orderly Services Ltd v Government of Manitoba* (1986) 32 DLR 4th 755 (Man QB); the question was discussed but left open by the Canadian Supreme Court in *Reference* re *Section 94 (2) of the Motor Vehicle Act* (1985) 24 DLR 4th 536 (SCC).

252 Section 8; see *Hunter v Southam Inc* (1984) 11 DLR 4th 64 (SCC).

253 S3394, 25 October 1986.

254 Rights Report 33. The Committee did, however, propose certain of the limitations on government power be declared subject to the federal defence power – id, 102. We comment on this suggested qualification later on under the heading 'Civil conscription' at para 9.887-9.901.

255 *A Bill of Rights for New Zealand* (1985) 71.

256 *A Bill of Rights for Australia? Exposure Report* (1985) 47-8, para 3.55-3.59.

set out in the New Zealand White Paper. As was there pointed out, 'The practice of courts under the different regimes suggests that the apparently greater precision resulting from the greater elaboration of detail in the Covenant and European models is just that – apparent. The particular judgment to be made remains essentially the same.'[257] Additionally, if the approach of the Covenant and European Convention were to be adopted, '[t]here would be a danger that too much significance would be given to differences between different limitations provisions . . .'.[258]

9.204 In addition to the general limitations section, there are particular provisions in the proposed new Chapter on Rights and Freedoms which contain their own modifiers, for example 'unreasonable', 'cruel, degrading, or inhuman', 'arbitrarily'. Some Canadian courts have taken the view that, when a section in the *Charter* contains its own modifier, there is no scope for the application of section 1.[259] The question has, however, been left open by the Canadian Supreme Court.[260]

9.205 ***Onus of proof.*** Whereas the onus of establishing a prima facie violation of the *Canadian Charter* lies on the party alleging the violation,[261] the onus of establishing the applicability of section 1 falls on the party relying on that section.[262] The position would, we believe, be the same were our recommendation adopted.

9.206 ***Limits prescribed by law.*** Limits on rights and freedoms are not effective under section 1 of the *Canadian Charter* unless they have been 'prescribed by law', whether by legislation or common law. Limits which are imposed merely by administrative guidelines are not 'prescribed by law.'[263] Open-ended statutory discretions to make decisions restrictive of rights and freedoms have also been held not to be limits prescribed by law.[264]

9.207 ***Reasonable limits . . . demonstrably justified in a free and democratic society.*** These words provide only broad guidelines according to which courts would have to assess the legitimacy of limitations of the guaranteed rights and freedoms. The Canadian Supreme Court has interpreted them to mean that the reviewing court needs to consider first the purpose of the limitations: whether it is of sufficient importance to warrant overriding of constitutionally protected rights and freedoms.[265] A purpose in direct conflict with any of these rights and freedoms may be regarded as a denial rather than a limitation upon it.[266] Limitations imposed for the sake of economy or administrative convenience are not normally acceptable.[267]

257 *A Bill of Rights for New Zealand* (1985) 71-2.
258 id, 72.
259 *Re Moore and The Queen* (1984) 6 DLR 4th 294 (HCJ); *R v Robson* (1984) 41 CR 3d 68 (BCSC).
260 *Hunter v Southam Inc* (1984) 11 DLR 4th 641 (SCC).
261 *R v Big M Drug Mart Ltd* (1985) 18 DLR 4th 321 (SCC).
262 *Hunter v Southam Inc* (1984) 11 DLR 4th 641 (SCC); *R v Big M Drug Mart Ltd* (1985) 18 DLR 4th 321 (SCC). See further Appendix M.
263 *R v Therens* (1985) 18 DLR 4th 655 (SCC).
264 *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1984) 5 DLR 4th 766 (Ont CA); *Re Luscher and Deputy Minister, Revenue Canada, Customs and Excise* (1985) 17 DLR 4th 503, 506-11 (Fed CA); see also *The Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Attorney-General v Ryan* [1980] AC 718.
265 *R v Big M Drug Mart Ltd* (1985) 18 DLR 4th 321; *R v Oakes* (1986) 26 DLR 4th 200.
266 *Quebec Association of Protestant School Boards v Attorney-General, Quebec (No 2)* (1984) 10 DLR 4th 321 (SCC).
267 *Singh v Minister of Employment and Immigration* (1985) 17 DLR 4th 422 (SCC).

9.208 Even if the purpose of the limitation in question is accepted as legitimate, consideration has to be given to the means adopted: are they, for example, genuinely intended to advance the purpose of the limitation; are they such as can reasonably be expected to produce the desired results; are they out of proportion with the impairment of rights and freedoms they will bring about?[268]

9.209 In deciding what limitations are permissible under section 1 of the *Charter,* Canadian courts have had regard to laws and practices in other democratic countries, though the fact that these contain similar limitations is not regarded as conclusive.

A power to opt-out?

Recommendation

9.210 We have decided by a majority (Sir Maurice Byers, Sir Rupert Hamer and Mr Whitlam) not to recommend that a Parliament may expressly declare that an Act, or part of an Act, shall operate notwithstanding a constitutionally entrenched right. That is, we *recommend* against a power to 'opt-out' of or override constitutionally guaranteed rights and freedoms.

9.211 It is the majority's view that the provision for the derogation of individual rights implied in an 'opt-out' section is inconsistent with the whole process of entrenching rights in the Constitution.

9.212 A minority of us (Professors Campbell and Zines), however, recommends that the proposed new Chapter of the Constitution include a section, modelled on section 33 of the *Canadian Charter of Rights and Freedoms,* to provide as follows:

(1) The Parliament of the Commonwealth or of a State may expressly declare in an Act of Parliament that the Act or a provision thereof shall operate notwithstanding a provision in this Chapter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Chapter referred to in the declaration.

(3) A declaration made under sub-section (1) shall cease to have effect three years after it comes into force or on such earlier date as may be specified in the declaration.

(4) The Parliament of the Commonwealth or of a State may re-enact a declaration made under sub-section (1).

(5) Sub-section (3) applies in respect of a re-enactment made under sub-section (4).

9.213 This provision would not apply to existing guarantees in other Chapters of the Constitution or to the recommended provisions to guarantee democratic rights.

Advisory Committee's recommendation

9.214 The Rights Committee recommended[269] that a new section 117A be inserted in the Constitution in the following terms:

> 117A. The Parliament of the Commonwealth or of a State may expressly declare in a law that the law shall operate notwithstanding a provision included in sections:
> 80
> 80A
> 116

268 *R v Oakes* (1986) 26 DLR 4th 200 (SCC); *Edwards Books and Art Ltd v The Queen* (1986) 35 DLR 4th 1 (SCC).

269 Rights Report, 38-9.

116A
or
117

Such declaration and any re-enactment thereof shall have effect for 3 years after it comes into force or such shorter period as may be specified in the declaration.

A law in respect of which such a declaration is in effect shall operate notwithstanding the prohibition in the Constitution which is referred to in the declaration.

A Parliament may re-enact a declaration so made.

9.215 The proposed opt-out provision would apply to the following provisions as recommended by the Committee:

(a) legal process rights (in redrafted section 80 and new section 80A);

(b) civil rights (in redrafted section 116 and new section 116A), notably freedom of religion, movement, political expression, peaceful assembly and information; and

(c) non-discrimination rights (in new section 117).

9.216 The proposed section 117A would not apply to the democratic rights of citizens, that is, in new sections 30, 34, 24A, 106A and 106B.

9.217 In recommending the 'opting-out' provision the Rights Committee was concerned to make more acceptable its proposals for the inclusion of other rights and freedoms in the Constitution, taking into account the sensitive issue of 'States' rights'. It justified the recommendation on the basis that it would preserve the sovereignty of Parliament, in the sense that the will of the elected representatives of the majority of the people could prevail where they consider that a constitutional protection should not apply to a particular law. The Committee was of the opinion that such a provision would be used rarely, if at all. In arriving at this judgment the Committee was guided by the limited use of the 'opt-out' provision in Canada. The Committee assumed, also, that 'a State Parliament would not use the opt-out provision in defiance of a clearly expressed wish of the people of that State' where the people had voted at referendum that a particular protection be included in the Constitution.[270]

Submissions

9.218 Few submissions were received on the question of whether parliaments should have power to override constitutional guarantees. Senator Tate favoured such a power, except in relation to voting rights.[271] The New South Wales Council for Civil Liberties also supported a parliamentary power of override but suggested that it should be exercisable only by special parliamentary majorities.[272]

9.219 The Queensland Government stated that, while it did not oppose the Committee's proposal, it found it contradictory in spirit. The 'very fact that it is suggested illustrates the inherent undesirability of imposing ill-defined civil rights on Governments and dramatically increasing the scope for policy judicial review of legislative actions'. The submission suggested that, if we are to propose the inclusion of the grand, abstract rights of political rhetoric in the Constitution, we might at least have the courage of our convictions. Although the compromise achieved through an 'opt-out' section may be of some political value, therefore, it is not philosophically sound.

270 id, 37.
271 S712, 1 November 1986.
272 S3344, 25 October 1986.

9.220 The Queensland Government's view is that the Rights Committee's recommendation does not go far enough. In its submission the 'opt-out' provision should be for a longer period than the proposed three years. It is also of the view that the provision should not be limited to legal and equality rights, but should refer as well to the democratic rights of 'fair election'. In its opinion, any limitation on the power of parliaments contradicts the principle of parliamentary sovereignty. On this basis, the most that can be said on behalf of the Rights Committee's recommendation is that it is at least recognising Australia's long and successful history of parliamentary supremacy. However, 'to require a State legislature to reaffirm every three years its will to retain a law which it believes is necessary but which is declared by unelected courts to be "contrary to human rights", is to impose a burden utterly unwarranted by anything in Australia's political history'.[273]

9.221 Submissions opposing the 'opt-out' clause recommended by the Rights Committee were made by the president of the Anti-Discrimination Board of New South Wales,[274] by Justice Elizabeth Evatt,[275] the National Women's Consultative Council,[276] and the Public Interest Advocacy Centre.[277] Salient points made in these submissions were (a) that constitutional guarantees which can be overridden by a Parliament are no guarantees at all; and (b) it is impossible to predict how a legislative power of override would be exercised.

9.222 Canadian experience in the use of such a power is no safe guide to how such a power might be used in Australia.

Reasons for recommendation

9.223 The majority of us believes that to include in the Constitution guarantees of individual rights and freedoms and, at the same time, authorise the Parliaments to enact legislation which negates or derogates from those guarantees, irrespective of whether the legislation is justifiable in a free and democratic society, is wrong in principle. There is simply no point in having those guarantees if the Parliaments, even though democratically elected, may override them, even for a limited period of time. In our opinion, the central purpose of entrenching certain rights and freedoms in the Constitution is to make it clear that parliamentary law-making powers cannot be used to impair those rights and freedoms unless good and sound reasons can be shown for their limitation. As the National Women's Consultative Council observed in its submission, constitutional guarantees of rights and freedoms 'are deliberately anti-majoritarian in the sense that they protect from the elected representatives the fundamental rights of all persons, including those who are in a position of weakness in the political system for numerical or other reasons.'[278]

9.224 The case for inclusion of an 'opt-out' clause is not, we think, assisted by reference to the fact that the *Canadian Charter of Rights and Freedoms* contains such a clause. The rights and freedoms guaranteed by that instrument were not constitutionally entrenched by a process of constitutional amendment comparable with that ordained by section 128 of the Australian Federal Constitution, which requires that alterations to the Constitution be approved by substantial electoral majorities. The Canadian constitutional guarantees were entrenched rather by a process of constitutional amendment which entails merely

273 S3069, 17 November 1987.
274 S3077, 20 November 1987.
275 S205, 13 October 1987.
276 S2542, 4 December 1987.
277 S3098, 24 November 1987.
278 S2542, 4 December 1987.

approval by prescribed legislative majorities. Moreover, they were entrenched with an 'opt-out' clause only because some eight provinces would not otherwise have agreed to their entrenchment.[279] Equally we draw no comfort from the fact that the Canadian override clause has been sparingly invoked, or from the fact that it has been held that the override power cannot be used to enact an 'omnibus' provision designed to 'save' all prior legislation which might otherwise be held to be inconsistent with the *Charter*.[280] There is no knowing how Australian governments might seek to utilise a legislative override power.

9.225 Freedoms need protection most when most under challenge. That challenge is strongest when they are perceived as protecting those who are, from time to time, the targets of popular anger or hysteria. In the United States, for example, American citizens of Japanese descent were interned, although no ground existed to doubt their loyalty. In eastern Australia, members of the Australia First Movement, whose patriotism could hardly have been open to serious question, were interned. In each case the decision was made by the elected representatives of the people. In each case it was wrong.

9.226 Where deep public feeling has been aroused, the citizen most needs the protection of an entrenched guarantee against the misconceptions of his or her fellow citizens. In such times, the people's representatives are likely to share, or feel overborne by, the errors of the electorate and are most prone to remove from those then most in need of it the guard and shield of the entrenched constitutional freedom.

9.227 It seems to the majority of us that concerns about the appropriate balance between legislative and judicial authority to determine the content of laws, with regard to the values enshrined in constitutional guarantees of individual rights and freedoms, are adequately catered for in the general limitations provision which all of us recommend should form part of the series of the provisions making up the proposed new Chapter in the Constitution on Rights and Freedoms. If governments have good reasons for promoting legislation which limits guaranteed rights and freedoms, they should, we think, be prepared to demonstrate to a court that the limitations are justifiable. We believe that, in determining whether legislative limitations are justifiable, the courts will give appropriate weight to legislative assessments of what limitations are necessary or desirable.

9.228 ***Minority view.*** The majority's view seems to be that there is an inconsistency between constitutional provisions which guarantee certain individual rights and freedoms and a further constitutional provision which would make it possible for the Parliaments to enact legislation which, though violative of those guarantees, would override them, and do so regardless of whether the legislation could be justified under the general limitations provision.

279 The history of section 33 of the *Canadian Charter* is related in R Romanow, 'Reworking the Miracle: The Constitutional Accord' (1981) 8 *Queen's Law Journal* 74, 90-3; P Weiler, 'Rights and Judges in a Democracy' (1984) 18 *University of Michigan Journal of Law Reform* 51.

280 *Alliance des Professeurs de Montreal v Attorney-General, Quebec* (1985) 21 DLR 4th 354 (Que CA). WH McConnell has noted:

> In 1986, Saskatchewan became the second province to use the override provision. Faced with a strike of provincial government employees, Premier Devine's Progressive Conservative government inserted a "notwithstanding" clause under subsection 33(1) in subsection 9(1) of its *Saskatchewan Government Employees' Union Dispute Settlement Act.* This subsection ordered provincial civil servants back to work and imposed a contract. The clause related specifically to the freedom of association provision in subsection 2(d), foreclosing a legal appeal to that *Charter* provision by the Union. 'Recent Developments in Canadian Law', (1986) 18 *Ottowa Law Review* 723, 759.

9.229 Their concern, however, has been to propose a regime for constitutional protection of individual rights and freedoms which will, on the one hand, secure those rights and freedoms more adequately than they are at present, and, on the other, meet the not insubstantial objections to incorporation of those guarantees of rights and freedoms in the Federal Constitution. They agree that adoption of the proposed new Chapter on Rights and Freedoms would produce a radical change in the effective allocation of power as between the Parliaments and the courts. It would, for practical purposes, give to the courts the last word in deciding a wide range of issues which are sometimes very difficult and which many people regard as issues which cannot always be satisfactorily resolved by methods of adjudication.

9.230 Professors Campbell and Zines do not agree that it is pointless to include further guarantees of rights and freedoms in the Constitution and, at the same time, to include an override provision of the kind they propose. In their view, incorporation of further guarantees in the Constitution, even with an override clause, would have a significant impact. It would operate to modify a good deal of existing law; it would introduce needed legal controls over the exercise of statutory discretions which can often result in infraction of civil liberties; and it would serve as a standing reminder to political Executives and Parliaments that the majority of Australian electors had agreed that those exercising Parliamentary legislative powers should be attentive to certain values which they have acknowledged to be of fundamental importance.

9.231 Under the override clause proposed by the minority, Parliaments would not be able to enact legislation which overrode the guaranteed rights and freedoms except by express words. Governments, the minority believe, would be slow to invoke the power of override, particularly if the object was to countermand a ruling by the High Court that the piece of legislation concerned violated a constitutional guarantee. Governments would need to be in a position to demonstrate that the invocation of the power was justified, and perhaps even imperative. To counter a judgment of the High Court would be politically onerous.

9.232 But cases are bound to arise in which there is no one legally correct answer to a problem. Many such cases would undoubtedly be ones in which existing laws, restrictive of guaranteed rights and freedoms, were defended as imposing reasonable limitations which were demonstrably justified in a free and democratic society. Can it be said that a court's judgment on that issue will always and necessarily be 'correct' or superior to that of a Parliament?

9.233 There is a further consideration. One of the major virtues of the override clause in the *Canadian Charter of Rights and Freedoms,* it has been suggested, is 'that it could elicit more vigorous judicial scrutiny of a broad range of civil rights issues, because it would give . . . judges a sense of security from the presence of a legislative safety net beneath them'.[281] That observation could, the minority believes, equally be made of an Australian version of the power of override.

9.234 Finally, the minority points out that once the High Court had ruled on an issue arising under the proposed new Chapter of the Constitution, the Court's interpretation would, in the absence of override power, stand until such time as the Court was persuaded to depart from it or until such time as the Constitution was formally altered to overcome the Court's ruling.

281 P Weiler, 'Rights and Judges in a Democracy: A New Canadian Version' (1984) 18 *University of Michigan Journal of Law Reform* 51, 81, n98.

Remedies

Recommendation

9.235 We *recommend* that the proposed new Chapter VIA of the Constitution on Rights and Freedoms include the following section:

> A person whose rights or freedoms, as guaranteed by this Chapter, or by sections eighty, one hundred and sixteen or one hundred and seventeen, have been infringed or denied may apply to a court of competent jurisdiction for such remedy as the court considers appropriate and just in the circumstances.

9.236 This proposed section is based on section 24(1) of the *Canadian Charter of Rights and Freedoms* and Article 25 of the draft New Zealand Bill of Rights 1985.

Current position

9.237 In Australia there are no special remedies for unconstitutional action. A common method of contesting the constitutionality of legislation is by suit for a declaration and for an injunction to restrain execution of the legislation. The constitutionality of legislation may also be raised for judicial decision by an application for a prerogative writ or like statutory remedy. For example, a writ of prohibition may be sought to prohibit proceedings before a court or tribunal on the ground that the statute under which it is purporting to act is unconstitutional.

9.238 Unconstitutional action may also give rise to civil actions for damages or restitution of money or property. For example, if a person has been imprisoned under an unconstitutional statute, damages may be awarded for the tort of false imprisonment. If property is taken under an unconstitutional statute, damages may be awarded for trespass, and, in the case of goods, conversion as well. If money has been exacted under colour of an unconstitutional statute, it may, in some circumstances, be recovered. But the general principle is that remedies of these kinds are available only if the unconstitutional action resulted in the commission of a recognised legal wrong. Compensation will not be awarded by a court merely because it can be shown that what was done was unconstitutional.[282]

9.239 The application of this general principle can sometimes mean that a person who has suffered loss as a result of the carrying out of unconstitutional legislation has no effective remedy, either because the action does not come within any existing category of legal wrongdoing, or because some necessary ingredient of civil liability is absent.[283]

9.240 Effective remedy for unconstitutional acts may also be precluded because the person who is immediately responsible for the wrongdoing lacks the means of making recompense or else is immune from suit.

9.241 Under the common law, the Crown cannot be sued for torts. The federal *Judiciary Act 1903* abrogated that immunity in suits within federal jurisdiction. In federal matters, therefore, both the Commonwealth and the States are vicariously liable for torts committed by their servants in the course of carrying out unconstitutional legislation, or

282 *James v Commonwealth* (1939) 62 CLR 339 (breach of section 92). See also *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37, 64.

283 See *McClintock v Commonwealth* (1947) 75 CLR 1 (conversion) and *Poulton v Commonwealth* (1953) 89 CLR 540, 577, 603. On recovery of unconstitutional exactions of money see *Mason v New South Wales* (1959) 102 CLR 108 and *Bell Bros Pty Ltd v Serpentine-Jarrahdale Shire* (1969) 121 CLR 137.

when acting without constitutional authority.[284] In a federal matter, however, neither the Commonwealth nor States are vicariously liable if the tortfeasor was an official exercising an independent statutory discretion. In that case, the official may be personally liable for any wrong committed as a result of exercising a power which cannot, constitutionally, be granted; but, under the common law, that official may be able to claim judicial or quasi-judicial immunity from liability.[285]

9.242 Statutes also may protect officials against civil liability for acting in purported exercise of powers conferred by the statute or in performance of duties imposed by it. The High Court has not had occasion to decide whether such a protective provision is valid and effective if the main provisions of the statute are unconstitutional. There are, however, cases in which it has been held that legislation which seeks to extinguish, retroactively, civil liabilities arising from acts done pursuant to statutes which contravene section 92 of the Constitution are themselves in contravention of that section.[286]

Position in other countries

9.243 ***Canada.*** Section 24(1) of the *Canadian Charter of Rights and Freedoms* provides:

> Anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

9.244 Sub-section (2) of the same section deals with exclusion of evidence obtained in contravention of the Charter.

9.245 Section 24 was included in the *Charter* because of concerns that, in the absence of a specific direction to the courts to grant appropriate remedies for violations of guaranteed rights and freedoms, the remedies the courts were likely to grant would be deficient. This concern seems to have been prompted mainly by some judicial decisions on the *Canadian Bill of Rights 1960,* and, in particular, by the decision in *Hogan v The Queen*[287] that evidence obtained in violation of that legislation was not thereby rendered inadmissible.[288]

9.246 While there have been many judicial decisions involving interpretation of section 24, few of them are decisions of the Supreme Court of Canada. The extent to which the courts can use the section to refashion remedial law is thus unsettled. This much is, however, clear:

(a) Section 24(1) does not have the effect of enlarging the jurisdiction of courts. Rather, it assumes the existence of jurisdiction conferred by instruments external to the Charter. So it does not authorise a court to grant a remedy of a kind which it could not grant under the other instruments which define and delimit its jurisdiction.[289]

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284 *James v Commonwealth* (1939) 62 CLR 339, 359-60; *Commissioner for Motor Transport v Antill Ranger and Co Pty Ltd* [1956] AC 527, 537.

285 See *Sirros v Moore* [1975] 1 QB 118; *Nakhla v McCarthy* [1978] 1 NZLR 291; *Trapp v Mackie* [1979] 1 WLR 377; *Moll v Butler* (1985) 4 NSWLR 231.

286 *Deacon v Grimshaw* (1955) 93 CLR 83; *Antill Ranger and Co Pty Ltd v Commonwealth* (1955) 93 CLR 83 (affirmed in *Commissioner of Road Transport v Antill Ranger and Co Pty Ltd* [1956] AC 527). See also *Barton v Commissioner for Road Transport* (1957) 97 CLR 633 (statute limiting time for bringing actions).

287 (1975) 48 DLR 3d 427.

288 On the genesis of section 24 see H Scott Fairley, 'Enforcing the Charter' (1982) 4 *Supreme Court Law Review* 217, 219-24.

289 *Singh v Minister of Employment and Immigration* (1985) 17 DLR 4th 422 (SCC); *Mills v The Queen* (1986) 29 DLR 4th 161 (SCC); *Rahey v The Queen* [1987] 1 SCR 588 (SCC).

(b) Section 24(1) incorporates a test of standing to sue, but, where there is a contest as to the constitutionality of legislation, the sub-section does not oust the general rules governing standing to sue.[290]

(c) For the purposes of section 24(1), the term 'remedy' should be construed in a generous fashion. Remedies encompass not merely court orders and judgments like injunctions, declarations, prerogative writs or remedies in the nature thereof, and compensatory awards, but also orders for stay of proceedings, dismissal of criminal charges, exclusion of evidence, orders as to costs, and mitigation of sentences.

9.247 Section 24(1) of the *Charter* was intended to give courts a constitutional mandate to grant remedies for violation of protected rights and freedoms notwithstanding that a remedy would not have been available under the general law. Some judges have recognised that, when dealing with applications under section 24(1), they are not constrained by prior remedial law.[291] Others have, however, tended to apply traditional principles. There has, for example, been a reluctance on the part of some courts to award damages where no actual damage to the plaintiff has been shown, or where officials have acted in good faith in reliance on statutes assumed to be valid.[292] Damages have also been denied where there was statutory protection against liability for acts done pursuant to the unconstitutional statute.[293] The *Charter,* it was said, does not preclude the enactment of legislation to protect officials against civil liability.

9.248 ***United States.*** Since 1871, United States law has included express provision whereby a remedy may be sought for deprivation of rights, privileges or immunities secured under the Constitution. The statutory remedy is, however, limited to cases where the infringement is committed under colour of legislation, custom or usage of States, Territories or the District of Columbia.[294]

9.249 In 1971 the United States Supreme Court held that, independently of any statutory provision, damages can be awarded for violations of constitutionally protected rights.[295] It thus became possible to obtain compensation for constitutional wrongs committed by federal officials as well as by State officials. Amendments to the *Federal Torts Claims Act* in 1976 strengthened this constitutional remedy by enlarging the range of cases in which the United States could be held vicariously liable for the acts of its officials.

9.250 To establish a claim for damages for a constitutional wrong, a plaintiff must show that the loss sustained would not have occurred but for that wrong.[296] Where the wrong consists of violation of due process rights, actual damage must be shown.[297] A further limitation on liability is that damages will not be awarded against officials unless they

290 *R v Big M Drug Mart Ltd* (1985) 18 DLR 4th 321 (SCC).
291 See *Germain v The Queen* (1984) 53 AR 264, paras 25-8, (Alta QB); *Crossman v The Queen* (1984) 9 DLR 4th 588 (FCTD); *Levesque v Attorney-General of Canada* (1985) 25 DLR 4th 184 (FCTD).
292 See *Vespoli v The Queen* (1984) DTC 6489 (Fed CA): *Crown Trust Co v The Queen in Right of Ontario* (1986) 26 DLR 4th 41 (Ont HCJ).
293 *Kohn v Globerman; Kohn v City of Winnipeg* (1986) 27 DLR 4th 583, 599 (Man CA).
294 42 US Code section 1983; made pursuant to section 5 of the Fourteenth Amendment.
295 *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics* 403 US 388 (1971).
296 *Mt Healthy School District Board of Education v Doyle* 429 US 274 (1977).
297 *Carey v Piphus* 435 US 247 (1978).

knew or ought to have known that they were violating the plaintiff's constitutional rights.[298] Officials exercising judicial powers and prosecutors are completely immune from liability.[299]

International obligations

9.251 By its ratification of the International Covenant on Civil and Political Rights Australia has assumed an obligation to ensure that those whose rights and freedoms under the Covenant have been infringed have an effective remedy. Article 2(3) provides:

> Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by a court of competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

9.252 Article 9(5) provides that 'Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.'

Reasons for recommendation

9.253 There can be no dispute that constitutional limitations on governmental powers should be enforceable by the courts. The question here is rather whether, when those limitations take the form of prohibitions against impairment of declared rights and freedoms of individuals, there is any need to have an express constitutional provision to authorise the courts to grant remedies to individuals whose constitutional rights and freedoms have been violated.

9.254 We acknowledge that, even without an express remedies clause such as that we propose, courts would, in many cases, be able to provide a suitable remedy to those whose guaranteed rights and freedoms had been infringed. There is, however, no assurance that they would be prepared to extend existing principles governing liability to pay compensation or make restitution in order to ensure that no one whose constitutional rights have been infringed could be denied recompense merely because the wrong done does not fit within existing categories of civil liability, or because of some principle protecting the defendant against liability.[300] The purpose of the section we propose is to provide courts with a clear constitutional mandate to develop existing remedial law so that no one whose constitutional rights or freedoms have been infringed is denied appropriate remedy. It is also designed to preclude the enactment of legislation the effect of which would be to prevent the award of appropriate judicial remedies.

9.255 The value of a section such as that we recommend is well illustrated by the case of *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*.[301] In this case, a barrister claimed compensation for violation of his right, under section 1 of the Constitution of Trinidad and Tobago, not to be deprived of his liberty save by due process of law. That

298 *Scheuer v Rhodes* 416 US 232 (1974); *Wood v Strickland* 420 US 308 (1975); *Butz v Economou* 438 US 478 (1978); *Harlow v Fitzgerald* 457 US 800 (1982).

299 *Butz v Economou* 438 US 478 (1978); *Pierson v Ray* 386 US 547 (1967); *Imbler v Packtman* 424 US 409 (1976).

300 It is relevant to note that anti-discrimination legislation making discrimination on certain grounds unlawful has always included express provisions on the remedies available for unlawful acts.

301 [1979] AC 385.

right had been violated when a judge committed him for contempt of court without first giving him an opportunity of being heard in his defence. At common law, no compensation would have been payable in this case because of the rule that judges incur no civil liability for acts done in exercise of their judicial powers. But section 6 of the Constitution of Trinidad and Tobago provided that if a person alleged a contravention of constitutionally guaranteed rights, application could be made to the High Court for redress, and the Court could 'make such orders, issue such writs and give such directions' as it considered 'appropriate for the purpose of enforcing, or securing the enforcement of' any of the constitutional guarantees to the protection of which the applicant was entitled. According to the Judicial Committee of the Privy Council, this section provided a mandate for the award of compensation, not against the judge who had denied Maharaj his constitutional right to due process, but against the state. It was not, the Judicial Committee said, a case of vicarious liability; it was not even a case of tortious liability. It was rather 'a liability in the public law of the state' created by section 6 of the Constitution.[302]

9.256 We have noted that under clause 17 of the Bill for the *Australian Bill of Rights Act 1985,* infringement of a right or freedom set out in the proposed Bill of Rights was expressly declared not to confer on any person any right of action or to render any person liable to any criminal proceeding. Elsewhere in the Bill, provision was made for investigation of complaints of infringement by the Human Rights and Equal Opportunity Commission. This scheme was proposed because of a fear that if the legislation allowed for affirmative, as distinct from defensive, remedies, courts could be swamped with litigation and limited legal aid funds could be further taxed.

9.257 United States experience shows that affirmative remedies for alleged violations of constitutional guarantees are frequently pursued. Section 1983 of title 42 of the *United States Code*[303] is said to be the most litigated section of that Code. Nonetheless our view is that a provision like clause 17 in the Federal Bill of 1985 has no place in the Constitution. If certain individual rights and freedoms are considered worthy of constitutional protection, then judicial remedy for violations of them should be assured.

9.258 Like its Canadian counterpart, the remedies section we propose would not operate to confer new jurisdiction on any court. Remedy would have to be sought from a court already having jurisdiction as regards the subject-matter, the parties and the particular remedy or remedies sought.

9.259 We would expect the term 'remedy' to be interpreted generously, as under section 24(1) of the *Canadian Charter,* and so as to include exclusion of otherwise relevant evidence on the ground that it was obtained by unconstitutional means. We do not think it necessary, or even desirable, to include in the Constitution a special rule on admissibility of evidence obtained in violation of constitutional guarantees.[304] We certainly do not favour a constitutional rule as strict as that adopted by the Supreme Court of the United States.[305] Nor do we consider it appropriate to include in the Constitution a provision as detailed as clause 16(1) of Bill for the *Australian Bill of Rights*

302 id, 399.
303 Discussed at para 9.248.
304 cf *Canadian Charter of Rights and Freedoms,* section 24(2).
305 *Mapp v Ohio* 367 US 643 (1961); as modified by *United States v Leon* 468 US 897 (1984).

Act 1985.[306] In our view, the matter of exclusion of evidence obtained by unconstitutional means is best left to the discretion of trial courts, to be exercised with reference to relevant competing interests.[307]

9.260 Finally, it should be said that constitutional assurance of a right to seek appropriate judicial remedies for infringement of guarantees of rights and freedoms would not preclude the enactment of legislation to provide for administrative remedies such as those which may be sought of the Human Rights and Equal Opportunity Commission. For the purposes of this Report it is unnecessary for us to express a view on the desirability of development of administrative remedies for violations of constitutionally guaranteed rights and freedoms. The existence of such remedies could, however, affect the exercise of judicial discretions to deny those judicial remedies which are discretionary.

ADDITIONAL RIGHTS AND FREEDOMS

9.261 In this part of the Chapter we recommend that basic individual rights and freedoms be inserted in the Constitution. Each of these rights and freedoms, or groups of them, is dealt with separately and in detail in the light of experience in other comparable countries. Reference is also made to relevant international instruments.

Freedom of conscience, religion, thought, belief and opinion

Recommendation

9.262 We *recommend* that the Constitution be altered to provide that:

> 124E. Everyone has the right to:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief and opinion;. . . .

9.263 We have *recommended* that freedom of expression, peaceful assembly and association be guaranteed in the Constitution.[308]

9.264 Also, we have recommended alterations to section 116 of the Constitution. If these alterations are approved at referendum, then we further *recommend* that the words 'and religion' be omitted from the proposed section 124E of the Constitution.

Current position

9.265 Freedom of conscience, religion, thought, belief and opinion are the basic freedoms in a liberal democracy. The liberal appeal to conscience and the argument for toleration are grounded upon these freedoms which constitute the first principles of a free and democratic society. These freedoms are not, however, guaranteed by the common law.

306 See also Senate Standing Committee on Constitutional and Legal Affairs, *A Bill of Rights for Australia?* (1985), 81, para 5.20-5.21.

307 See *The Queen v Ireland* (1970) 126 CLR 321; *Bunning v Cross* (1978) 141 CLR 54; *Cleland v The Queen* (1982) 151 CLR 1. See also Australian Law Reform Commission, *Evidence* (Report No 26) (1985) para 964.

308 Under the headings 'Freedom of expression', 'Freedom of peaceful assembly' and 'Freedom of association', para 9.302, 9.342 and 9.364 respectively.

9.266 The Federal and Tasmanian Constitutions include a guarantee of freedom of religion (sections 116 and 46 respectively). At present, the first binds the Commonwealth but not the States; the second may be repealed by the State Parliament.[309] Section 46 of the Tasmanian Constitution also provides a guarantee of freedom of conscience.

9.267 No other State Constitution provides protection for any of the basic liberal freedoms.

9.268 The protection granted by the Federal Constitution covers only religious freedom. The importance of freedom of conscience is recognised in federal statutes, however, at least as it applies to an exemption from compulsory military service on the ground of conscientious belief.[310]

Position in other countries

9.269 ***United States.*** The First Amendment of the Constitution, ratified in 1791, states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

9.270 The Supreme Court of the United States has held that the First Amendment safeguards the free exercise of any chosen form of religion and that this safeguard involves two concepts: the freedom to believe and the freedom to act. The first is absolute but the second cannot be. Conduct, or religious freedom to act, is subject to regulation for the protection of society.[311]

9.271 The denial of unemployment benefits to a person who refused to work on Saturdays on religious grounds has been held to be unconstitutional.[312] However, in a case where an Amish employer of Amish workmen sought exemption from the duty to pay social security taxes, the Court decided that the interest of the government in preserving the integrity of the social security system was a compelling one, requiring the employer to comply with the law even though it 'violated' his faith.[313]

9.272 It has also been held that the First Amendment permits an exemption from military service for those who oppose participation in all wars but does not exempt those whose religious philosophy prohibits participation in a particular war.[314]

9.273 Further, the Supreme Court has decided that a right to silence may be derived both from the underlying freedom of belief and conscience embodied in the First Amendment and from its express prohibition against Congress making laws 'abridging the freedom of speech'. This right is compromised by a requirement to enunciate opinions and affirm beliefs which the individual does not hold,[315] or where the individual is compelled to subscribe to propositions which are not his or her own.[316] The Court has struck down requirements that State employees affirm allegiance to the national and State Constitutions and disclaim membership of the Communist Party and other 'subversive'

309 Section 116 is discussed at para 9.794-9.833.

310 Section 29A(1) of the *National Service Act 1951* (Cth) provides such an exemption. Section 29A(5) of the Act states: 'For the purpose of this section, a conscientious belief is a conscientious belief whether the ground of the belief is or is not of a religious character and whether the belief is or is not part of the doctrines of a religion.' Section 61(2) of the *Defence Act 1903* (Cth) provides an identical definition of conscientious belief.

311 *Cantwell v Connecticut* 310 US 296 (1940).

312 *Sherbert v Verner* 374 US 398 (1963).

313 *United States v Lee* 455 US 252 (1982).

314 *Gillette v United States* 401 US 437 (1971).

315 *West Virginia State Board of Education v Barnette* 319 US 624 (1943).

316 *Wooley v Maynard* 430 US 705 (1977).

organisations.[317] Also, a State regulation that children in public schools salute and pledge loyalty to the United States' flag has been held to be unconstitutional. In that case, *West Virginia Board of Education v Barnette*, Jackson J declared:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[318]

9.274 ***Canada.*** Section 2 of the *Canadian Charter of Rights and Freedoms* states:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication . . . .

9.275 The courts have held that, where the *Charter* uses the word 'freedom', what it guarantees is non-interference by the state in the activity embraced by the freedom.[319] The 'fundamental freedoms' enumerated in section 2 of the *Charter* are the essential liberal freedoms against state interference, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

9.276 Pursuant to this, it has been decided that freedom of religion is not infringed, for example, where the state exercises its right to safeguard the health and welfare of children,[320] or where a member of a religious group is prevented from carrying in public places a religious symbol capable of use as a weapon.[321] Neither is it infringed where prevention from possessing and cultivating marijuana violates a sincerely held belief of some persons based on a life-style required by their conscience or religion.[322]

9.277 In *R v Big M Drug Mart Ltd*[323] the Supreme Court of Canada held that Sunday trading legislation violated the freedom of conscience and religion guaranteed under the *Charter*. It decided that these guarantees mean at the very least that the Government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. The object of these guarantees, it was said, is to entrench those individual freedoms which are fundamental to a democracy.[324]

9.278 The Canadian Supreme Court has also upheld the right to silence on the ground that, since the freedom of thought, belief, opinion and expression guarantees to every person the right to express the opinions he or she may have, *a fortiori* it must prohibit compelling anyone to utter opinions that are not his or her own.[325]

9.279 ***New Zealand.*** Article 6 of the draft Bill of Rights 1985 provides:

> Everyone has the right to freedom of thought, conscience, religion and belief, including the right to adopt and to hold opinions without interference.

317 *Keyishian v Board of Regents* 385 US 589 (1967).
318 319 US 624, 642 (1943).
319 *Re Allman et al and Commissioner of the Northwest Territories* (1983) 144 DLR 3d 467 (NWTSC); 8 DLR 4th 230 (NWTCA).
320 *Re Davis* (15 August, 1982, Alta Prov Ct (Fam Div)); *Re McTavish and Director, Child Welfare Act* (1986) 32 DLR 4th 394 (Alta QB); *Re Killins* (5 March, 1987, Alta Prov Ct (Fam Div)).
321 *Hothi v The Queen* (1985) 3 WWR 256 (Man QB).
322 *R v Kerr* (1986) 75 NSR 2d 305 (NSCA).
323 (1985) 18 CCC 3d 385 (SCC).
324 See also, *Re Attorney-General of British Columbia and Board of Trustees of School District No 65 (Cowichan)* (1985) 19 DLR 4th 166 (BCSC).
325 *Re National Bank of Canada and Retail Clerks' International Union* (1984) 9 DLR 4th 10 (SCC); see also, *Re Lavigne and Ontario Public Service Employees Union* (1986) 55 OR 2d 449 (Ont HCJ).

9.280 In contrast to the *Canadian Charter,* the draft New Zealand Bill of Rights includes separate provisions for those freedoms 'concerned with the internal subjective element', on the one hand, and those relating to the expression or the 'external manifestations of that element, for instance in religious worship and speech'.[326]

International Convenant on Civil and Political Rights

9.281 Article 18(1) of the International Covenant on Civil and Political Rights 1966 provides:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

9.282 Article 19(1) of the Covenant provides:

> Everyone shall have the right to hold opinions without interference.

Submissions

9.283 We consider the views expressed in the submissions concerning freedom of religion later in this Chapter.[327] A majority of these supported the entrenchment of religious freedom in the Constitution, either in the form of the broadly worded provision we recommend here, or as embodied in an altered version of section 116. A number of these submissions also favoured entrenchment of a guarantee of freedom of religious conscience in the Constitution.[328] Other submissions supported a guarantee of freedom of conscience on general ethical grounds.[329] Dr PH Springell argued, *inter alia,* that 'conscientious objectors to military expenditure be eligible to have that portion of their taxes corresponding to the military component of the budget paid into a Peace Tax Fund'.[330]

9.284 A few submissions opposed entrenchment of freedom of conscience in the Constitution.[331]

Issue

9.285 The issue is whether it is appropriate to entrench in the Constitution a guarantee of freedom of conscience, religion, thought, belief and opinion.

Reasons for recommendation

9.286 We believe that freedom of conscience, religion, thought, belief and opinion should be entrenched in the Constitution. The freedoms we seek to protect here are fundamental to any proper ordering of the relationship between the citizen and the state. They underpin our civil and political rights. They also enable individuals to develop their moral, intellectual and spiritual personalities. These freedoms are, therefore, essential to the integrity of the individual. Speaking of the region of human liberty appropriate to a liberal order, John Stuart Mill said in 1859:

326 *A Bill of Rights for New Zealand: White Paper,* 78, para 10.53.
327 para 9.819-9.822.
328 The Brethren S954, 15 December 1986; Church of Scientology S3384, 25 October 1986.
329 PC Bingham S1138, 6 March 1987; Knights of the Southern Cross S464, 11 November 1986; LAWASIA S956, 16 February 1987.
330 S103, 5 June 1986.
331 Mr L Burton S1333, 25 March 1987; Mr L Gregson S714, 1 November 1986.

> It comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological.[332]

9.287 In formulating an appropriate provision, we have used section 2 of the *Canadian Charter* as a model. We have not, therefore, followed the approach adopted by the framers of the draft New Zealand Bill of Rights, where separate provision is made for the freedom to believe or think, on the one hand, and the freedom to act, on the other. We recognise that the distinction is appropriate in a legal interpretation of these basic freedoms. Yet, in our view, the distinction cannot be made in a categorical sense, especially in relation to freedom of religion where certain prescribed practices of worship may be fundamental to faith itself. While freedom of conscience, etc, operate primarily in the subjective, inward domain of consciousness, they are not exclusive to it.

9.288 Some might argue that these freedoms duplicate one another and that, consequently, they would introduce repetition and uncertainty into the Constitution. Our view is that each of the enumerated freedoms would offer distinct guarantees relating to particular, though connected, aspects of the individual's moral, spiritual and intellectual life.

9.289 ***Freedom of conscience.*** By conscientious belief is meant a deeply held moral conviction which, in the words of the Senate Standing Committee on Constitutional and Legal Affairs, 'is part of the core fundamental values of a person and which is expressed as an imperative having primacy in the life of the person concerned.'[333] As Professor Peter Singer explained in evidence to the Committee, this broad statement is best understood if we see what it leaves out.

> What it leaves out most clearly are beliefs based on selfish desires of one sort or another, personal interest, belief based on emotions like fear or ambition perhaps. It also leaves out beliefs which are whimsical or based on impulse.[334]

9.290 Chief Justice Barwick commented in *Reg v The District Court of the Queensland Northern District; Ex Parte Thompson*:

> A conscientious belief because it is a matter of conscience with its compulsive quality is durable though not unchangeable .... Such a belief must be carefully distinguished from mere intellectual persuasion which by its very nature may be transient.[335]

9.291 A conscientious belief, therefore, is a seriously held moral conviction, the violation of which would impair an individual's integrity as a human being.

9.292 An explained elsewhere[336] and, as is clear from the cases in the United States and Canada, this freedom (and others) must, in particular circumstances, be balanced with other freedoms and social interests. This is expressly provided for in proposed section 124C.

9.293 ***Freedom of religion.*** As we explain later in this Chapter, religious freedom is the paradigm freedom of conscience.[337] Yet, 'religion' and 'conscience' are not synonymous; our conception of moral conviction extends beyond belief in a supernatural Being, Thing or Principle which accords with the traditional, if not exclusive, meaning of religion. At

332 JS Mill, *Utilitarianism, On Liberty and Considerations on Representative Government* (Acton ed, 1972) 75.
333 Senate Standing Committee on Constitutional and Legal Affairs, *Conscientious Objection to Conscripted Military Service* (1985) 10.
334 id, 9.
335 (1968) 118 CLR 488, 492.
336 para 9.808 and 9.828.
337 ibid.

its broadest, religion is associated with spiritual belief and with the canons of conduct that give effect to it.[338] What is proposed here is a general guarantee of freedom of religion which extends to acts done in pursuance of religious beliefs.

9.294 We discuss below the judicial comments, made in relation to section 116 of the Constitution, regarding the justified limitations on the free exercise of religion.[339] That no right of religious freedom exists under the common law is also considered later in this Chapter.[340]

9.295 We recognise that if section 116 is altered to cover Federal, State and Territorial Governments, as we have recommended, then it would duplicate the guarantee of religious freedom we recommend here. It would be the same guarantee expressed in a different way. Section 116 would provide specific prohibitions against Governments. The proposed section 124E, while presented as a positive recognition of a general freedom of religion, would have the same practical effect. A real possibility of contradiction between the two must also be recognised. This would arise as a result of the minority's recommendation in this Chapter that a State or Federal Parliament be given the power to override the guarantees embodied in the proposed Chapter on Rights and Freedoms. Under these circumstances, a State might 'opt-out' of the general guarantee of religious freedom, yet still be subject to substantially the same limitations on its power under an altered section 116.

9.296 We recommend that, if the alterations we propose to section 116 are passed at referendum, then the words 'and religion' be omitted from the proposed section 124E.

9.297 ***Freedom of thought.*** 'Thought' refers to acts of cognition not necessarily involving moral conviction or spiritual belief. It embraces reflection, doubt, being in 'two minds', analysis, speculation and reasoning.

9.298 ***Freedom of belief and opinion.*** A 'belief' is a settled view. It may be so settled that it cannot be changed in the face of argument, evidence or experience. An opinion, in contrast, is a provisional view or a transient intellectual persuasion capable of change in response to such factors. Both 'belief' and 'opinion' encompass moral and spiritual views and both extend beyond these to cover settled and provisional views on politics, science, art and all other fields of human interest and endeavour.

9.299 A guarantee of freedom of belief and opinion would underpin and explicitly embody the freedom from being compelled to adopt or affirm views which are not one's own, either by way of direct or by way of 'symbolic' speech. In the absence of a guarantee of freedom of belief and opinion, the right not to speak must be inferred from the freedom of positive speech. That right could only be claimed in relation to beliefs and opinions; it would not extend to cover the freedom not to divulge information which would often conflict with the public's interest in the disclosure of information.

9.300 Freedom of thought, belief and opinion are basic to a society such as ours.

9.301 ***Summary.*** We believe that these distinct, though related, freedoms are of the utmost importance. The guarantees they offer are real and substantial; the principles they embody are of serious and practical moment. We do not suggest that these basic liberal freedoms are under threat in Australia today. Nevertheless, primarily as a result of

338 For judicial comment on the different definitions of religion see *Church of the New Faith v Commissioner of Pay-roll Tax (Vict)* (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J), 154 (Murphy J) and 174 (Wilson and Deane JJ).

339 para 9.829.

340 para 9.825.

developments in technology, there has been in recent times an increase in the actual or potential powers of the arms of government to intrude in and interfere with the affairs of individuals, even in the first region of human liberty which belongs to the inward person. The history of this century confirms what John Stuart Mill said in *On Liberty* (1859):

> it is not difficult to show, by abundant instances, that to extend the bounds of what may be called moral police, until it encroaches on the most unquestionably legitimate liberty of the individual, is one of the most universal of all human propensities.[341]

We believe that the most unquestionably legitimate freedoms of the individual – freedom of conscience, religion, thought, belief and opinion – should be entrenched in the Constitution.

Freedom of expression

Recommendation

9.302 We *recommend* that the Constitution be altered to provide that:

> 124E. Everyone has the right to . . .
>
> (c) freedom of expression;. . . .

Current position

9.303 The Constitution does not, at present, place any direct limitations on parliamentary powers to make laws which limit freedom of expression. The Federal Parliament's powers to do so are indirectly limited, but only because its legislative powers are confined to enumerated matters.

9.304 Laws restricting freedom of expression cover a wide range of subjects. They include the laws on defamation, sedition, blasphemy, obscenity, indecency, and offensive behaviour; contempt of court and of parliaments; legislation restricting reporting of certain court proceedings; laws regulating advertising; laws governing the importation of books, films, videos and so forth; laws regulating the exhibition of films and the sale of certain types of publications; laws regulating broadcasting and use of postal services; and official secrets legislation.

9.305 The reasons why legal limits are imposed on what people may say and write, on what publications they may distribute, etc, are many and various. To take but a few examples: the restrictions imposed by laws of defamation are to protect people's reputational interests; the restrictions imposed by the laws on contempt of court are to secure fair trials, to maintain the authority of the courts and the integrity of their processes. This is not to say, however, that all of the restrictive laws are consistent with a free and democratic society. Were there to be a constitutional guarantee of freedom of expression, some of them, or some aspects of them, might not survive constitutional challenge.

Position in other countries

9.306 Constitutions which guarantee individual rights and freedoms invariably protect freedom of expression in one way or another. For present purposes, it is sufficient to consider the position in the United States and Canada, and the draft New Zealand Bill of Rights 1985.

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341 JS Mill, op cit, 141.

9.307 ***United States.*** The First Amendment, ratified in 1791, declares that Congress shall, amongst other things, 'make no law . . . abridging the freedom of speech, or of the press . . .'. Since 1925 it has been accepted that the Fourteenth Amendment (1868) extends this prohibition to the States.[342] It has also been accepted that the guarantee operates not only in favour of natural persons, but also in favour of corporations and associations.[343]

9.308 The United States Supreme Court has interpreted the concept of speech very broadly to include not merely communication by words and pictorial representations but also communications by non-linguistic symbols or gestures, for example, the wearing of armbands by schoolchildren to signify protest against the war in Vietnam,[344] the burning of a draft card to express opposition to conscription for that war,[345] and the wearing of Nazi uniforms with the object and effect of expressing a point of view.[346] It has even been held that freedom of speech is affected by legislation which limits the financial contributions which can be made to the campaign of a candidate for public office, which limits the expenditures which may be incurred by or on behalf of such a candidate, or which otherwise limits financial contributions to or expenditures on political campaigns.[347] The main justification for treating such legislation as restrictive of freedom of speech is that 'virtually every means of communicating ideas in today's mass society requires the expenditure of money.'[348]

9.309 For many years, the Supreme Court took the view that commercial speech, such as advertising, was not protected by the First Amendment. The Court reversed its position in 1975, though it has not been prepared to accord commercial speech the same degree of protection as political speech.[349]

9.310 Freedom of speech has been interpreted to mean not merely an absence of governmental constraints on expression. In some circumstances, the constitutional guarantee requires that those who wish to exercise their freedom be given facilities to do so, for example, reasonable access to publicly owned spaces and buildings for the purpose of meetings and demonstrations.[350] There is no comparable constitutional duty on private persons and concerns to allow access to their facilities.[351] On the other hand, it has been held permissible for the Federal Communications Commission to impose right of reply

342 *Gitlow v New York* 268 US 652 (1925).
343 *First National Bank of Boston v Bellotti* 435 US 765 (1978).
344 *Tinker v Des Moines School District* 393 US 503 (1969).
345 *United States v O'Brien*, 391 US 367 (1968).
346 *Smith v Collin* 436 US 953 (1978).
347 *Buckley v Valeo* 424 US 1 (1976); *First National Bank of Boston v Bellotti* 435 US 765 (1978); *Citizens Against Rent Control v Berkeley* 450 US 908 (1982); *Secretary of State of Maryland v Joseph H Munson Co Inc* 467 US 947 (1984); *Federal Election Commission v National Conservative Political Action Committee* 470 US 480 (1985).
348 *Buckley v Valeo* 424 US 1, 19 (1976).
349 *Bigelow v Virginia* 421 US 809 (1975); *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* 425 US 748 (1976); *Bates v State Bar of Arizona* 433 US 350 (1977); *Ohralik v Ohio State Bar Association* 436 US 447 (1978); *Bolger v Young Drug Products Ltd* 463 US 60 (1983); *Linmark Associates Inc v Willingboro* 431 US 85 (1977); *In re MJ* 455 US 191 (1982); *Zauderer v Office of Disciplinary Counsel* 471 US 626 (1985); *Central Hudson Gas and Electricity Corp v Public Service Commission* 447 US 557 (1980); *Posadas de Puerto Rico Associates v Tourism Co* 106 S Ct 2968 (1986).
350 *Hague v CIO* 307 US 496 (1939); *Edwards v South Carolina* 372 US 229 (1963); *Brown v Louisiana* 383 US 131 (1966); *Tinker v Des Moines School District* 393 US 503 (1969); *Grayned v City of Rockford* 408 US 104 (1972); cf *Greer v Spock* 424 US 828 (1976); *Lehman v City of Shaker Heights* 418 US 298 (1974); *Perry Educational Association v Perry Local Educators Assocn* 460 US 37 (1983); *Members of the Council of the City of Los Angeles v Taxpayers for Vincent* 466 US 789 (1984); *Clark v Community for Creative Non-Violence* 468 US 288 (1984); *Cornelius v NAACP Legal Defense and Educational Fund Inc* 473 US 788 (1985).
351 *Miami Herald Publishing Co v Tornillo* 418 US 241 (1974).

requirements on licences of broadcasting stations.[352] The extent to which the First Amendment supports claims of rights of access to information in the hands of governments is considered later in this Chapter.[353]

9.311 The freedom guaranteed by the First Amendment, though guaranteed without express qualifications, is not absolute. Freedom of speech may be limited by governmental action, but only if there is a very good justification for it. Limitations imposed by laws on defamation, obscenity, seditious incitement to violence, contempt of court and advertising have been upheld, but some laws on these subjects have been found unconstitutional. Many of the laws in the latter category have Australian counterparts. Prior restraints on freedom of speech, that is, restraints which operate before publication, for example, by a system of censorship, have rarely been tolerated, and then only subject to stringent conditions.[354]

9.312 What is referred to as political speech has been accorded a preferred position. Abridgements of it have been permitted only when there have been compelling justifications, for example, to deal with a clear and present danger to national security. Perhaps the most striking demonstration of the preferred position of political speech was the case of *New York Times Co v Sullivan* in 1964[355] where the United States Supreme Court held that no one could be liable, civilly or criminally, for defaming a public official or public figure in the absence of proof that the defamatory publication was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.' This case, Brennan J observed, had been considered

> against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials . . .[356].

9.313 ***Canada.*** The fundamental freedoms guaranteed by section 2 of the *Canadian Charter of Rights and Freedoms* include 'freedom of expression . . . freedom of the press and other media of communication.' The scope of this guarantee is still unclear. While there have been many cases in the courts of the provinces in which the guarantee has been relied on, few cases on the guarantee have come before the Canadian Supreme Court. The Court has held that expression is not confined to communication by use of language. It extends to picketing as a means of expressing protest.[357]

9.314 Laws which have been held to infringe the guarantee of freedom of expression have included a legislative prohibition of commercials directed to children under the age of 13 years,[358] rules restricting communications between lawyers and media representatives,[359] legislative proscription of contributions to electoral expenses by

352 *Red Lion Broadcasting Co v Federal Communications Commission* 395 US 367 (1969); see also *CBS v Democratic National Committee* 412 US 94 (1973); *CBS v FCC* 453 US 367 (1981).

353 Discussed under the heading 'Freedom of information', para 9.908-9.909.

354 See *Freedman v Maryland* 380 US 51 (1965); see also *New York Times Co v United States* 403 US 713 (1971).

355 376 US 254.

356 id, 270. On who are public officials and figures see *Rosenblatt v Baer* 383 US 75 (1966); *Curtis Publishing Co v Butts* 388 US 130 (1967); *Gertz v Robert Welch Inc* 418 US 323 (1974).

357 *Retail, Wholesale and Department Store Union Local 580 v Dolphin Delivery Ltd* (1986) 33 DLR 4th 174. See also *Comite pour la Republique du Canada – Committee for the Commonwealth v Queen in right of Canada* (1987) 36 DLR 4th 501 (Fed CA) where it was held that, although a ban on the distribution of political pamphlets and the exhibition of political placards in airport terminals infringed freedom of expression, the ban was justifiable under section 1 of the Charter.

358 *Irwin Toy Ltd v Attorney-General, Quebec* (1986) 32 DLR 4th 641 (Que CA).

359 *Re Klein and Law Society of Upper Canada; Re Dvorak and Law Society of Upper Canada* (1985) 16 DLR 4th 489 (Ont Div Ct).

persons and bodies other than candidates and registered political parties,[360] and certain restrictions on the political activities of public servants.[361] On the other hand, laws against obscenity have, in the main, survived challenge.[362]

9.315 As in the United States, commercial speech has, in most cases, held to be protected by the constitutional guarantee.[363]

9.316 ***New Zealand.*** Article 7 of the draft Bill of Rights 1985 provides:

> Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions in any kind or in any form.

9.317 This proposed guarantee is subject to the justified limitations clause in section 3 of the draft Bill. The formulation in proposed Article 7 draws on Article 19 of the ICCPR.

International instruments

9.318 Section 2 of Article 19 of the International Covenant on Civil and Political Rights provides:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[364]

9.319 Section 3 of the same Article goes on to state that the exercise of the rights provided for in section 2, may 'be subject to certain restrictions' but that:

> these shall only be such as are provided for by law and are necessary:
>
> (a) For respect of the rights and reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.[365]

9.320 Article 20 positively requires proscription by law of certain types of expression, namely 'propaganda for war' and '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence . . .'.[366]

9.321 Some guidance on how the requirements of Article 19 might be applied, by an international tribunal, to Australian law is provided by decisions of the European Court of Human Rights on petitions against the United Kingdom for alleged violations of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the wording of which is similar to that of Article 19 of the ICCPR.[367]

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360 *National Citizens Coalition Inc v Attorney-General Canada* (1984) 11 DLR 4th 481 (Alta QB).

361 *Re Fraser and Attorney-General of Nova Scotia* (1986) 30 DLR 4th 340 (NSSC); cf *Osborne v The Queen* (1986) 30 DLR 4th 662 (FCTD).

362 See, for example, *R v Red Hot Video Ltd* (1985) 18 CCC 3d 1 (BCCA).

363 *Irwin Toy Ltd v Attorney-General, Quebec* (1986) 32 DLR 4th 641 (Que CA); *Attorney-General, Quebec v La Chaussure Brown's Inc* (1986) 36 DLR 4th 374 (Queb CA); *Re Grier and Alberta Optometric Association* (1987) 5 ACWS 3d 334 (Alta CA); *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1984) 5 DLR 4th 766 (Ont CA).

364 cf Article 7 of proposed Australian Bill of Rights 1985.

365 See also the public emergency proviso in Article 4.

366 This article is included among Australia's remaining reservations to the ICCPR.

367 See *The Sunday Times v United Kingdom* (1979) 2 EHRR 245 and *Handyside v United Kingdom* (1976) 1 EHRR 737.

Advisory Committee's recommendation

9.322 The Rights Committee recommended[368] that the Constitution be altered to provide:

> Subject to section 51(vi.) the Commonwealth or a State shall not
> . . .
> restrict freedom of expression concerning government, public policy and administration, and politics.

9.323 The Committee recorded that many of those who had submitted that the Constitution should be altered to provide for more ample constitutional protection of rights and freedoms had 'listed freedom of speech as one of the most fundamental freedoms deserving protection.'[369] It, nonetheless, concluded that it was preferable to limit a federal constitutional guarantee of freedom of speech to 'political speech' and to leave 'other areas of speech which are subject to various forms of appropriate restrictions . . . such as obscenity, copyright or incitement to racial hatred . . . for debate within the ordinary political process.'[370]

9.324 The object of the provision it proposed was to preserve 'the political process itself' against 'interference with speech which concerns matters affecting the processes of government'.[371] The Committee suggested that:

> the proposed wording of the freedom of expression provision would not be interpreted narrowly, so as merely to protect matters of immediate political concern. It would encompass all speech and expression, in any form, dealing with the structure of government and issues concerning the functioning of matters which bear upon public administration.'[372]

9.325 It also assumed that the word 'expression' would be interpreted 'widely so as to encompass all forms of communication'.[373]

Submissions

9.326 Submissions in support of the broad proposition that the Federal Constitution ought to contain a guarantee of freedom of expression indicated that freedom of

368 Rights Report, 55.
369 id, 54.
370 id, 54-5.
371 id, 55.
372 ibid.
373 ibid.

expression, broadly conceived, ranks high in the order of priorities of people who want the Constitution to be altered to place further restrictions on the powers of governments.[374]

9.327 At the same time, there were several submissions urging the imposition of greater controls over incitements to racial hatred and group defamation.[375]

9.328 Also, several submissions were concerned to see adequate safeguards against slander, libel and defamation,[376] or sedition,[377] or obscenity.[378] Others would limit the freedom to 'political speech'.[379]

9.329 The Queensland Government opposed both the Rights Committee's recommendation and any other provision to guarantee freedom of expression.[380] The Committee's proposal, it suggested, was 'totally unnecessary and would cause unintended problems for the Australian community and result in meritless and mischievous litigation'. Limitation of its application to 'political speech', it was further suggested, was 'unsatisfactory because [t]he parameters of what constitutes "political speech" are impossible to determine in advance.'

9.330 Reference was made in the Queensland Government's submission to a number of the decisions on the United States Constitution – notably those on non-linguistic forms of expression, 'offensive' publications, and defamation of public figures – and to comments of the European Court on Article 10(2) of the European Convention. This was to illustrate the kinds of problems which could arise if the Australian Federal Constitution were altered to include a general guarantee of freedom of expression.

9.331 'If', the Queensland Government contended, 'there was some objective reason for seeking to protect this particular civil right [that is, freedom of expression] which all Governments respect, the matter could perhaps be viewed in a different light. However, this is a proposal of academic interest only.'

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374 eg AR Pitt S2585, 23 December 1987; M Carter S3154, 17 November 1987; D Beasant S2376, 15 August 1987; RJ Ross S2719, 20 October 1987; K Crombie S2946, 4 November 1987; Federation of Ethnic Communites Councils of Australia S2561, 28 October 1987; S2829, 28 October 1987; RG Lowe S2914, 18 October 1987; WEHJ Phillips S3031, 5 November 1987; Citizens for Democracy S2262, 21 June 1987; J Zonius S269, 13 November 1986; H Monroe S3811, 21 October 1986; LJ Trebilco S50, 7 March 1986; Greenpeace S3033, 11 November 1987; J White S24 September 1986; J Glazebrook S27, 16 February 1986; SAL Kitchen S1108, 24 November 1986; DG Harper S154, 6 November 1987; NSW Council for Civil Liberties S3394, 25 October 1986; M Heller S439, 24 October 1986; J Taplin S3460, 15 November 1986; LJ Barker S465, 10 November 1986; AC Buckley S470, 8 November 1986; TR Stedman S484, 8 November 1986; D Hohke S520, 15 November 1986; J Allenbogen S3402, 25 October 1986; S Cathcart S3357, 19 March 1988; National Council of Women S3217, 27 January 1988; A Story S3160, 13 January 1988; E Mitchell S2594, 22 December 1987; SG Cozens S3085, 22 November 1987; E Byrne S2937, 31 October 1987; St Kilda Income Stretchers S3115, November 1987; GW and IA Potts S2863, 31 October 1987; Cayon Para-physical Research Centre S2480, 7 September 1987; PJ Benjamin S3001, 26 October 1987; RE Larkins S1897, 14 April 1987; PC Bingham S1137, 5 March 1987; M Allen S1322, March 1987; Soroptimist International of Cooma S843, 20 October 1987; Queensland Council for Civil Liberties S3363, 23 March 1988; L Burton S1333, 8 February 1987; Australian Press Council S727, 17 December 1986; PH Bailey S190, 22 November 1986; S3473, 4 December 1986; Vince Martin & Co S573, 19 November 1986; Italian Federation of Migrant Workers and their Families S1241, 7 March 1987.

375 eg Bureau of the Northern Land Council S1194, 6 March 1987.

376 R Wallace S1196, 8 April 1987; L Jolley S22, 16 February 1986; W Hearl S3582, 5 December 1986; SC Mathew S609, 25 November 1986; K Hussein S590, 19 November 1986.

377 A Richardson S2915, 29 October 1987. The Australian Humanists, on the other hand, were in favour of the abolition of existing laws which restrict freedom of speech in the areas of blasphemy and sedition: S1987, 27 April 1987.

378 J Jones S2909, 26 October 1987.

379 PJ Benjamin S091, 26 October 1987.

380 S3069, 17 November 1987.

Reasons for recommendation

9.332 Freedom of expression has long been recognised as vital to the maintenance of a democratic system of government and the exercise of democratic rights. A democratic system of government, of the kind with which Australians are familiar, involves on-going competition, mainly among political parties, for the right to govern through parliaments and other institutions of government, and the holding of periodic elections at which electors are required to signify which of the competitors should, in their opinion, be accorded the right to govern until the next election. A democratic system of government might also be thought to require institutional arrangements which facilitate continuing dialogue between those to whom governmental powers have been entrusted and those on whose behalf the powers are to be exercised.

9.333 A constitutional guarantee of freedom of expression provides a safeguard against the use, by temporary majorities, of the powers of government, either to eliminate competition from their political rivals or to place temporary minorities at such a disadvantage in the marketplace of political ideas that the possibilities of political change are significantly reduced. Such a guarantee also serves to ensure that channels for communication of information and ideas are not unnecessarily impeded and to remind governments that their policies and performances are never immune from criticism.

9.334 A guaranteed freedom to challenge and to criticise governmental actions and proposals means that governments need be prepared to answer criticisms and to defend what they do. This, in the end, makes for better policies and better administration.

9.335 While the chief purpose of giving constitutional protection to freedom of expression has been to establish an essential condition for the practice of democracy, it has not been the sole purpose. Most constitutions which afford that protection do not limit it to political speech. Freedom of speech is valued for other reasons, for example, because it is indispensable to the pursuit of truth and the advancement of knowledge, or because it is seen as a vital aspect of the individual's moral right to develop his or her faculties and personality. 'People', it is said, 'will not be able to develop intellectually and spiritually, unless they are free to formulate their beliefs and political attitudes through public discussion, and in response to the criticism of others.'[381] This latter justification of freedom of expression looks not only to the individual's interest in being able to communicate, freely, his or her thoughts and feelings to others. It looks also to the individual's interest in being able to seek and receive information and ideas.

9.336 We have concluded that freedom of expression should be guaranteed by the Australian Federal Constitution and we have recommended that it be guaranteed in substantially the same terms as section 2(c) of the *Canadian Charter of Rights and Freedoms*. We do not think it is necessary to stipulate that the guarantee includes freedom to seek, receive and impart information and ideas because, in our view, freedom of expression would be interpreted as encompassing all of these things. There can be little doubt that a person's freedom of expression would be held to be impaired not merely by laws which restrict what that person may say, write, publish or distribute, but also by laws which restrict, say, the person's freedom to import books and the like which have been published overseas.[382]

381 E Barendt, *Freedom of Speech* (1985) 14.

382 See, for example, *Re Luscher and Deputy Minister of National Revenue, Customs and Excise* (1985) 17 DLR 4th 503 (Fed CA).

9.337 The term 'expression' is, we think, preferable to the term 'speech'. The reference to freedom of speech in the First Amendment to the United States Constitution has been interpreted as if it were a general guarantee of freedom of expression. In more modern constitutions and in current relevant international instruments, the preferred term is 'expression'. That term, it is clear, can cover communications by non-linguistic as well as by linguistic symbols.

9.338 It is not, in our view, desirable to limit a constitutional guarantee of freedom of expression to 'expression concerning government, public policy and administration, and politics', as the Rights Committee recommends. We know of no other constitution which limits the scope of a guarantee of freedom of expression in this way. Even when the primary object has been to protect freedom of political speech, the framers of constitutions and of international instruments such as the ICCPR[383] have chosen to describe the protected activity in terms which do not confine it to political speech. Courts applying a general guarantee of freedom of expression may, as in the United States, choose to give political speech a preferred status so that expression 'designed to contribute to public debate on a matter of legitimate general concern is entitled to a greater degree of protection than expression aimed at a private interest, particularly in the commercial sector'.[384] Even if it were suggested that political speech merits a higher degree of constitutional protection than non-political speech, it would not follow that non-political speech should not receive constitutional protection. We do not believe that the case for freedom of political expression is stronger than that for freedom of non-political speech.

9.339 Another reason why we do not accept the Committee's recommendation is that the limited constitutional guarantee of freedom of expression which it proposes is stated in terms which would oblige the courts to make distinctions and develop criteria which they might find it extremely difficult to defend on rational grounds. A concept of political speech would be entrenched in the Constitution and courts would be required to reject certain claims on the ground that although freedom of expression was at stake, the expression involved was not relevantly political. The mere rejection of a claim on the ground that it did not fall into the political domain could expose the court to the criticism that it was itself making a political statement about what does not and does pertain to politics and was thereby engaging in the limitation of freedom of political expression.

9.340 Were the Australian Federal Constitution to be altered, as we recommend, to include a provision that everyone shall have a right to freedom of expression, in any case in which a court was asked to uphold that right, the court's first task would be decide whether a law, or something done in reliance on a law, did or did not infringe the claimant's asserted right. The court might also be asked to decide that, even though the claimant's constitutional right had, prima facie, been violated, the exercise of it had been permissibly limited by a law or laws which are demonstrably justified in a free and democratic society. There can be little doubt that questions of the latter kind would be likely to prove the most troublesome. In considering them, courts would need to have regard to a range of interests, public and private, which may be adversely affected by unconstrained freedom of expression, for example, national security, public safety and order, public health and morals, the need to maintain the authority and impartiality of the judiciary and to ensure fair trials, the need to protect individuals' reputations and legitimate claims to privacy, the need to prevent disclosure of certain types of information received in confidence, and the general need to protect the countervailing interests of others.

383 See *Handyside v United Kingdom* (1976) 1 EHRR 737.
384 E Barendt, op cit, 150.

9.341 Australian courts have considerable experience in dealing with cases in which claims to freedom of expression have had to be set off against claims for the protection of other interests, and in which legal principles have had to be shaped with regard to the competing claims and interests. The course of judicial development of the law on defamation, on obscenity and indecency, on contempt of court, and on confidential information – to take a few examples – is replete with instances in which courts have moulded the law with reference to competing interests. The introduction of a constitutional guarantee of freedom of expression, subject to a limitations clause of the kind we propose, would simply give greater prominence to that judicial function and extend it to the scrutiny of legislation.

Freedom of peaceful assembly

Recommendation

9.342 We *recommend* that the Constitution be altered to provide that

> 124E. Everyone has the right to . . .
>
> (d) freedom of peaceful assembly;. . . .

Current position

9.343 At present, the Constitution does not impose any express constraints on the powers of Australian legislatures to make laws which control people's ability to gather together, whether in public or private spaces, and whether for the purpose of holding a meeting, conducting a march or procession, or staging some kind of demonstration. But the Federal Parliament has power to make such laws only if the laws are with respect to one or more of the enumerated heads of federal legislative power.

9.344 Freedom of assembly is subject to many forms of legal regulation. The common law regulates the uses which may be made of public highways for meetings and processions, though nowadays much of this law is overridden by legislation. For the preservation of public order, the common law makes certain forms of assembly subject to criminal sanctions, for example, for the offences of riot, rout, affray, and unlawful assembly. Nowadays, however, the laws which have most immediate relevance to the right of assembly are statutory. These statutory laws create a variety of offences, most of them summary offences, and a number of them prohibit assemblies and processions in public thoroughfares and places except under licence by police or some other public authority.

9.345 For present purposes it is not necessary to enter into the details of these laws. They are discussed in a number of published works and are also the subject of a good deal of critical literature.[385]

Position in other countries

9.346 As in the case of freedom of expression, freedom of peaceful assembly is one of the freedoms which is normally guaranteed in those constitutions of democratic countries which contain such guarantees.

9.347 ***United States.*** The First Amendment, together with the Fourteenth Amendment, guarantees 'the right of the people peaceably to assemble'. Generally speaking, the United States Supreme Court has treated this guarantee as one aspect of freedom of expression.

385 See GA Flick, *Civil Liberties in Australia* (1981) Chap 4; A Hiller, *Public Order and the Law* (1983); F Brennan, *Too much Order with Too Little Law* (1983).

But, inasmuch as assembly involves conduct, state regulation has been tolerated to a somewhat greater extent than regulation of what is sometimes called 'pure speech'. Reasonable regulation to preserve public order is permissible; likewise reasonable regulation of meetings in public places. The regulations may relate to the time and place of meetings and the manner of their conduct. But regulation of the content of a meeting is not permissible.[386] Peaceful assembly also cannot be visited with criminal sanctions unless there is an element of violence or advocacy of violence.

9.348 Regulation of rights of assembly has not been regarded as reasonable if it involves prior grant of a permit to conduct a public meeting or procession and the legislation gives to the licensing authority an open-ended discretion to decide whether or not a permit shall be granted. Even when licensing discretions satisfy constitutional requirements, the manner of their exercise is still subject to close judicial scrutiny to ensure that they have been used in an even-handed manner and with regard to constitutionally permissible considerations.

9.349 As has already been mentioned,[387] the First Amendment has been construed as guaranteeing a right of access to certain kinds of public places for the purpose of meetings and demonstrations.

9.350 ***Canada.*** The fundamental freedoms guaranteed to everyone by section 2 of the *Canadian Charter of Rights and Freedoms* include 'freedom of peaceful assembly' (section 2(c)).

9.351 To date there has been little case-law on this guarantee. This may be explained in part by the fact that, in a number of cases, freedom of assembly has been subsumed within freedom of expression.

9.352 ***New Zealand.*** Article 9 of the draft New Zealand Bill of Rights 1985 guarantees freedom of peaceful assembly in the same terms as section 2(c) of the *Canadian Charter.*

International Covenant on Civil and Political Rights

9.353 Article 21 of the International Covenant on Civil and Political Rights provides:

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order *(ordre public),* the protection of public health or morals or the protection of the rights and freedoms of others.[388]

9.354 This Article is subject to Article 4 which permits derogations from the obligations imposed by the Covenant 'in time of public emergency which threatens the life of the nation'.

Advisory Committee's recommendation

9.355 The Rights Committee recommended that the Constitution be altered to provide that:

> Subject to Section 51(vi) the Commonwealth or a State shall not
> . . .

386 See *Clark v Community for Creative Non-Violence* 468 US 288 (1984).
387 Discussed at para 9.310.
388 See also Article 10 of the proposed Australian Bill of Rights 1985.

> restrict any person from engaging in peaceful assembly or from participating in the culture, religion and language of a cultural, religious or linguistic group to which they belong.[389]

9.356 As regards the first limb of this proposed provision, the Committee stated that 'many of those submissions supporting the concept of a Constitutional Bill of Rights regarded the right of peaceful assembly as fundamental to a free and democratic society'. The Committee recorded that a large number of submissions expressed concern about the measures adopted in 'some States in recent years to limit the opportunity for peaceful assembly'. The Committee itself expressed concern about 'these erosions of traditional common law rights by legislative action' and concluded that peaceful assembly should be protected by the Constitution.[390]

Submissions

9.357 The Commission received several submissions on freedom of assembly. Those which opposed its inclusion in the Constitution did so mainly on the ground that it cannot be guaranteed that an assembly will in fact be 'peaceful'.[391] A Richardson[392] suggested that, in the event that the right is entrenched, 'peaceful' would need to be defined.

9.358 Some submissions favoured the entrenchment of freedom of peaceful assembly in the Constitution, but only insofar as that freedom does not infringe the freedom of movement or property rights of others.[393] The Queensland Government[394] argued that freedom of peaceful assembly has only been abridged in Australia when such abridgement was necessary in order to protect the public good. Therefore there is no need to entrench the freedom in the Constitution. It concluded that the concept of freedom of peaceful assembly is 'nebulous and open-ended'. One submission opposed the inclusion of freedom of peaceful assembly in the Federal Constitution on the ground that the States should have the right to control such matters.[395]

9.359 The vast majority of submissions, however, favoured the inclusion of a right to peaceful assembly in the Constitution.[396] The Republican Party of Australia[397] stipulated that this right should be exercisable without any requirement of prior permission, provided that the necessary authorities are informed in advance so that appropriate traffic control plans can be made. Another submission expressed concern that police powers over the issuing of permits for demonstrations might be exercised in such a way as to confine peaceful assembly to a deserted city centre on a Saturday afternoon.[398]

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389 Rights Report, 56.

390 id, 55.

391 H Brownsdon S3079, 15 November 1987; H Hein S3024, 29 October 1987; JW Bradbury S2869, 2 November 1987.

392 S2915, 29 October 1987.

393 LC Jolley S22, 16 February 1986; CA Lloyde S3056, 18 November 1987; PJ Benjamin S3132, 29 December 1987.

394 S3069, 17 November 1987.

395 KF Deuter S3155, 11 January 1988.

396 J Glazebrook S22, 16 February 1986; A Watchmen S601, 24 November 1986; LJ Barker S465, 10 November 1986; PC Bingham S1138, 6 March 1987; LAWASIA Human Rights Sub-Committee Australian Support Group S956, 16 February 1987; I Robertson S2720, 19 October 1987; AR Pitt S2585, 23 December 1987; M Carter S3154, 17 November 1986; Federation of Ethnic Communities Council of Australia S2561, 28 October 1987; J Keogh S2784, 24 October 1987; RG Lowe S2914, 18 October 1987; I Macpherson S3038, 11 November 1987; D Beasant S2376, 15 August 1987; RJ Ross S2719, 20 October 1987; G Gower S2808, 26 October 1987; Citizens for Democracy S2262, 21 June 1987; A Richardson S2915, 29 October 1987; GP Wilson S2586, 7 December 1987.

397 S3382, 25 October 1986.

398 Senator M Reynolds S3572, 4 November 1986.

Reasons for recommendation

9.360 We agree with the Rights Committee that the right of peaceful assembly should be guaranteed in the Constitution. We do not, however, endorse the second limb of the provision recommended by the Committee. Our reasons are set out later in this Chapter.[399]

9.361 A right of peaceful assembly should, in our view, be constitutionally guaranteed for much the same reasons as a right to freedom of expression should be guaranteed. It is true that not everything that can be characterised as an assembly of persons is for the purpose of communicating information or opinions, but the fact remains that, historically, claims in the name of a right of peaceful assembly have been closely allied to claims in the name of freedom of speech. Indeed, in the absence of a specific constitutional guarantee of a right of peaceful assembly, a guarantee of freedom of expression would almost certainly be construed as importing freedom of peaceful assembly. A virtue of including a specific guarantee of a right to freedom of peaceful assembly is that it avoids any need to draw fine distinctions between speech and conduct. This is not, however, to say that the distinction would cease to have any relevance. Its relevance would be rather in determining whether governmental action restrictive of the freedom was justifiable. There may be more cogent reasons for placing legal constraints on conduct than for placing constraints on 'pure speech'.

9.362 The close connection between freedom of expression and freedom of peaceful assembly has been recognised by many judges and it is something which many of them have taken into account in developing and applying common law principles, in interpreting legislation and in adjudging the validity of subordinate legislation.[400] But, under existing constitutional arrangements in Australia, there is little judges can do to countermand or moderate express statutory provisions which are restrictive of freedom of assembly. Superior courts exercising a supervisory jurisdiction may, on occasions, declare the exercise of statutory discretions to control assemblies to be illegal or invalid. Courts may also be able to moderate the operation of restrictive laws by means of the exercise of their discretion in sentencing criminal offenders. But the relevant judicial powers are, in the main, ones which are not capable of being invoked until after the event, that is, until after the denial of the asserted right.

9.363 To establish the case for constitutional guarantee of a right to freedom of peaceful assembly, we do not think it necessary to present a detailed analysis of existing Australian laws and practices which courts would probably characterise as inhibitory of a constitutionally guaranteed right to freedom of peaceful assembly, and which might or might not be held not to be justifiable according to the reasonable limitations clause we propose. The case is, we think, strengthened by the fact that there is a substantial body of informed opinion in Australia which is highly critical of some of the laws and their administration. But our case rests rather on the proposition that the freedom in question is one of those which is basic to the maintenance of a free and democratic society, and that, therefore, the use of governmental powers to contain, and to regulate the exercise of, that freedom should be subject to a constitutional regime whereunder the onus is always on governments to produce compelling reasons for the inhibitions they have chosen to impose.

399 para 9.926.

400 See, for example, *Melbourne Corporation v Barry* (1922) 31 CLR 174; *Hubbard v Pitt* [1976] QB 142, 178-9 (Lord Denning MR).

Freedom of association

Recommendation

9.364 We *recommend* that the Constitution be altered to provide that:

124E. Everyone has the right to . . .

(e) freedom of association.

Current position

9.365 The Constitution does not, at present, offer any direct protection against governmental interference with freedom of association or associational activities. Indirect protection is afforded by the guarantee of freedom of religion in section 116,[401] but this section binds only the Commonwealth. The extent to which the Commonwealth may impair freedom of association is also limited by the fact that the legislative powers of the Federal Parliament are confined to enumerated subjects. Federal legislative powers, notably the defence power (section 51(vi.)), were, for example, found inadequate to sustain the *Communist Party Dissolution Act 1949* (Cth).[402]

9.366 Precisely what kinds of governmental acts can be regarded as affecting freedom of association depends on what one considers to be entailed by that freedom. As one author has pointed out, the freedom 'is a relatively new member of the group of political liberties which are thought worthy of legal and constitutional protection in most Western democracies.'[403] It is not expressly protected by the United States Constitution, though the Supreme Court of the United States has held that the Constitution impliedly protects it.[404]

9.367 One reason, and perhaps the main reason, why the concept of freedom of association is such a difficult one to pin down is that most human activities involve associations and interactions between individuals on a continuing basis. Laws are basically about people's interactions with another. Many laws are therefore likely to affect freedom of association, in the broad sense. Some examples are the laws of contract; rules governing the formation and operations of corporations, partnerships, co-operatives, trade unions, political parties, and of unincorporated associations generally; the law forbidding restrictive trade practices; rules governing capacity to marry and the rights and obligations of all those in a family relationship; the law about conspiracy, civil and criminal; the law declaring certain associations to be unlawful;[405] rules which either forbid consorting with persons of a defined class or which authorise judges or other officers of government to make orders forbidding particular individuals from associating with others.

Position in other countries

9.368 ***United States.*** The United States Constitution does not expressly guarantee freedom of association. Nevertheless, the Supreme Court of the United States has held this freedom is implicitly guaranteed, first 'as a fundamental element of personal liberty' which is central to the whole scheme of the Constitution, and secondly as an incident to the freedoms protected by the First Amendment, that is freedom of speech, assembly, and petition for the redress of grievances, and free exercise of religion.[406]

401 para 9.794-9.833.
402 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
403 E Barendt, *Freedom of Speech* (1985) 280.
404 Discussed at para 9.366.
405 See *Crimes Act 1914* Part 11A (Cth).
406 *Roberts v United States Jaycees* 468 US 609, 618 (1984).

9.369 In its first aspect, freedom of association protects the liberty of individuals to enter into and maintain certain intimate personal relationships and affords those relationships 'a substantial measure of sanctuary from unjustified interference by the State'.[407] The personal relationships so protected include those 'that attend the creation of a family', for example, marriage,[408] childbirth,[409] the rearing and education of children,[410] and co-habitation with relatives.[411] The high degree of constitutional protection given to the formation and maintenance of these relationships, the Supreme Court has said,[412] 'reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.' The 'constitutional shelter' afforded to intimate personal relationships also reflects a recognition by the Court 'that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers, between the individual and the power of the State'.[413]

9.370 Freedom of expressive association, that is to say, the freedom of association implicit in the First Amendment (as extended by the Fourteenth Amendment), involves a right to associate for the purposes of engaging in the activities which are protected by the First Amendment. This right is seen as 'an indispensable means of preserving' the liberties expressly protected.[414] As Harlan J once observed,[415] 'Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . .'.[416] Constitutional protection of 'collective effort on behalf of shared goals' has also been seen as 'especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.'[417]

9.371 Expressive freedom of association has not been confined to the right to form and to join associations, such as political parties and trade unions. It has been held to include freedom to pursue the objectives of the association. Thus laws which are restrictive of associational activities may be unconstitutional. They may be unconstitutional even if they do not directly inhibit expression of ideas and views by the association. For example, in one case, involving the National Association for Advancement of Colored People (NAACP), the Supreme Court struck down a State law which appeared to make it illegal for the association to encourage prospective litigants to engage the services of particular lawyers.[418] In another case, the Court held that a State tertiary educational institution had violated the constitutionally secured freedom when it refused to recognise a group of students who wanted to form a local chapter of Students for a Democratic Society.[419] The effect of this refusal was that the group was denied access to campus facilities, such as meeting rooms and notice boards. The group's 'ability to participate in the intellectual

407 ibid.
408 *Zablocki v Redhail* 434 US 374 (1978).
409 *Carey v Population Services International* 431 US 678 (1977).
410 *Smith v Organization of Foster Families* 431 US 816 (1977).
411 *Moore v East Cleveland* 431 US 494 (1977).
412 *Roberts v United States Jaycees* 468 US 609, 619 (1984).
413 id, 618-9.
414 id, 618.
415 *NAACP v Alabama* 357 US 449, 460 (1958).
416 See also *Citizens Against Rent Control/Coalition for Fair Housing v City of Berkeley* 454 US 290, 294 (1981).
417 *Roberts v United States Jaycees* 468 US 609, 622 (1984).
418 *NAACP v Button* 371 US 415 (1963). See also *UMW v Illinois State Bar Association* 389 US 217 (1967); *Brotherhood of Railroad Trainmen v Virginia Bar* 377 US 1 (1964).
419 *Healy v James* 408 US 169 (1972).

give and take of campus debate, and to pursue its stated purposes . . . [was] limited by denial of access to the customary media of communications with administration, faculty members, and other students'.[420]

9.372 There are many other ways in which freedom to associate has been held to have been violated, albeit indirectly. Legislation which requires the membership of an association to be disclosed to a public authority has been held unconstitutional,[421] likewise a law requiring schoolteachers to disclose every association to which they had belonged or contributed financially over the previous five years,[422] and a law prohibiting the employment of any member of the Communist Party in a defence facility.[423]

9.373 Freedom to associate has also been held to include freedom not to associate, that is to say, freedom from coercion, direct or indirect, to join an association or to support its activities. Such coercion has been seen as an interference with the individual's First Amendment freedoms. Thus, it has been held unconstitutional to threaten to dismiss public employees in a sheriff's office because they were not affiliated with the political party to which the newly elected sheriff belonged,[424] and to compel employees to pay dues to a trade union of which they were not members when the contributions were for the support of the political activities of the union, as distinct from its collective bargaining activities.[425]

9.374 The implied freedom of association, in both of its aspects, is not absolute. But the freedom to enter into and maintain close personal relationships has been afforded greater protection against governmental intrusions than freedom of expressive association. Infringements of that latter right, it has been said, 'may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms'.[426] It was on that basis that the United States Supreme Court upheld a Minnesota anti-discrimination statute which made it unlawful for the Jaycees to exclude females from their membership.[427] There could, the Court conceded, 'be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire':[428] that is, forces them to associate with persons with whom they do not wish to associate. 'Such a regulation may impair the ability of the original members to express only those views that brought them together'.[429] Nevertheless, the Court was 'persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms.'[430]

9.375 Overriding public interests have also been held to justify regulation of certain trade union activities. While the First Amendment includes the 'right to organize collectively and to select representatives for the purposes of engaging in collective bargaining',[431]

420 id, 181-2.
421 *NAACP v Alabama* 357 US 449 (1958); see also *Brown v Socialist Workers '74 Campaign Committee* 459 US 87, 91-2 (1982); cf *Communist Party v Subversive Activities Control Board* 367 US 1 (1961).
422 *Shelton v Tucker* 364 US 479 (1960).
423 *United States v Robel* 389 US 258 (1967).
424 *Elrod v Burns* 427 US 347 (1976); see also *Branti v Finkel* 445 US 507 (1980).
425 *Abood v Detroit Board of Education* 431 US 209 (1977); see also *Ellis v Railway Clerks* 466 US 435 (1984) and Annotation 'Employees' Rights regarding use of Union Dues or Fees for Purposes with which they Disagree: Supreme Court Cases' 80 L Ed 2d 898.
426 *Roberts v United States Jaycees,* 468 US 609, 623 (1984).
427 ibid.
428 ibid.
429 ibid.
430 ibid.
431 *United Federation of Postal Clerks v Blount* 325 F Supp 879, 883 (1971); affirmed 404 US 802 (1971).

freedom to strike has not been given unqualified protection. 'The right to strike', the Supreme Court has said, 'because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for the lawful purpose of collective bargaining . . .'.[432] Public employees, have been held to have no constitutionally protected right to strike. Strike action by them has been seen to have too great a potential to influence political decisions.[433]

9.376 Whether a claim to associational freedom falls into the category of freedom of intimate association or into that of freedom of expressive association 'entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments'.[434] Generally speaking, the only associations which have been accepted as falling into the first category are those 'distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship'.[435] Family relationships clearly fall into this category, but so also may contractual relationships in cases where the contract is the foundation for a close personal relationship, for example, a contract for the employment of a babysitter, a housekeeper or a personal tutor.[436] In contrast, the local chapters of the United States Jaycees exhibited none of these characteristics. They were found by the United States Supreme Court to be 'large and basically unselective groups'.[437] Neither the national organisation nor the local chapters employed any criteria for judging applicants for membership apart from age and gender, and 'much of the activity central to the formation and maintenance of the association . . . involves the participation of' non members,[438] for example, in maintenance of the association's community program.

9.377 ***Canada.*** 'Everyone', section 2(d) of the *Canadian Charter of Rights and Freedoms* declares, 'has . . . freedom of association'.

9.378 The scope of this guarantee has recently been considered by the Supreme Court of Canada in a series of cases concerning the associational rights of trade unionists.[439] In the first, and most important, of these cases, three of the judges interpreted section 2(d) as a guarantee of 'the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal . . .'.[440] The guarantee, they held, does not extend to each and every activity which an association undertakes in pursuit of its objects. In particular, it does not guarantee a right to strike or a right to bargain collectively which overrides laws requiring arbitration of industrial disputes.[441] These rights were said not to be 'fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by courts as requiring a specialized expertise'.[442] They did not think it right that the Court should substitute its 'judgment for that of the legislature in

432 *UAWA v Wisconsin Employment Relations Board* 336 US 245, 259 (1949).
433 *United Federation of Postal Clerks v Blount* 325 F Supp 879 (1971); affirmed 404 US 802 (1971).
434 *Roberts v United States Jaycees* 468 US 609, 620 (1984).
435 ibid.
436 *Runyon v McCrary* 427 US 160, 187-9 (1976) (Powell J concurring).
437 *Roberts v United States Jaycees* 468 US 609, 621 (1984).
438 ibid.
439 *Reference re Public Service Employee Relations Act* (1987) 38 DLR 4th 161; *Public Service Alliance of Canada v Queen in Right of Canada* (1987) 38 DLR 4th 249; *Government of Saskatchewan v Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955* (1987) 38 DLR 4th 277.
440 *Reference re Public Service Employee Relations Act* (1987) 38 DLR 4th 161, 239 (Le Dain J; Beetz and La Forest JJ concurring).
441 id, 240.
442 ibid.

constitutionalizing in general and abstract terms rights which the legislature has found it necessary to define and qualify in various ways according to the particular field of labour relations involved.'[443]

9.379 Justice McIntyre agreed with that conclusion, but his interpretation of the scope of the constitutional guarantee was somewhat different from that of the other majority judges. In his view, freedom of association encompasses 'the right to join with others in lawful, common pursuits and to establish and maintain organizations and associations . . .'. It also guarantees 'the collective exercise of constitutional rights' such as freedom of expression, and the right to do in concert that which 'an individual can lawfully pursue as an individual . . .'.[444] But section 2(d) does not give 'constitutional protection to all collective activities which . . . are essential to the lawful goals of an association'; if it did, it would 'confer greater constitutional rights upon members of the association than upon non-members'.[445]

9.380 Chief Justice Dickson and Wilson J dissented. The Chief Justice emphatically rejected what he termed the 'constitutive definition' of freedom of association, namely 'freedom to belong to or form an association'.[446] The constitutional protection accorded to freedom of association must, he thought, protect not only this freedom but also certain associational activities. Section 2(d), he said, 'embraces the liberty to do collectively that which one is permitted to do as an individual'.[447] But, he went on to point out, 'there will . . . be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights.'[448] This was the situation in the case before the Court.

> There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is qualitatively rather than quantitatively different. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.[449]

9.381 A legislative ban on strike action clearly disclosed such a purpose.

9.382 The Supreme Court's recent decision provides much needed guidance to the lower courts on how the constitutional guarantee of freedom of association is to be interpreted and applied. Prior to this decision, there had been many cases concerning the associational rights of trade unionists and judicial interpretations of the ambit of the constitutional guarantee had varied. A number of the issues raised in the previous cases have not been resolved by the Supreme Court's decision, for example, the constitutionality of a law which requires employees to pay dues to a union regardless of whether they are members of the union,[450] or a law which forbids public servants being members of political parties.[451]

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443 ibid.
444 id, 227.
445 id, 223, 226.
446 id, 194.
447 id, 198.
448 ibid.
449 ibid.
450 *Re Lavigne and Ontario Public Service Employees Union* (1986) 55 OR 2d 449 (Ont HCJ) (held unconstitutional). See also KD Ewing, 'Freedom of Association in Canada' (1987) 25 *Alberta Law Rev* 437.
451 *Re Fraser and Attorney-General of Nova Scotia* (1986) 30 DLR 4th 340 (NSSC) (held unconstitutional).

9.383 While most of the cases to date have concerned unions of employees, there have been a few involving claims to associational rights of a rather different order. In one case, the Alberta Court of Appeal struck down rules of the province's Law Society which prohibited non-residents from practising law in association with residents of the province, and which also prohibited members of the Society being partners or associates in more than one legal firm.[452] In another case, the Federal Court held that the release of a prisoner on parole on the condition that he did not associate with persons with criminal records violated the freedom of association guarantee, but that the condition was justifiable under section 1 of the Charter.[453] The same Court has rejected a claim that a person's freedom of association is violated by a decision of immigration authorities to refuse entry into Canada of the spouse of a person living in the country.[454]

9.384 ***New Zealand.*** Article 10 of the draft New Zealand Bill of Rights 1985 provides:

> (1) Everyone has the right to freedom of association
>
> (2) This right includes the right of every person to form and join trade unions for the protection of that person's interests consistently with legislative measures enacted to ensure effective trade union representation and to encourage orderly industrial relations.

9.385 Up to a point, this proposed provision adopts the wording of Article 22 of the International Covenant on Civil and Political Rights and of Article 8 of the International Covenant on Economic, Social and Cultural Rights.[455] It departs from them at the point where the right to form and join trade unions is qualified. The qualification is in the terms of New Zealand's reservation to its ratification (in 1978) of Article 22 of the former Covenant.

9.386 The explanatory comment in the White Paper on the draft Bill of Rights records that the text of the reservation indicates that there were doubts whether New Zealand laws on trade unions were compatible with a generalised right to form and join trade unions. It records also that in a report to the United Nations Human Rights Committee in 1982, the New Zealand Government stated that it considered that, the country's legislative restrictions on the formation of trade unions and its legislation on membership of trade unions 'were considered necessary to guarantee "public order (ordre public)" or to protect other interests as permitted by Article 22(2) of the' ICCPR. The nature of this legislation was summarised in the White Paper. It included

> legislation which gives pre-eminence to an existing union in a particular industrial area and prohibits new unions, or which gives Ministers powers to dissolve unions, or restrains their bargaining powers and activities, or enables membership of the relevant union to be made compulsory by agreement or by provisions in the award (with the exception of those with a conscientious objection to that).[456]

9.387 It was also noted that there were 'professional organisations with compulsory membership.'[457]

9.388 The White Paper refers to the complexity of the issues to do with compulsory unionism and considerations of those issues within the International Labour Organisation, by courts in Europe and within the Commonwealth of Nations.[458]

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452 *Black v Law Society of Alberta* (1986) 27 DLR 4th 527 (Alta CA).
453 *Re Bryntwick and National Parole Board* (1986) 32 CCC 3d 321 (FCTD).
454 *Re Horbas and Minister for Employment and Immigration* (1985) 22 DLR 4th 600 (FCTD).
455 These Articles are set out under the heading 'International instruments' at para 9.390 and 9.391.
456 A *Bill of Rights for New Zealand* (1985) 82.
457 ibid.
458 id, 83-4.

International instruments

9.389 Australia is a party to several international covenants and conventions which have a direct bearing on freedom of association. They are the International Covenant on Civil and Political Rights (ICCPR) (ratified in August 1980), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (ratified in December 1975) and ILO No 87 – Freedom of Association and Protection of the Right to Organise 1948 (ratified in February 1973).[459] The relevant provisions of these instruments are as follows:

9.390 *ICCPR, Article 22*

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order *(ordre public)*, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

9.391 *ICESCR, Article 8*

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

9.392 *ILO Convention No 87*

PART I – FREEDOM OF ASSOCIATION

Article 1.

Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

459 See also ILO Convention No 98 – Concerning the Applications of the Principles of the Right to Organise and Bargain Collectively 1949 (ratified in February 1973).

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

Article 6

The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of workers' and employers' organisations.

Article 7

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

Article 9

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 10

In this Convention the term "organisation" means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

PART II – PROTECTION OF THE RIGHT TO ORGANISE

Article 11

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

9.393 Article 22 of the ICCPR is similar to Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights has held that, while the latter Article does not confer a universal right not to associate, a threat by British Rail to dismiss employees who were not members of the

trade union which had entered into a closed shop arrangement with British Rail infringed the employees' freedom of association. Six members of the Court considered that a closed shop system would violate Article 11 irrespective of whether a person had political or conscientious objections to joining the union.[460] On the other hand, the Court has held that Article 11 was not infringed by a law which required medical practitioners to be registered with an organisation established by legislation to regulate the profession. Such an organisation was not an association within the meaning of Article 11. The Court, however, also stated that the position would have been different had the law of the respondent state prevented medical practitioners from forming and becoming members of professional associations. 'Totalitarian regimes', it was pointed out, 'have resorted – and resort – to the compulsory regimentation of the professions by means of closed and exclusive organisations taking the place of the professional associations and the traditional trade unions. The authors of the Convention intended to prevent such abuses.'[461]

9.394 The European Court has also held that Article 11 does not confer a right on unions to be recognised for bargaining purposes.[462]

9.395 The provisions of ILO Convention No 87 have been interpreted by several instrumentalities of ILO, among them the Committee of Freedom of Association, which was set up in 1950-51 to examine complaints of infringement of trade union rights; the Committee of Experts which considers governmental reports on the application of ILO conventions and standards in member states; and commissions of inquiry established by the Governing Body to examine complaints of violations against these states.[463]

Advisory Committee's report

9.396 The Rights Committee's Report did not squarely address the question of whether freedom of association should be constitutionally protected. The desirability of constitutional protection of some associational freedoms was considered by the Committee in connexion with the right of peaceful assembly, and in connexion with rights of what may, loosely, be described as rights of persons belonging to cultural minorities.[464]

9.397 The 'right to strike' was considered by the Committee under the general rubric of socio-economic rights. It stated that protection of this 'right' 'raises very difficult issues'. 'Australia has a long-established tradition of the "right" to strike', but it was also pointed out that 'Commonwealth and State legislation has provided from time to time for the insertion of "no strike" and "no-bans" clauses in Industrial Awards'.[465] The Committee queried whether 'the "right to strike"' is a matter of individual rights or in fact a collective or group right.'[466] It concluded 'that in terms of individual rights no amendment [of the Constitution] should be proposed which deals specifically with the question of strikes.'[467]

460 *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38.
461 *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1, 23.
462 *Swedish Engine Drivers' Union v Sweden* (1976) 1 EHRR 617; *National Union of Belgian Police v Belgium* (1975) 1 EHRR 578.
463 See *Reference re Public Service Employee Relations Act* (1987) 38 DLR 4th 161, 189-91 (Dickson CJC); P Sieghart, *The International Law of Human Rights* (1983) 353 et seq.
464 Rights Report, 67.
465 ibid.
466 ibid.
467 ibid.

Submissions

9.398 A large number of submissions was received on freedom of association. The overwhelming majority of these said that the freedom is fundamental to a democratic society and that it should be entrenched in the Constitution.[468] Support in some submissions was qualified on the ground that the freedom should not infringe other rights.[469] In evidence to the Rights Committee, Senator Macklin said that the experience of the Solidarity Movement in Poland, for example, had underlined for many people in Australia the importance of free trade unions:

> . . . there is a certain sense out there in the community, that people should be allowed to associate for political purposes, even in times of great stress . . .[470].

9.399 A number of submissions said that the freedom to associate should embrace the freedom not to associate. In particular, it was said that compulsory unionism violates the individual's freedom of association.[471]

9.400 DL Dwyer,[472] while agreeing with this viewpoint, was prepared to countenance the prospect that non-union members should perhaps not be entitled to wage rises won by union action. M McCoy[473] thought that the 'freedom not to associate' should extend to political parties as well. D Schaefer[474] would do likewise for any association or club.

9.401 Certain submissions were concerned not only about the rights of individuals, but the rights of the associations to which they belong. The Unemployed People's Embassy[475] submitted that associations should have some government funding so that they can attract new members and operate new programmes. T Young[476] considered that any guarantee of freedom of association should be subject to the proviso that associations are entitled to stipulate appropriate conditions of memberships. Others pointed out the close correlation between freedom of association and other rights and freedoms, for example, the rights of ethnic minorities.[477]

9.402 Only a few submissions opposed the entrenchment of freedom of association in the Constitution.[478]

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468 eg K MacPherson S3038, 11 November 1987; RJ Ross S2719, 20 October 1987; G Gower S2808, 26 October 1987; HW Murrell S752, 20 December 1986; A Watchman S601, 24 November 1986; MR Dawson S614, 27 September 1986; Citizens for Democracy S2262, 21 June 1987; South Australian Council for Civil Liberties S697, 22 December 1986; H Monroe S381, 21 October 1986; LJ Trebilco S50, 7 March 1986; J Lawson S3522, 2 December 1986; JM Carson S3060, 19 November 1987; C and D Burnett S3341, 14 March 1988; R Wallace S1968, April 1987; W Roberts S1334, 24 March 1987; Italian Federation of Migrant Workers and their Families S1241, 30 March 1987; PC Bingham S1138, 6 March 1987; LAWASIA, Human Rights Sub-Committee Australian Support Group S956, 16 February 1987; J Hunter S711, 9 December 1986; The Brethren S954, 15 December 1986.

469 AR Pitt S2585, 23 December 1987; C Keay S622, 27 September 1986.

470 S712, 1 November 1986.

471 eg KM Cunningham S3149, 2 January 1988; JS Butler S3279, 18 February 1988; J Zonius S469, 13 January 1988; Republican Party of Australia S3382, 25 October 1986; J Dona S3426, 7 November 1986; R Ciantar S3424, 7 November 1986; M McCoy S3356, 19 March 1988; Dr RJ Chesney S2108, 27 April 1987; J Bramblett S53, 12 March 1986; CJ Byers S2809, 26 October 1987; J Bush S337, 10 October 1986; J D'Sousa 3195, 6 January 1988; JC Marley S2897, 6 November 1987; S Souter S1177, 8 March 1987; LJ Byrne S977, 21 February 1987; AJ Smit S951, 11 February 1987; AR Williams S1011, 24 February 1987; White S274, 24 September 1986.

472 S798, 7 January 1987.

473 S3356, 19 March 1988.

474 S17, 14 February 1986.

475 S372, 26 October 1986.

476 S3564, 3 December 1986.

477 Human Rights Group and Maltese Guild of Australia S1035, 27 February 1987.

478 eg EA Greer S3132, 29 December 1987; J Tolson S3041, 11 November 1987; Country Women's Association of Australia S933, 12 December 1986.

Reasons for recommendation

9.403 We have concluded that freedom of association is of such importance as to warrant express constitutional protection. We acknowledge that, even if this freedom were not to be guaranteed expressly, it might nonetheless be held to be implicit in the other freedoms which we recommend should be the subject of constitutional guarantees, for example, freedom of expression. But in that case, the implied right to freedom of association might be given too narrow a construction. It might be restricted to associational activities to give effect to these other freedoms, and no others.[479] We do not believe that freedom of association should be so restricted. A constitutional guarantee of it should, in our opinion, be explicit and independent of other guarantees.

9.404 The purpose of a constitutional guarantee of freedom of association is admirably stated in the opinions of Chief Justice Dickson and McIntyre J in *Reference re Public Service Employee Relations Act.*[480] For the Chief Justice the essential purpose of such a guarantee is

> to recognise the profoundly social nature of human endeavours and to protect the individual from State-enforced isolation in pursuit of his or her ends .... As social beings, our freedom to act with others is a primary condition of community life, human progress and civilised society. Through association, individuals have been able to participate in determining and controlling the immediate circumstances of their lives, and the rules, *mores* and principles which govern the communities in which they live.[481]

9.405 Both he and McIntyre J noted the words of Alexis de Tocqueville:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.[482]

9.406 Freedom of association, it was pointed out, has become increasingly important in modern society.[483] As an American author had observed:

> More and more the individual, in order to realise his own capacities or to stand up to the institutionalised forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives.[484]

9.407 'Association', Dickson CJC added[485]

> has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.

9.408 Freedom of association, according to McIntyre J, serves not merely the interests of individuals. It 'strengthens the general social order, and supports the healthy functioning of democratic government.' It provides a check against the power of the state, it serves to

479 See *Reference re Public Service Employee Relations Act* (1987) 38 DLR 4th 161, 196 (Dickson CJC).
480 ibid.
481 id, 197. The 'core' of freedom of association, McIntyre J said, is that 'the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others' (id, 218).
482 in P Bradley (ed), *Democracy in America (1945), vol 1, 196.*
483 (1987) 38 DLR 4th 161, 197 (Dickson CJC), 218 (McIntyre J).
484 T Emerson, 'Freedom of Association and Freedom of Expression' (1964) 74 *Yale Law Journal* 1.
485 (1987) 38 DLR 4th 161, 197.

educate members of associations 'in the operation of democratic institutions' and it makes 'possible the effective expression of political views' and the exercise of influence over 'the formation of governmental and social policy'.[486]

9.409 The form of the constitutional guarantee which we recommend is that adopted in section 2(d) of the *Canadian Charter of Rights and Freedoms.* It does not, as do Articles 22 and 8 of the ICCPR and ICESCR respectively, provide that the right includes the right to form and join trade unions. Nor does it provide, as does Article 20(2) of the Universal Declaration of Human Rights, that 'no one may be compelled to belong to an association'. We do not think it either necessary or desirable to refer specifically to trade unions, for the generalised right of freedom of association could not but be interpreted as including the right to form and join such unions. Nor do we think it necessary to state that freedom to associate includes a right not to be compelled to associate. Freedom to associate clearly includes freedom not to associate.

9.410 The scope of the guaranteed freedom would, of course, be determined ultimately by the High Court of Australia. There is no reason why it should be defined narrowly. It could, indeed, be interpreted broadly but, at the same time, many laws regulating the manner in which it may be exercised could be sustained on the ground that they impose reasonable limitations which are demonstrably justified in a free and democratic society.

9.411 This right we see as a right vested in individuals. In other words, its guarantee would not operate to confer on groups greater constitutional rights and freedom than their constituent members possess as individuals.[487]

Freedom of movement

Recommendation

9.412 We *recommend* that the Constitution be altered to provide that:

> 124F. (1) Every Australian citizen has the right to enter, remain in and leave Australia.
>
> (2) Everyone lawfully in Australia has freedom of movement and residence in Australia.
>
> (3) Sub-sections (1) and (2) of this section are not infringed by laws made by the Parliament with respect to entry into and residence in a Territory that is not on the mainland of Australia.

Current position

9.413 Section 92 of the Constitution provides that trade commerce and intercourse between the States shall be absolutely free. The extent to which the section's reference to intercourse guarantees to the individual a right of interstate movement is still uncertain. Some judges have found such a right as a fundamental one arising from the fact of federal union,[488] though both Barton J[489] and Murphy J[490] suggested that the reference to intercourse in section 92 strengthens or supports the fundamental implied right of

486 id, 219.

487 id, 220 (Dickson CJC), The Constitutional Court of the Federal Republic of Germany has, however, interpreted article 9(1) of the Basic Law ('All Germans shall have the right to form associations and societies') as conferring some rights on an association, for example, the right to determine the constitution of the association and to adopt rules governing membership. See E Barendt, *Freedom of Speech* (1985) 284.

488 *Rex v Smithers; Ex parte Benson* (1912) 16 CLR 99, 108 (Griffith CJ), 110 (Barton J); *Buck v Bavone* (1976) 135 CLR 110, 137 (Murphy J).

489 (1912) 16 CLR 99, 110.

490 (1976) 135 CLR 110, 135.

movement interstate. The implied right of movement extends beyond interstate movement and comprises movement to secure access to government and to the courts.[491] These views have not met with general acceptance.

9.414 In *Gratwick v Johnson*[492] the High Court struck down a war-time regulation forbidding a person to travel by rail or commercial passenger vehicle interstate without a permit. The provision was invalid, the Court said, because it was 'directed against'[493] or imposed 'a direct restraint on'[494] interstate trade, commerce and intercourse. Starke J, however, said of section 92 '(t)he people of Australia are thus free to pass to and fro among the States without burden, hindrance or restriction'.[495]

9.415 In its recent re-examination of section 92, the Court has said that '[a] constitutional guarantee of freedom of inter-state intercourse, if it is to have substantial content, extends to a guarantee of personal freedom "to pass to and fro among the States without burden, hindrance or restriction".'[496] The Justices went on to point out that not every form of intercourse must be left free of any restriction or regulation, but added that personal movement across a border cannot, generally speaking, be impeded.[497]

9.416 It would seem, therefore, that section 92 is likely to be treated in the future as safeguarding in most cases the personal right of individuals to move across State boundaries.

9.417 The common law did not recognise a right to freedom of movement: the common law writ *ne exeat regno* allowed the King to prevent anyone leaving the kingdom without a licence.

Position in other countries

9.418 ***United States.*** The right of citizens of each State to all the privileges and immunities of citizens in the several states is guaranteed by Article IV Section 2 of the Constitution. Section 1 of the Fourteenth Amendment prohibits the States abridging the privileges and freedoms of citizens of the United States.

9.419 The Supreme Court has treated the right of doing business in a State other than the State of citizenship or residence as guaranteed by the Constitution.[498] A later decision was that the right to travel interstate was a fundamental constitutional right.[499] This right, the Court decided, ensures to new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents.[500] So a statute of a State requiring the employment of qualified residents of the State in preference to non-residents was held unconstitutional.[501]

9.420 The Supreme Court has also recognised that the right to travel abroad is an important aspect of liberty of which a citizen cannot be deprived without due process of law.[502] Therefore, the Court struck down a federal statute denying passports to members

491 (1912) 16 CLR 99, 108 Griffith CJ citing *Crandall v State of Nevada* 6 Wall 35, 44.
492 (1945) 70 CLR 1.
493 id, 14.
494 id, 16, 22.
495 id, 17.
496 *Cole v Whitfield* (1988) 78 ALR 42, 55-6.
497 id, 56.
498 *Toomer v Witsell* 334 US 385 (1948).
499 *Shapiro v Thompson* 394 US 618 (1969).
500 *Memorial Hospital v Maricopa County* 415 US 250 (1974).
501 *Hicklin v Orbeck* 437 US 519 (1978).
502 *Aptheker v Secretary of State* 378 US 500 (1964).

of communist organisations because its underlying purpose (the protection of national security) too broadly and indiscriminately violated the constitutional right to travel. In *Haig v Agee*,[503] the Supreme Court distinguished the right to travel internally and said the right to travel abroad with a passport was subordinate to national security and foreign policy considerations, and was accordingly subject to reasonable government regulation.

9.421 ***Canada.*** Section 6 of the *Charter of Rights and Freedoms* is as follows:

> 6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (a) to move to and take up residence in any province; and
>
> (b) to pursue the gaining of a livelihood in any province.
>
> (3) The rights specified in subsection (2) are subject to
>
> (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
>
> (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
>
> (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

9.422 The *Charter* does not define the term citizen, but citizenship is a subject matter within the legislative competence of the Federal Parliament.[504] The term 'permanent resident of Canada' used in section 6(2) is defined in the federal *Immigration Act* as meaning a person who has been granted landing, has not become a Canadian citizen and who has not ceased to be a permanent resident pursuant to section 24 (which contemplates a permanent departure).[505]

9.423 ***Section 6(1).*** The Ontario Court of Appeal decided (a) that extradition of a Canadian citizen was prima facie an infringement of the rights guaranteed by sub-section 6(1), but (b) that the Crown and the demanding State had met the burden of establishing the limit on that right imposed by the *Extradition Act,* RSC 1970 cE-21 and the treaty between Canada and the Federal Republic of Germany was a reasonable one demonstrably justified in a free and democratic society within section 1 of the Charter,[506] having regard to Canada's obligations to the international community and the history of such legislation in free and democratic societies. The fact that the ultimate decision lay with the Executive did not make the extradition unreasonable, for the Minister could accept the Court's order in favour of extradition or refuse to follow it. Thus, the discretion was entirely in favour of the fugitive. No international convention militated against extradition by a State of one of its own nationals. The fact that the Federal Republic of Germany would not extradite its own nationals was compensated for by its undertaking to try its own nationals for offences committed in other countries. There was thus an equivalence in substance, if not in form, for it had not been shown that there was any right to prosecute the fugitive in Canada for the crimes he had committed in Germany.[507]

503 101 S Ct 2766 (1981).

504 Hogg, *Constitutional Law of Canada* (2nd edn, 1985) 668 and *Citizenship Act, SC 1974-75-76,* clause 108.

505 id, 669.

506 Section 124C of our recommended Chapter VIA.

507 *Re Federal Republic of Germany and Rauca* (1983) 145 DLR 3d 638 (Ont CA). This decision has been followed in *Re Voss and The Queen* (1984) 12 CCC 3d 538 (BCCA); *Re Decter and United States of America* (1983) 148 DLR 3d 496 (NSSC); *US v Cotroni (No2)* (1984) 11 WCB 440 (Que SC) and it seems by the Supreme Court: *Schmidt v The Queen* (1987) 39 DLR 4th 18.

9.424 ***Section 6(2), (3).*** There have been a considerable number of decisions upon the meaning and extent of the right to inter-provincial movement guaranteed by sub-section 6(2) as qualified or explained by sub-section 6(3). Thus, it was decided by the Federal Court of Appeal that the restriction of competition for a position in the federal public service to residents of a particular region did not contravene this provision. The Court pointed out that the restriction was authorised by statute, as sub-section 6(3) allows, and was adopted in accordance with a public service personnel manual. It did not discriminate primarily on the basis of province of present or previous residence. The phrase 'laws and practices of general application in force in a province' included federal as well as provincial laws.[508] Again, sub-section 6(2)(a) does not create a separate and distinct right to work divorced from the mobility provisions. The provision does not guarantee to a permanent resident of Canada the right to work as a lawyer in his province of residence in the face of provincial laws requiring that lawyers be Canadian citizens or British subjects.[509] But a regulation prohibiting non-residents of Nova Scotia from being licensed as salesmen was inconsistent with subsection 6(2) and invalid.[510] Marketing quotas of general application which do not discriminate primarily on the basis of present or past residence in a province were upheld.[511]

9.425 The section affords the Canadian citizens who come into a province for the purpose of gaining a livelihood the right to do so without being disadvantaged by provincial barriers, other than laws or practices of general application, which establish a preference for provincial residents. Where a billing procedure operates to deny a doctor the opportunity to practise on a viable economic basis[512] it offends the section.[513]

9.426 ***New Zealand.*** Article 11 of the draft New Zealand Bill of Rights provides:

> (1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.
>
> (2) Every New Zealand citizen has the right to enter New Zealand.
>
> (3) Everyone has the right to leave New Zealand.
>
> (4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

9.427 If passed into law, the rights in Article 11 are, like those in section 124F, subject to the power to provide such reasonable limits prescribed by law as can demonstrably be justified.

Other countries and international instruments

9.428 The 1949 Constitution of India recognises the right of every citizen to move freely throughout the territory and to settle in any part of it. The Supreme Court has held that the right to travel abroad, though not specifically provided for, is implied in the right to personal liberty of which a person may not be deprived except according to a procedure established by law.[514] A similar right exists in Cyprus[515] and has been recognised by

508 *Re Demaere and The Queen in Right of Canada* (1984) 11 DLR 4th 193 (Fed CA).
509 *Law Society of Upper Canada v Skapinker* (1984) 9 DLR 4th 161 (SCC).
510 *Basile v Attorney-General of Nova Scotia* (1984) 11 DLR 4th 219 (NSCA).
511 *Re Groupe des Eleveurs de Volailles de l'Est et de l'Ontario et al. and Canadian Chicken Marketing Agency* (1984) 14 DLR 4th 151 (FCTD).
512 *Re Mia and Medical Services Commission of British Columbia* (1985) 17 DLR 4th 385 (BCSC).
513 Section 124F which we propose contains no provisions similar to subsections (2) and (3) of the Canadian guarantee. It is with the effect of this subsection that many of the Canadian decisions are concerned. Our recommendations for a substituted section 117 will, however, if adopted, raise analogous questions.
514 *Maneka Ghandhi v Union of India* (1978) SCR 312.
515 *Elia v The Police* (1980) 2 Cyprus Law Reports 118.

Article 13 of the Universal Declaration of Human Rights; Article 12 of the International Covenant on Civil and Political Rights; Fourth Protocol to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 2(1), (2) (4) and 3 and Article VIII of the American Declaration of the Rights and Duties of Man.

Advisory Committee's recommendation

9.429 The Rights Committee recommended that a new section 116A be inserted in the Constitution in the following terms:

> 116A. Subject to Section 51(vi), the Commonwealth or a State shall not:
>
> (a) impose any form of civil conscription or restrict the freedom of movement of citizens and permanent residents of Australia into and out of Australia or within and between the States and Territories (save that the Parliament of the Commonwealth may make special provisions with respect to residence in a Territory other than the Northern Territory and the Australian Capital Territory).

9.430 The Committee viewed freedom of movement as being of fundamental importance. 'Yet it is a freedom which is extremely vulnerable as police powers increase', it said.[516] The Committee noted that in a recent case the English High Court had held that 'there was no right to freedom of movement at common law.'[517] It also noted that the right is not guaranteed adequately under section 92 of the Constitution.

9.431 The Committee concluded that freedom of movement 'should be protected by the Constitution from interference by both Federal and State Governments, other than in situations when the defence power is properly involved.'[518] It recognised, however, that special provisions should be made with respect to such external Territories as the Norfolk, Cocos and Christmas Islands on the ground that:

> In these Territories, there exists a unique situation in which an Islander population has special claims to protection from uncontrolled immigration by Australians generally.[519]

Submissions

9.432 Among the submissions received, one argued expressly in favour of the entrenchment of freedom of movement in the Constitution, stating that all 'citizens' should 'enjoy complete freedom of movement throughout Australia'.[520]

Reasons for recommendation

9.433 It was apparent to us that rights of movement guaranteed by the proposed section 124F are the minimum rights of mobility now recognised not only in international instruments but in a great number of the constitutions of civilized states. This was hardly surprising bearing in mind that in 1215 a right to freedom of movement for freemen had been granted by Ch. 42 of *Magna Carta* (in the version confirmed by King Edward I in 1297).[521] In this country, what the Supreme Court of the United States described as 'basic in our scheme of values'[522] may be curtailed by arbitrary imprisonment or other restraint in times of emergency; and travel overseas may be prevented or curtailed by executive

516 Rights Report, 53.
517 ibid.
518 ibid.
519 ibid.
520 Republican Party of Australia S3382, 25 October 1986.
521 6 *Halsbury's Statutes* (3rd edn) 401.
522 *Kent v Dulles* 357 US 116 (1958).

decision as to the issue of a passport.[523] An attempt by an Australian citizen to resist deportation from Norfolk Island by relying upon the right of a citizen to freedom of movement and residence in Australia, said to be derived from sections 9 and 10 of the *Racial Discrimination Act 1975* (Cth) and Article 5 (d)(i) of the *Convention on the Elimination of All Forms of Racial Discrimination,* was rejected by the Full Federal Court.[524] The Court held that the power of deportation given by the *Immigration Ordinance (Norfolk Island) 1968,* section 17, had no nexus with any question of race, colour, descent or national or ethnic origin and was not 'invalidated' by the *Racial Discrimination Act.*[525]

9.434 It is still not altogether clear whether section 92 guarantees to an individual a right to movement interstate independent of his or her employment of commercial means of transport, although it seems likely that such is, or will be declared to be, its effect.

9.435 But section 92 does not address the citizen's right to enter, to remain in or leave Australia, nor his or her right to travel within his or her State or in the Territories. It is an obvious feature of life in commercially sophisticated countries such as Australia that the right of movement is, or may be, essential to a person's livelihood as well as the enjoyment of life, to the ability to contribute to this country's commercial growth and to the right of a citizen to petition the central and other governments in person if he or she so desires – a practice of everyday occurrence to the men and women in business. We therefore decided that a guarantee of freedom of movement should not be denied to Australian residents while enjoyed by the people of so many other countries.

9.436 Justice Mason said of the mobility right expressed in the United Nations Universal Declaration of Human Rights and Freedoms that:

> In broad terms the concept may be said to embrace a claim to immunity from unnecessary restrictions on one's freedom of movement and a claim to protection by law from unnecessary restrictions upon one's freedom of movement by the State or by other individuals. It extends, generally speaking, to movement without impediment throughout the State, but subject to compliance with regulations legitimately made in the public interest, such as traffic laws, and subject to the private and property rights of others. And it would include a right of access to facilities necessary for the enjoyment of freedom of movement, subject to legitimate regulation of those facilities.[526]

9.437 Subject to the operation of proposed sections 124A and 124C, the above passage describes the content of the right we propose. We consider that the right should not be available so as to imperil the lifestyle or environment of Territories such as Norfolk Island or the Cocos Islands.

Equality rights

Recommendation

9.438 We *recommend* that the Constitution be altered to provide that:

> 124G. (1) Everyone has the right to freedom from discrimination on the ground of race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.
>
> (2) Sub-section (1) is not infringed by measures taken to overcome disadvantages arising from race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.

523 E Campbell and H Whitmore, *Freedom in Australia* (2nd edn, 1973) 180-3, 203-6.
524 *Lewis v Trebilco* (1984) 53 ALR 581.
525 id, 587.
526 *Gerhardy v Brown* (1985) 159 CLR 70, 102.

Current position

9.439 Constitutionally guaranteed equality rights provide for the establishment and maintenance of the legal framework conducive to the development of the capacities of all individuals. They achieve this objective by striking down any unreasonable, arbitrary or invidious distinctions between persons.

9.440 The common law provides no protection against legislative and other governmental acts that discriminate on grounds such as race, sex or marital status.

9.441 At present, equality rights in general terms are not enshrined either in the Federal Constitution or in any of the State Constitutions.[527] A guarantee against discrimination is found in section 117 of the Federal Constitution but, as we have said,[528] its focus is on the relationship between a State and the people of other States. It does not include protection for the resident of a State against the Government of that State. Over the past 20 years or so, wide ranging anti-discrimination laws have been passed at federal and State level, reflecting the world-wide movement of ideas during the period towards greater equality of opportunity and the determination of many groups and individuals to achieve that objective.

9.442 Whereas the relevant federal and State laws are concerned with both governmental and private actions, and thus control the conduct of individuals in relation to each other, the provision we recommend is confined to the relationship between the individual and the arms of government.

9.443 ***Federal laws.*** The *Racial Discrimination Act 1975* (Cth) gave effect to the International Convention on the Elimination of All Forms of Racial Discrimination which Australia signed on 13 October 1966 and ratified on 30 September 1975. Section 9(1) of the Act, which is based on Article 1(1) the Convention, states:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

9.444 After noting the relationship between section 9(1) of the Act and the Convention, Brennan J said in *Gerhardy v Brown*:

> The conception of human rights and fundamental freedoms in the Convention definition of racial discrimination describes that complex of rights and freedoms the enjoyment of which permits each member of a society equally with all other members of that society to live in full dignity, to engage freely in any public activity and to enjoy the public benefits of that society. If it appears that a racially classified group or one of its members is unable to live in the same dignity as other people who are not members of the group, or to engage in a public activity as freely as others can engage in such an activity in similar circumstances, or to

527 During the Convention debates in the 1890s the framers of the Australian Constitution considered and rejected the inclusion of an 'equal protection' guarantee similar to that contained in the Fourteenth Amendment of the Constitution of the United States. (Conv Deb, Melbourne, 1898, 667). Isaac Isaacs was critical of the proposed clause, saying it was vague and unnecessary and that it would interfere too much with States' rights (id, 667-70). The proposal was rejected, partly because of the concern about the validity of legislation existing in some of the States which discriminated 'against Chinese and other coloured aliens resident in Australia': see JA LaNauze, *The Making of the Australian Constitution* (1972) 232.

528 Discussed in Chapter 2 under the heading 'Discrimination against out-of-State residents', para 2.82-2.91.

> enjoy the public benefits of that society to the same extent as others may do, and that the disability exists because of the racial classification, there is a prima facie nullification or impairment of human rights and fundamental freedoms.[529]

9.445 Section 8(1) of the *Racial Discrimination Act 1975* (Cth) adopted the principle, embodied in Article 1(4) of the Convention, that certain 'special measures' taken for the 'sole purpose of securing adequate advancement' of disadvantaged racial or ethnic groups or individuals 'shall not be deemed racial discrimination'.[530] Section 8(1) of the Act recognises that formal equality must yield on occasions to achieve what the Permanent Court of International Justice called 'effective, genuine equality'.[531] With reference to this, Justice Brennan went on to say:

> Human rights and fundamental freedoms may be nullified or impaired by political, economic, social, cultural or religious influences in a society as well as by the formal operation of its laws. Formal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities "in the political, economic, social, cultural or any other field of public life".[532]

9.446 The *Sex Discrimination Act 1984* (Cth) gave effect to the International Convention on the Elimination of All Forms of Discrimination Against Women which Australia signed on 12 July 1980 and ratified on 28 July 1983. States Parties to the Convention undertake, *inter alia,* to 'embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein'.[533] The Act defines unlawful discrimination as both direct and indirect discrimination (Section 5(2)); it is designed, therefore, to cover systemic discrimination, that is, discrimination arising from wider social circumstances, practices and attitudes and not from direct, deliberate and immediate acts.[534] The *Sex Discrimination Act 1984* (Cth) does not provide for an affirmative action program, but sections 33 and 40(6) provide that actions designed to promote equal opportunity for persons of a particular sex or marital status or 'persons who are pregnant' shall not be deemed unlawful. Affirmative action programs are provided for in the *Public Service Act 1922* (Cth) which was amended by the *Public Service Reform Act 1984* to require Federal Government departments to design and implement equal opportunity programs (section 22B). The *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth) imposes similar obligations on private employers of more than 100 employees and institutions of higher education.[535] The *Equal Opportunity (Commonwealth Authorities) Act 1987* (Cth) covers Commonwealth authorities.

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529 (1985) 159 CLR 70, 126-27. Stephen J, in *Koowarta v Bjelke-Petersen* ((1982) 153 CLR 168, 220) said that, quite apart from the Convention, 'Australia has an international obligation to suppress all forms of racial discrimination because respect for human dignity and fundamental rights, and thus the norm of non-discrimination on the grounds of race, is now part of customary international law, as both created and evidenced by state practice and as expounded by jurists and eminent publicists.'

530 Article 1(4) continues: '. . . provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.' Further, Article 2(2) imposes an obligation on States Parties to take 'special and concrete measures' when the circumstances so warrant.

531 *Minority Schools in Albania Opinion* (1935) Ser. A/B No. 64, 19.

532 *Gerhardy v Brown* (1985) 159 CLR 70, 129.

533 Article 2.

534 The *Racial Discrimination Act 1975* (Cth) is less clear on this point, though its adoption of the phrase 'purpose or effect' in section 9(1) implies it is not restricted to intentional discrimination.

535 Section 3(4) of the Act states: 'Nothing in this Act shall be taken to require a relevant employer to take any action incompatible with the principle that employment matters should be dealt with on the basis of merit'.

9.447 Neither the *Racial Discrimination Act 1975* (Cth) nor the *Sex Discrimination Act 1984* (Cth) was intended, therefore, to deal exclusively or exhaustively with their respective subject areas.[536] While the latter covers both governmental and private actions, its scope with regard to State and Territorial governmental actions is restricted: it does not, for example, extend protection to State Government employees. Moreover, the protection it affords to men against sex discrimination is inadequate.[537]

9.448 ***State laws.*** New South Wales, South Australia, Victoria and Western Australia have all introduced anti-discrimination legislation: *Anti-Discrimination Act 1977* (NSW), *Equal Opportunity Act 1984* (SA), *Equal Opportunity Act 1984* (Vic) and *Equal Opportunity Act 1984* (WA). The *Prohibition of Discrimination Act 1966* (SA) was the first anti-discrimination law passed by an Australian Parliament, having as its object the elimination of discrimination on the ground of race. The *Equal Opportunity Act 1984* (SA) repealed the *Sex Discrimination Act 1975* (SA), the *Racial Discrimination Act 1976* (SA) and the *Handicapped Persons Equal Opportunity Act 1981* (SA). The *Equal Opportunity Act 1984* (Vic) repealed the *Equal Opportunity Act 1977* (Vic) and the *Equal Opportunity (Discrimination Against Disabled Persons) Act 1982* (Vic). All the State Acts currently in force have broadly the same objects and cover similar though not identical areas of activity, for example, employment, education and accommodation. These State Acts, which all define discrimination to include direct and indirect discrimination, prohibit discrimination on the following grounds.[538]

	NSW	SA	VIC	WA
race	*	*	*	*
sex	*	*	*	*
marital status	*	*	*	*
pregnancy		*		*
intellectual impairment	*		*	
physical impairment	*	*	*	
homosexuality/sexuality	*	*		
political conviction			*	*
religious conviction			*	*

Affirmative action provisions are included in the New South Wales and Western Australian statutes.[539]

9.449 Queensland and Tasmania have no anti-discrimination laws. Thus, while much legislation of this kind has been passed in Australia in recent years, the equality rights enjoyed by individuals differ markedly in scope and content from one State to another.

536 For the former this was shown retrospectively in the *Racial Discrimination Amendment Act 1983* wherein Parliament, in light of the High Court's decision in *Viskauskas v Niland* (1983) 153 CLR 280), passed a provision to the effect that the Act was not intended to 'exclude or limit the operation of a law of a State or Territory' that furthers the objects of the Convention (section 6A(1)). The *Sex Discrimination Act 1984* (Cth) contains a provision to the same effect (section 10(3)).

537 Discussed under the heading 'A federal human rights power?', para 9.938.

538 The Victorian Act adopts a unique formulation, referring to three 'criteria' of unlawful discrimination, namely status, private life and sexual harassment. The term 'status' is defined to mean the sex, marital status, race and impairment of a person, or the condition of being a parent, childless or a de facto spouse. 'Private life' is defined to cover religious or political beliefs.

539 For example, section 21 of the *Anti-Discrimination Act 1977* (NSW) refers to affirmative action in relation to the 'special needs' of certain races and section 122C promotes the policy of equal employment opportunity in public employment; sections 31 and 51 of the *Equal Opportunity Act 1984* (WA) deal with the 'special needs' of designated groups.

Position in other countries

9.450 ***United States.*** Section 1 of the Fourteenth Amendment of the Constitution, which was ratified on 28 July 1868, provides:

> No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without the process of law; nor deny to any person within its jurisdiction *the equal protection of the* laws.[540]

9.451 The equal protection clause is an open-textured provision which provides a general and indeterminate standard of equality to which the United States Supreme Court has had to ascribe some content. It gives the Court no guidance about what kinds of classifications should be most closely scrutinised, nor does it proscribe discrimination as such or explain what constitutes State action in this context.[541] Also, the Fourteenth Amendment does not explicitly refer to affirmative action.

9.452 All of these matters have been the cause of uncertainty in the interpretation of the clause which for many years offered an imperfect guarantee of the rights it sought to protect. One paradoxical result was that, while the purpose of the clause was to ensure racial equality, for over 60 years a system of racial segregation in the United States was found to be consistent with it.[542] Not until 1952, in *Brown v Board of Education for Topeka County,*[543] was the 'separate but equal' doctrine reversed decisively.

9.453 In its attempt to define and give content to the equal protection clause, the United States Supreme Court has adopted a doctrine of 'suspect' or 'reasonable classification'. This has been interpreted to mean that different classifications of persons for legislative purposes are subject to varying levels or judicial scrutiny. Where a 'suspect classification' is used, such as race or ethnic origin, then the courts will apply 'strict scrutiny' which means that a Government statute or practice 'can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.'[544] Gender-based classifications, on the other hand, are subject to 'intermediate scrutiny' which requires that the law concerned bear a 'substantial relationship' to an 'important governmental objective'.[545] A broader problem, according to the critics, is that the doctrine permits judicial review of wide areas of substantive policy and that it creates an arbitrary hierarchy of rights and interests.

9.454 Though not explicitly mentioned in the Fourteenth Amendment, affirmative action has been accepted in principle by the Supreme Court and has been held to be subject to 'intermediate scrutiny'.[546]

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540 Emphasis supplied. An equal protection element has been implied into the due process component of the Fifth Amendment which acts upon the Federal Government, for example, in *United States Department of Agriculture v Moreno* 413 US 528 (1973).

541 *Shelley v Kraemer* 334 US 1 (1948).

542 For example, *Plessy v Ferguson* 163 US 537 (1896).

543 347 US 483, 489-91 (1954).

544 *University of California Regents v Bakke* 438 US 265, 357 (1978) Brennan, White, Marshall and Blackmun JJ. Very few laws survive this level of scrutiny which originated in *Korematsu v United States* 323 US 214 (1944). In that case, the Supreme Court held that, where the classification discriminates against a racial or ethnic minority, only a 'pressing public necessity' will suffice.

545 *Craig v Boren* 429 US 190 (1976). According to the opinion of Powell J in *University of California Regents v Bakke:*

> Gender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria. With respect to gender, there are only two possible classifications. (438 US 265, 302-3 (1978)).

A third level of scrutiny, known as 'minimum rationality', requires that there be a rational relationship between the legislative means used and the object sought to be accomplished.

546 *University of California Regents v Bakke,* 438 US 265 (1978).

9.455 ***Canada.*** Section 15 of the *Canadian Charter of Rights and Freedoms* provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[547]

9.456 Section 15 is a broadly worded provision which suggests that the framers of the *Charter* intended to cover every conceivable operation of the law.[548]

9.457 Section 15 came into operation in 1985. Many cases have come before the courts since then and a number of problems of interpretation have emerged. A particular problem relates to the fact that, while section 15 of the *Charter* (unlike the Fourteenth Amendment of the United States Constitution) enumerates certain grounds on which discrimination is prohibited, the list is not designed to be exhaustive. It has been left to the courts, therefore, to decide on the relationship between the grounds of discrimination which are and are not enumerated in the section. In *Re Headley et al and Public Service Commission Appeal Board*[549] MacGuigan J held that discrimination entails a 'perjorative distinction' and that such distinctions which are based on grounds enumerated in section 15 should be subject to closer scrutiny than those based on unenumerated grounds, an opinion which, if adopted, would appear to point the Canadian courts towards the suspect classification doctrine. Further, for discrimination on an unenumerated ground to come within section 15, it was decided in *Kask v Shimizu* that it must be such as to undermine the values of a free and democratic society.[550] What is less clear is the extent to which unenumerated grounds must be similar in nature to those that are enumerated. In *Mirhadizadeh v The Queen in right of Ontario*[551] the Ontario High Court held that such substantive similarity was required, while in *Re MacVicar and Superintendent of Family and Child Services*[552] the British Columbia Supreme Court held that it was not. It is clear that section 15 does not reach private activity, but is confined to governmental action.

9.458 ***New Zealand.*** Article 12 of the draft Bill of Rights 1985 provides:

> Everyone has the right to freedom from discrimination on the ground of colour, race, ethnic or national origins, sex, or religious or ethical belief.

9.459 The commentary notes that neither the phrase 'equality before the law' nor 'the equal protection of the law' is used anywhere in the Bill of Rights: the first because 'its meaning is elusive and its significance difficult to discern'; the second 'because of its openness and the uncertainty of its application.'[553] The proposed Bill does not include an affirmative action provision; the commentary says that laws and programs to overcome existing disadvantages 'are unlikely to be seen as discrimination at all'.[554]

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547 Sections 27 and 28 are also relevant, the first relating to multiculturalism, the second to equality between 'male and female persons'.

548 WS Tarnopolsky and GA Beaudoin (eds), *The Canadian Charter of Rights and Freedoms: Commentary* (1982) 396.

549 (1987) 35 DLR 4th 568 (Fed CA).

550 (1986) 28 DLR 4th 64 (Alta QB). It was further held that the list of enumerated grounds itself provides an indication of the kinds of discrimination that would undermine these values.

551 (1986) 33 DLR 4th 314 (Ont HCJ).

552 (1986) 34 DLR 4th 488 (BCSC).

553 *A Bill of Right for New Zealand: White Paper*, 86, para 10.81-10.82.

554 id 86, para 10.79.

International Covenant on Civil and Political Rights

9.460 Article 3 of the International Covenant on Civil and Political Rights 1966 provides:

> The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

9.461 Article 26 of the Covenant provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

9.462 The UN Human Rights Committee has commented that Article 3 requires not only measures of protection, but also affirmative action designed to ensure the positive enjoyment of equal rights.[555] As we have noted, affirmative action programmes are explicitly provided for in the two subsidiary instruments, the anti-discrimination Conventions. Unlike ICCPR, these also contain a definition of the term 'discrimination'.[556] Having regard to these and other provisions, one commentator has said that:

> 'Discrimination' is defined under international law to mean only unreasonable, arbitrary, or inviduous distinctions, and does not include special measures of protection .... Putting it positively, the equality principle forbids discriminatory distinctions but permits and sometimes requires the provision of affirmative action. The principle of the equality of individuals under international law does not require a more formal or mathematical equality but a substantial and genuine equality in fact.[557]

Issues

9.463 Five main issues concerning equality rights arise:

(a) Should equality rights be entrenched in the Constitution?

(b) If so, should the proposed section include an affirmative action provision?

(c) Should the proposed section refer either to the 'equal protection of the law' or to 'equality before the law'?

(d) Which grounds, if any, of non-discrimination should be enumerated in the proposed section and why?

(e) Should the enumerated grounds of non-discrimination constitute an exhaustive list?

Advisory Committee's recommendation

9.464 The Rights Committee recommended that section 117 of the Constitution should be deleted and replaced by the following section:

555 P Sieghart, *The International Law of Human Rights* (1983) 77.

556 In Article 1(1) of the Convention on the Elimination of All Forms of Racial Discrimination and Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women. Both find discrimination by looking to either 'purpose or effect'.

557 W McKean, op cit., 288. McKean also refers to the ruling of the Permanent Court of International Justice in the *Minority Schools in Albania Opinion* where it was said that equality in fact, as against equality in law, 'may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.' ((1935) Ser. A/B No. 64, 19) Both that ruling and McKean's work are quoted in Justice Brennan's consideration of discrimination in international law in *Gerhardy v Brown* (1985) 159 CLR 70, 128 and 130 respectively.

> The Commonwealth or a State shall not deny equality before the law to all of the citizens and to all of the permanent residents of Australia and in particular the Commonwealth of a State shall not unfairly discriminate between any of them on any grounds.

9.465 The Committee's argument was that, owing to the narrow and literalistic interpretation by the High Court of the guarantee therein, the existing section 117 'has been relatively ineffective in striking down State legislation discriminating against residents of other States.'[558] It concluded that the section should be altered 'to provide a clear expression of the fundamental principle of non-discrimination which the Founding Fathers sought to achieve in section 117'.[559]

9.466 In formulating an alternative provision, the Committee was concerned, *inter alia,* to restate the principle of 'equality before the law' embodied in the *Magna Carta* and in such a way as to 'make it clear that any unfair discrimination between Australians should be placed beyond the powers of Governments.'[560] The use of the term 'unfair discrimination' in its recommendation was designed to ensure that the constitutional entrenchment of non-discrimination would not result in the courts striking down measures intended to assist disadvantaged groups. Thus, a non-discrimination provision should not prevent a Government from making 'appropriate distinctions between different Australians, founded on a rational basis.'[561] The Rights Committee noted it was:

> aware of the adverse effects which systematic discrimination against particular groups can have in Australian society and believes that it is essential that a basic standard must be set, re-affirming the unacceptable nature of inequalities before the law and of unfair discrimination.[562]

9.467 The Committee noted also that it had considered the desirability of enumerating an exclusive or non-exclusive list of particular grounds on which the Federal and State Governments would not discriminate. However, having regard to the narrow interpretation of the distinctly formulated provision of the existing section 117, the Committee preferred on balance simply to restate the ancient principle of 'equality before the law', leaving the grounds of unfair discrimination to be determined by the courts according to changing social and political conditions.[563]

Submissions

9.468 A number of detailed submissions were received in response to the Rights Committee's recommendation. While a majority of these favoured the entrenchment of equality rights in the Constitution, most were critical of the Rights Committee's recommendation, preferring that a different approach be adopted. Many of the concerns were summed up by the National Women's Consultative Council which noted five main limitations on the scope of the new section 117 proposed by the Rights Committee:

(a) it does not recognise or declare a right to equality;

(b) it prohibits only discrimination by governments, including discrimination in legislation, and does not apply to discrimination by the private sector;

(c) it addresses only procedural, and not substantive, in-equality;

558 Rights Report, 62.
559 id, 63.
560 ibid.
561 ibid.
562 ibid.
563 id, 64.

(d) it does not specify the grounds on which it is prohibited to discriminate, and in particular does not specifically prohibit discrimination on the basis of sex; and

(e) it prohibits discrimination only against citizens and permanent residents.[564]

9.469 The case for point (d) was made in a number of submissions. It was said that lack of specificity would limit the proposed provision's educative function;[565] also that the narrow interpretation of the present section 117 is due more to the generality and uncertainty of its language than to its specificity.[566] It was further argued that certain grounds of non-discrimination relate to fundamental rights which do not vary according to social and political conditions and that these should be enumerated in the Constitution.[567] As a rider to this, the women members of the South Australian Legislative Council said they favoured enumeration of the grounds of non-discrimination in such a way that they are not limiting to further extension.[568]

9.470 On the other hand, Dr W Sadurski said he agreed with the Committee's decision not to stipulate the prohibited grounds of discrimination. He added, however, that he did not favour inclusion of the phrase 'on any grounds' because 'it makes the provision too "wordy" and tautological'.[569]

9.471 Concern was also expressed regarding use of the phrase 'unfair discrimination'. On this matter, the National Women's Consultative Council submitted:

> The use of the adjective 'unfair' to qualify 'discrimination' in the proposed section 117 may have been designed to justify affirmative action policies. However, as it is not limited to such policies, it also implies that there can be fair discrimination on any grounds, including race and sex. This implication may lead to courts placing the onus of proof of unfairness on the persons alleging discrimination, a very difficult burden to discharge in a society in which differences between men and women are regarded as 'natural' or 'real' and sex-based discrimination is widely accepted.

9.472 Referring to the dichotomy between procedural and substantive equality, Dr W Sadurski said he was concerned about the relationship between the two parts of the proposed section 117, separated by the words 'in particular'. The first part of the proposed section refers to 'equality before the law', the meaning of which is restricted to the enforcement of existing laws, whereas the second part would appear to refer to the content of the law. The words 'and in particular' suggest that what follows is a further specification of what has been said before; but this cannot be the case, maintained Dr Sadurski.[570]

9.473 A number of submissions supported the inclusion of further grounds of non-discrimination in the Constitution, in particular on the ground of mental or physical impairment,[571] age,[572] homosexuality [573] and political belief.[574]

564 National Women's Consultative Council S2542, 11 December 1987.
565 Justice E Evatt S205, 13 October 1987; Anti-Discrimination Board S3077, 20 November 1987.
566 National Women's Consultative Council S2542, 11 December 1987.
567 Public Interest Advocacy Centre S3098, 24 November 1987.
568 S2857, 29 October 1987.
569 S2840, 27 October 1987; The Federation of Ethnic Communities' Council of Australia S2829, 29 October 1987 favoured a general prohibition against discrimination 'on any grounds'.
570 S2840, 27 October 1987.
571 Intellectual Disability Rights Service S383, 15 October 1986; Australian Society for the Study of Intellectual Disability and Australian Association of Special Education S787, 23 December 1986.
572 Australian Pensioners' Association S498, 11 November 1986.
573 Australian Federation of AIDS Organisations S568, 21 November 1986; Womens Electoral Lobby Australia Inc – ACT S2724, 21 November 1987.
574 National Women's Consultative Council S2542, 11 December 1987.

9.474 As we note below,[575] a number of submissions joined with Justice Elizabeth Evatt in arguing that there should be a federal legislative power with respect to equality and non-discrimination.[576] Justice Evatt was also among those who advocated inclusion of a declaration of the equality of men and women in a new preamble to the Constitution.[577]

9.475 Those submissions against the entrenchment of equality rights in the Constitution argued that the inherent difficulty lies in their vagueness.[578] Summing up this line of reasoning, the Queensland Government said:

> vague rights such as those proposed give no clear guidelines to government, increase the scope of arid litigation and offer Australians no further protection than that which they have always been afforded. Of concern also is the fact that the judiciary would be drawn into essentially policy and social disputes under the guise of 'equality before the law'.[579]

Reasons for recommendation

9.476 We believe that the Constitution should provide for the protection of individuals against arbitrary discrimination. An individual's right to fulfill his or her potential, irrespective of such factors as race, colour or sex, is of fundamental importance. Equality of opportunity is an underlying principle of liberal society and it is our belief that the Constitution should make some provision to allow for the establishment and maintenance of that principle. It is manifestly the case that some Australians do suffer disadvantages which prevent them from enjoying the rights which permit an individual to live in full dignity and to participate freely in every sphere of social and political life.[580] Our recommendation is both a recognition of this fact and a statement of the right of all members of a society, equally with all other members of that society, to choose and pursue their own plan of life without being hindered or fettered by the forces of social prejudice. Formal equality before the law is an essential tenet of a fair society; we are of the opinion that adherence to it does not preclude a further commitment to what has been called 'effective, genuine equality'.

9.477 We understand that equality rights are especially controversial and we have examined the case against them with particular care, having regard to the experience of comparable countries where these rights are constitutionally entrenched. We acknowledge, too, that the Rights Committee faced a difficult task when constructing an appropriate recommendation in this instance.

9.478 The task as we see it is to formulate a provision which is sufficiently broad to encompass the major grounds of discrimination, yet explicit and precise enough to avoid the problems which analagous provisions have generated elsewhere. For this purpose, we have preferred to use Article 12 of the draft New Zealand Bill of Rights as a model, rather than the recommendation of the Rights Committee or the relevant sections of the United States Constitution or the *Canadian Charter of Rights and Freedoms*.[581]

9.479 We find the same difficulties in the recommendation of the Rights Committee as were canvassed in many of the submissions. In particular, we are concerned about the use of the phrase 'equality before the law' in the context of a provision which seeks equality in the content of the law, that is, in its purpose and effect. As we have indicated, 'equality

575 Under the heading 'A federal human rights power?' at para 9.938.
576 S205, 13 October 1987.
577 This is discussed in Chapter 3, para 3.21-3.23.
578 Tasmanian Government S1361, 30 March 1987.
579 Queensland Government S3069, 25 November 1987.
580 For judicial comment on the disadvantages suffered by Aborigines see, for example, *Koowarta v Bjelke Petersen* (1982) 153 CLR 168, 239 (Murphy J); and *Gerhardy v Brown* (1985) 159 CLR 70, 136 (Brennan J).
581 We have used the latter as a model in explicitly providing for affirmative action measures.

before the law' is an ancient and worthy principle which is basic to our conception of a fair society. It is the formal principle of equality which requires that the law be administered impartially to all, regardless of status, and that the administration of the law by the courts can be invoked by all in order to protect their rights. It does not, however, provide that the laws in themselves advance equality nor even that they do not perpetuate or exacerbate inequality. All classes of persons in nineteenth century England were subject to the laws governing the property of married women, for example; yet these laws created and maintained a system of inequality between married men and married women and between married and unmarried women. Our view is that the principle of 'equality before the law' is not adequate to provide substantive equality rights.

9.480 We do not believe that it is prudent to include the word 'unfair' in a recommendation of this sort. Its inclusion would have the effect of placing a duty on the judiciary to evaluate any differentiation in any statute in order to decide whether or not it is fair. This would involve the application of value judgments by the courts to an unacceptable extent and would open the opportunity for almost any type of legislation to come under judicial scrutiny, including appropriations, taxation laws, the regulation of trades and professions, bounties and union preference, and a wide range of executive and administrative decisions. This is not a desirable course to pursue and it should be viewed as a diversion from the real objectives which equality rights are designed to promote. It is not appropriate to formulate criteria which are so general as to leave the courts to impose their own views of substantive fairness; for that would constitute a denial of the principles of representative democracy and place unnecessary and unhelpful burdens on our courts. For similar reasons, we do not recommend inclusion of the phrase 'equal protection of the laws'.

9.481 Furthermore, notwithstanding the views expressed in some of the submissions, we believe that, having regard to the relevant experience in the United States and Canada, it is preferable to enumerate in the Constitution an exhaustive list of grounds on which discrimination is prohibited. This would avoid the kind of problems the courts have faced in Canada in recent years when trying to establish the relationship between the enumerated and unenumerated grounds of non-discrimination. It would also avoid the establishment of what many critics of the United States equal protection clause see as an arbitrary hierarchy of rights and interests. Another important consideration is that the recommendation we propose would substantially curtail the volume of litigation which statements of these rights tend to generate.

9.482 The question is, which grounds of non-discrimination should be enumerated in the proposed provision? We believe that discrimination on the ground of race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief should be explicitly prohibited in the Constitution. First, race, colour, ethnic or national origin and sex are the antecedent and not acquired characteristics of an individual and therefore lie outside the realm of his or her choice. Moreover, these have been the objects of the most invidious kinds of direct and systemic discrimination in our society. They are precisely and quintessentially the kinds of discrimination which a provision of this sort seeks to eliminate. They are the common denominators in the relevant federal and State laws and in the major international, regional and national instruments and constitutions in this field.

9.483 Secondly, discrimination on the basis of marital status is also deeply entrenched in the customary practices and attitudes of our society; as many of the submissions suggested, a constitutional prohibition against such discrimination would play an

invaluable educative function, acting as a powerful reminder against a form of discrimination whose effects may otherwise be concealed or underestimated. All the State anti-discrimination laws prohibit discrimination on the ground of marital status.

9.484 Thirdly, freedom from discrimination on the ground of political, religious or ethical belief corresponds with the most fundamental rights which liberal constitutions have sought to protect. The concern to guard against violation of any of these freedoms is a perennial feature of liberal society and their inclusion in a proposed provision on equality rights is a legitimate conclusion derived from the central tenets of liberal thought and practice. These freedoms are fundamental to the operation of a free and democratic society and all that is being claimed here is that individuals should be constitutionally protected against forms of discrimination which contradict the essential features of the Australian polity.

9.485 We note that, while we have chosen to present the grounds of non-discrimination in the form of an exhaustive list, this does not preclude additional protections against discrimination by legislation or amendment to the Constitution. Also, in our view it is more appropriate to protect such emerging rights as those concerned to prohibit discrimination on the ground of physical or intellectual impairment, or age, by legislation, at least for the time being. It should be emphasised in this respect that the anti-discrimination laws passed at federal and State level cover both governmental and private actions, whereas the provision we recommend is restricted to the former.

9.486 We have said that we consider it appropriate to include a provision explicitly allowing for affirmative action measures in the Constitution. The propriety of such measures is well-established in international and domestic law, and the principle has received judicial analysis and exposition by the Australian High Court. We have said that the framers of the draft New Zealand Bill of Rights argued against the need for an affirmative action provision on the ground that such measures 'are unlikely to be seen as discrimination at all'. We, on the other hand, prefer to achieve more certainty in this matter. In this respect, we note that the High Court, in *Gerhardy v Brown* (1985),[582] tended to view the 'special measure' concerned as an exception to the general rule of non-discrimination, that is, as a form of 'reverse discrimination', whereas others have maintained that affirmative action programs should not be seen as discrimination at all.[583] Affirmative action is non-discriminatory if discrimination is defined, as it would appear to be in international law, to mean only unreasonable, arbitrary or invidious distinctions. It is argued, therefore, that the principle of equality forbids discriminatory distinctions but permits and sometimes requires the provision of affirmative action. In short, equality does not entail identity of treatment.

9.487 The proposed affirmative action sub-section should be read, not as an exception to a general rule, but as a clarification of the scope and purpose of sub-section(1) of the proposed provision on equality rights.

9.488 Further, the proposed equality rights are not designed to create either uniformity or an equality of outcomes. Their purpose is to establish and maintain the legal framework conducive to the most dynamic *de facto* equality of opportunity that can be achieved in a free and democratic society. We note, too, the relevance of section 51(xxvi.) of the Constitution in relation to measures taken to overcome disadvantages arising from race.

582 159 CLR 70. The views of Wilson J, in *Koowarta v Bjelke-Petersen* ((1982) 153 CLR 168, 244), expressed in relation to section 51(xxvi.) of the Constitution, are also relevant here; see also *Commonwealth v Tasmania, (Tasmanian Dam Case)* (1983) 158 CLR 1, 242 (Brennan J).

583 W Sadurski, 'Gerhardy v Brown v The Concept of Discrimination: Reflections on the Landmark Case that Wasn't,' (1986) 11 *Sydney Law Review* 5.

While that section, which confers on the Federal Parliament the power to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws,' is expressed in neutral terms, some judges of the High Court have said that its 'primary object' is 'beneficial'.[584]

9.489 The common law provides no protection against legislative and other governmental acts that discriminate on grounds such as race or sex. To that extent, the equality rights we recommend represent something of a departure from Australia's legal tradition. However, their 'alien' quality should not be overstated. As we have said, anti-discrimination legislation exists at both federal and State level. Our proposal, which is restricted to the sphere of governmental action, would not cover the same areas of activity as the existing statutes which extend to relationships among individuals. It is not designed to be either exclusive or exhaustive, therefore. But it is of fundamental importance. The purpose of the proposed provision is to ensure consistency in the relationship between individuals and the arms of government with respect to equality rights throughout Australia. It is that consistency which is lacking at present and, as we have said before, we do not believe there is room for variation in a federation where the basic rights of individuals are concerned. Whether or not the Federal and State Governments choose to legislate with respect to discrimination, and however federal and State anti-discrimination laws vary between themselves, there should be a uniform, consistent and entrenched right to equality of the nature we propose.

Cruel or inhuman punishment

Recommendation

9.490 We *recommend* that the Constitution be altered to provide that:

> 124H. (1) Everyone has the right not to be subjected to cruel, degrading or inhuman treatment or punishment.
>
> (2) Everyone has the right not be subjected to medical or scientific experimentation without that person's consent.

9.491 This guarantee is designed to ensure the physical integrity of the individual. Its concern is to prohibit forms of treatment, punishment or experimentation which are incompatible with respect for the inherent dignity and worth of the human person.

Current position

9.492 Neither the Federal Constitution nor any of the State Constitutions provide a guarantee of the kind recommended. Principles relevant to it are, however, of fundamental importance to Australia's legal tradition.

9.493 ***Cruel, degrading or inhuman treatment or punishment.*** A basic principle of the common law, derived from the *Magna Carta* of 1215, is that a sentence for an offence should be proportionate to its gravity.[585] The *Bill of Rights 1689* states: 'That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.' As Wilson J explained in *Veen v The Queen* (No 2):

584 *Tasmanian Dam Case* (1983) 158 CLR 1, 242 (Brennan J), 180 (Murphy J) and 273 (Deane J).

585 The *Magna Carta* states: 'A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity . . .'. For judicial comment, see *Veen v The Queen* (1979) 143 CLR 458, 462 (Stephen J), 472 (Mason J), 473-491 (Jacobs J) and 494-5 (Murphy J). See also *Veen v The Queen* (No 2) (1988) 62 ALJR 224, 225 (Mason CJ, Brennan, Dawson and Toohey JJ), 233 (Wilson J), 237 (Deane J) and 238 (Gaudron J).

> a sentence should not exceed that which is appropriate to the gravity of the crime considered in the light of its objective circumstances. In other words, the punishment must fit the crime.[586]

9.494 Also, it has been held that a sentence cannot be extended beyond what is appropriate to a crime merely on the ground of preventive detention for the protection of society, although that is a permissible factor in sentencing.[587]

9.495 In *Sillery v R*, a majority of the High Court (Gibbs CJ, Murphy and Aickin JJ) held that a mandatory sentence of life imprisonment for an offence contrary to section 8 of the *Crimes (Hijacking of Aircraft) Act 1972* (Cth) was in that case disproportionately severe. However, only Murphy J explicitly associated the sentence with the concept of 'cruel and unusual punishment'.[588] In *Pochi v Macphee*, Murphy J went on to say:

> our legal heritage from the English Revolution of 1688 and the resulting Bill of Rights suggests a limitation on law making which prohibits cruel and unusual punishment. Even if Parliament has power to make laws which authorise cruelty, which may be doubted, all Acts should be construed (at least in the absence of unmistakable language to the contrary) as subject to an unexpressed qualification that the power be exercised humanely according to modern civilised standards.[589]

9.496 ***Consent for medical or scientific experimentation.*** A general principle of the common law is that no one can be compelled to submit to medical treatment or examination against his or her will. If a doctor treats a patient without his or her consent, or without the consent of a person who is capable of giving consent on the patient's behalf, then he or she may be guilty of trespass to the person.[590] Consent may be given expressly, as where a patient authorises a surgeon to perform an operation, but it may also be implied.[591] Consent must be genuine, however; that is, it must be both free and informed.[592] In stating the scope of the doctor's duty to give information to a patient, the courts have applied a dual standard, stating that a doctor must provide information that a *reasonable* doctor would give a *reasonable* patient in the circumstances of that patient.[593]

9.497 Pursuant to National Health and Medical Research Council guidelines, an Australia-wide network of institutional ethics committees has been established for the purpose of supervising research on human subjects. Ethics committees operate in every

586 id, 233.
587 id, 227, (Mason CJ, Brennan, Dawson and Toohey JJ).
588 *Sillery v R* (1981) 35 ALR 227, 233-5 (Murphy J); see also *Pochi v Macphee* (1982) 151 CLR 101, 114-5 (Murphy J); *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 109 (Murphy J); *Gallagher v Durack* (1983) 152 CLR 238, 249 (Murphy J).
589 (1982) 151 CLR 101, 114.
590 E. Campbell and H. Whitmore, *Freedom in Australia* (1973) 207.
591 JG Fleming, *The Law of Torts* (7th edn 1987) 72.
592 id, 72-3.
593 eg, *F v R* (1983) SASR 189, 191 (King CJ): the few relevant cases are considered in the report of the Law Reform Commission of Victoria, *Informed Consent to Medical Treatment*, October 1987, 7-17.

institution in Australia that conducts research on humans.[594] Appropriate practices have also been established for giving and obtaining consent to medical and scientific experimentation.[595]

Position in other countries

9.498 ***United States.*** The Eighth Amendment to the Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

9.499 Disproportionate and excessive sentences have been held to constitute 'cruel and unusual punishment'. In *Weems v United States,* it was decided that the guarantee in the Eighth Amendment was not limited to prohibiting torture, but was capable of expansion as public opinion became enlightened by a humane justice.[596] Similarly, in *Trop v Dulles,* where the denial of citizenship to a wartime deserter was considered sufficiently excessive to constitute 'cruel and unusual punishment', it was held that the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[597] Powell J (dissenting) observed in *Rummel v Estelle:*

> In sum, a few basic principles emerge from the history of the Eighth Amendment. Both barbarous forms of punishment and grossly excessive punishments are cruel and unusual. A sentence may be excessive if it serves no acceptable social purpose, or is grossly disproportionate to the seriousness of the crime.[598]

9.500 *Robinson v California* [599] established that the cruel and unusual punishments clause applies to the States through the operation of the Fourteenth Amendment. The Court held that imprisonment for the crime of being a drug addict was cruel and unusual. While the death penalty itself did not violate the Eighth Amendment,[600] a mandatory sentence of death, which prevented due consideration of the details of the case, was sufficiently disproportionate and excessive to be unconstitutional.[601] The Supreme Court has also held that the Eighth Amendment's prohibition of cruel and unusual punishment prevents the government from imposing the death penalty upon a prisoner who is presently insane and that the government must provide a procedure that is designed to provide a fair hearing on the issue of a prisoner's sanity.[602]

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594 New South Wales Law Reform Commission, *In Vitro Fertilization,* July 1987, 98. Relevant guidelines also operate at the international level; principles to guide those conducting research on human subjects are contained in the Declaration of Helsinki adopted at the 18th Assembly of the World Medical Association in 1964 and amended at the 29th Assembly in Tokyo in 1975 and the 35th Assembly in Venice in 1983.

595 id, 137-149. Sections 10, 11, 12 and 13 of the *Infertility (Medical Procedures) Act 1984* (Vic) provide that an in vitro fertilization procedure cannot be carried out unless the female patient has consented to the procedure in writing. These sections were proclaimed to commence on 1 July, 1988. The only legislation which touches on the issue of informed consent to medical treatment, in contrast to experimentation, is the *Consent to Medical and Dental Procedures Act 1985* (SA) – see Law Reform Commission of Victoria, *Informed Consent to Medical Treatment,* October 1987, 7. The Act has as its object the protection of medical practitioners from criminal and civil liability in respect of medical procedure if, *inter alia,* the patient, being a competent adult or a minor covered by the Act, consents. 'Consent' is defined to mean 'an informed consent given after proper and sufficient explanation of the nature and likely consequences of the procedure'.

596 217 US 349 (1910).

597 356 US 86 (1957).

598 *Rummel v Estelle* 445 US 263, 293 (1980).

599 370 US 660, 675 (1962).

600 *Greg v Georgia* 428 US 153 (1976).

601 *Woodson v North Carolina* 428 US 280 (1976); *Roberts v Louisiana* 431 US 633 (1977); *Lockett v Ohio* 438 US 586 (1978). The sentence of death for the crime of rape was similarly excessive – *Coker v Georgia* 433 US 584 (1977).

602 *Ford v Wainwright* 106 S Ct 2595 (1986).

9.501 Neither the practice of 'double-celling' in a maximum security prison,[603] nor a mandatory life sentence for offenders convicted of three felonies violated the Eighth Amendment.[604]

9.502 ***Canada.*** Section 12 of the *Canadian Charter of Rights and Freedoms* provides:

> Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

9.503 The standard to be applied in determining whether treatment or punishment is cruel and unusual is whether the treatment or punishment is so excessive as to outrage standards of decency and surpass all rational bounds of treatment or punishment.[605] Section 12 of the *Charter* is aimed at punishments that are more than merely excessive and are grossly disproportionate.[606] McIntyre J (dissenting) said in *Smith v The Queen* (1987) that a punishment will be cruel and unusual if it has any one or more of the following characteristics: (1) the punishment is of such character or duration as to outrage the public conscience or to be degrading to human dignity; (2) the punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or (3) the punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards.[607]

9.504 A majority of the Supreme Court of Canada held that the minimum punishment of seven years' imprisonment for the offence of importing or exporting narcotics violated section 12 of the *Charter.*[608] The strip searching of male inmates in the presence of female prison guards has also been held to infringe the section,[609] as has the sentencing of an 'habitual criminal' to an indeterminate duration pursuant to legislation since repealed.[610]

9.505 Many instances of treatment or punishment have been held not to be cruel and unusual. These include: sentences of preventive detention for an indeterminate period for a dangerous offender,[611] or for a person found not guilty by reason of insanity;[612] mandatory and minimum sentences for various offences;[613] double-celling;[614] the making and execution of a deportation order that might result in the subject of the order being sent to a country in which he or she would have a well-founded fear of persecution;[615] and the treatment of prisoners on remand in correction centres where, *inter alia,* the provisions made for exercise and other activity programs are not as extensive for remand prisoners as for prisoners who are already sentenced.[616]

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603 *Rhodes v Chapman* 452 US 337 (1981).
604 *Rummel v Estelle* 445 US 263, (1980) (Powell, Brennan, Marshall and Stevens JJ, dissenting).
605 *Re Mitchell and The Queen* (1983) 6 CCC 3d 193 (Ont HCJ); *R v Konechny* (1983) 6 DLR 4th 350 (BCCA).
606 *Smith v The Queen* (1987) 34 CCC 3d 97 (SCC).
607 ibid. In *Re Soenn and Thomas* it was held that the principle of disproportionality can only be applied to punishment. Factors which are relevant to whether treatment is cruel and unusual are: whether or not it is in accord with public standards of decency and propriety; whether it is unnecessary because of the existence of adequate alternatives; and whether or not the treatment can be applied upon a rational basis and in accordance with ascertained or ascertainable standards. (1983) 3 DLR 4th 658 (Alta QB).
608 *Smith v The Queen* (1987) 34 CCC 3d 97 (SCC).
609 *Weatherall v Attorney-General of Canada* (June 9, 1987 FCTD, Strayer J).
610 *Re Mitchell and The Queen* (1983) 6 CCC 3d 193 (Ont HCJ).
611 *R v Simon (No 3)* (1982) 69 CCC 2d 557 (NWTSC); *Re Moore and The Queen* (1984) 6 DLR 4th 294 (Ont HCJ); *R v Langein* (1984) 8 DLR 4th 485 (Ont CA).
612 *R v Swain* (1986) 24 CCC 3d 385 (Ont CA).
613 *R v Krug* (1982) 7 CCC 3d 324 (Ont Dist Ct); affd 7 CCC 3d 337 (Ont CA), affd on other grounds 21 DLR 4th 161 (SCC); *R v Konechny* (1983) 6 DLR 4th 350 (BCCA).
614 *Collin v Kaplan* (1982) 143 DLR 3d 121 (FCTD).
615 *Re Vincent and Minister of Employment and Immigration* (1983) 148 DLR 3d 385 (Fed CA).
616 *Re Maltby and Attorney-General of Saskatchewan* (1982) 143 DLR 3d 649 (Sask QB), appeal dismissed (1984) 13 CCC 3d 308.

9.506 Further, it has been decided that section 12 does not extend to medical treatment [617] and that the words 'cruel and unusual' are interacting and are not, therefore, strictly conjunctive.[618]

9.507 ***New Zealand.*** Article 20 of the draft Bill of Rights 1985 provides:

> (1) Everyone has the right not be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment.

9.508 The commentary to the draft Bill notes that the reference to 'disproportionately severe' treatment or punishment is intended to ensure that the courts can review the appropriateness of any treatment or punishment in particular circumstances. The courts would, therefore, have the power to strike down an excessive punishment imposed by Parliament.[619]

9.509 It also provides:

> (2) Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

9.510 Commenting on the limitation implicit in Article 7 of the ICCPR, which is discussed below, the framers of the draft Bill note that, in their view, 'the principle that all medical and scientific experiments require the subject's consent' should not be qualified in this way.[620]

International instruments

9.511 Article 7 of the International Covenant on Civil and Political Rights 1966 provides:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

9.512 The right to freedom from medical or scientific experimentation was expressed as a component of the larger right to freedom from cruel, inhuman or degrading treatment or punishment, the purpose of which was to ensure that legitimate scientific or medical practices were not hindered.[621]

9.513 Australia signed the subsidiary instrument, the *International Convention on the Elimination of Torture,* on 10 December 1985. The Convention imposes on the State Parties an obligation, *inter alia,* to ensure that neither torture, nor other cruel, inhuman or degrading treatment or punishment will take place within its jurisdiction.

9.514 Article 3 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms 1950 provides:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

9.515 That provision has been the subject of a number of decisions.

(a) *Torture.* In *Republic of Ireland v United Kingdom,* the European Court of Human Rights defined torture as 'deliberate inhuman treatment causing very serious and cruel suffering'.[622] Torture is not restricted to bodily assault, but may also include the infliction of mental suffering (Evrigenis J). In

617 *Re McTavish and Director, Child Welfare Act* (1986) 32 DLR 4th 394 (Alta QB).
618 *Re Gittens and The Queen* (1982) 137 DLR 3d 687 (FCTD).
619 *A Bill of Rights for New Zealand: White Paper,* 108.
620 ibid.
621 ibid.
622 (1978) 2 EHRR 25.

Denmark, Norway, Sweden and Netherlands v Greece, the European Commission of Human Rights held, *inter alia,* that inadequate and restrictive conditions of detention may sometimes amount to torture.[623]

(b) *Inhuman treatment.* It has been held that 'inhuman treatment' covers at least such treatment as deliberately causes severe suffering, mental or physical.[624] In some circumstances, deportation or extradition may constitute inhuman treatment.[625]

(c) *Degrading treatment.* This has been defined by the European Commission of Human Rights as treatment which grossly humiliates an individual or drives him to act against his or her will or conscience.[626] Discrimination on the ground of race may constitute degrading treatment.[627]

(d) *Degrading punishment.* In *Tyrer v United Kingdom* it was found that birching as a punishment is an assault on human dignity which humiliates and disgraces the offender.[628]

Advisory Committee's recommendation

9.516 The Rights Committee recommended alteration of the Constitution to provide:

> 80A. The Commonwealth or a State shall not . . .
>
> (viii) impose cruel or degrading treatment or punishment.

9.517 The Committee said this is one of the common law principles of procedure and justice which 'are generally accepted by all members of the community.'[629] In evidence to the Committee it was claimed that:

> In some States the conditions of incarceration on remand are sub-standard and may amount to 'cruel and unusual punishment'.[630]

Submissions

9.518 A number of submissions were received supporting the entrenchment of the right to freedom from cruel and unusual punishment in the Constitution.[631] Some of these were especially concerned about prison conditions in Australia.[632] Mr Peter Bailey, then Deputy Chairman of the Human Rights Commission, said that first among the three major kinds of complaints the Commission had received, was that:

> people should not be subject to cruel, inhuman or degrading treatment or punishment. Now, that is the form in which Article 7 of the international covenant is phrased, and it has been surprising how often, in terms of complaints from prisoners, in terms of complaints

623 (3321-3/67; 3344/67) Report: YB 12.

624 In *Denmark et al v Greece,* the European Commission of Human Rights used the term 'unjustified' in this context, whereas in *Ireland v United Kingdom* it explained that such treatment was never justified ((5310/71) Report: 25 January 1976).

625 For example, *X v Belgium* (984/61) CD 5, 39.

626 In *Republic of Ireland v United Kingdom* the European Court of Human Rights held that interogation techniques used by the British security forces were degrading 'since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.'

627 For example, *X and Y v United Kingdom* (5302/71) CD 44, 29. A State's refusal to give formal recognition to an individual's change of sex has also been held to constitute degrading treatment – *X v Federal Republic of Germany* (6699/74) DR 11,16.

628 (1978) 2 EHRR 1.

629 Rights Report, 48.

630 id, 9.

631 PC Bingham S1138, 6 March 1987; LAWASIA Human Rights Sub-Committee Australian Support Group S956, 1 February 1987; K Johnson S617, 27 September 1986.

632 B Love S3450, 15 November 1986; B Hocking, National Freedom Council S3488, 22 November 1986.

from aborigines, in terms of complaints from prohibited non-citizens, in terms of complaints from people who are trying to get benefits, how often that kind of theme comes through. And it does seem to me that that is one possible right that could be built into the Constitution, would be clearly uncontroversial, because it does not seem to me to attack any of the kind of preconceived moral and ethical positions that, say, a right to life would involve, and I do commend it.[633]

9.519 On the other hand, the Queensland Government, in a detailed submission which cited many European, United States and Canadian cases, noted with respect to the recommendation of the Rights Committee:

> Innocuous and laudable though this proposal may at first appear, it would, in fact, result in a minefield of jurisprudential, moral and political problems and thrust the judiciary into the very centre of the political process.[634]

9.520 A particular concern of the Queensland Government was that the use of the word 'or' in the term 'cruel or degrading treatment or punishment' would allow a disjunctive interpretation of the proposed provision. In Canada, in contrast, the term 'cruel and unusual' has to be read 'conjunctively so that it encompasses only a punishment at once both cruel and unusual', it was submitted.[635]

Issues

9.521 Five main issues are:

(a) Does the right we seek to guarantee here receive adequate protection under the common law?

(b) Should a constitutional provision be expressed in a conjunctive or disjunctive form?

(c) Should a constitutional provision adopt the traditional formulation of 'cruel and unusual punishment'?

(d) Would a provision of the sort we have recommended give rise to a host of jurisprudential, moral and political problems?

(e) Is a distinct guarantee of the right not to be subjected to medical or scientific experimentation without consent required? Would it have the effect of inhibiting legitimate research?

Reasons for recommendation

9.522 We believe that a guarantee of protection against cruel, degrading or inhuman treatment or punishment and of the right not to be subjected to medical or scientific experimentation without consent should be entrenched in the Constitution. The guarantee embodies a principle that is fundamental to the common law, namely, that of the autonomy and inviolability of the individual. It is designed to prohibit any form of treatment, punishment or experimentation which is inconsistent with the inherent worth of the human person. At the core of our moral tradition is the view that a human being should be treated justly. This means at least that a person should not be treated merely as a means to an end, for example, as an instrument employed to achieve the goals of the state. Each human being is an end in him or herself, demanding the dignity and respect which belongs to all persons. The guarantee we recommend here is a constitutional expression of this moral imperative.

633 P Bailey S3473, 22 November 1986.
634 S3069, 25 November 1987.
635 Citing the case of *R v Miller and Cockriell* (1976) 70 DLR 3d 324.

9.523 We have used Article 7 of the ICCPR as our model in this instance. We have, however, omitted the word 'torture' from the proposed provision on the ground that it is implicit in the phrase 'inhuman treatment or punishment', being an aggravated form of these. Also, like the framers of the draft New Zealand Bill of Rights, we have preferred to express the right to freedom from medical or scientific experimentation without consent independently of the right to freedom from cruel, degrading or inhuman treatment or punishment. Our view is that sub-sections (1) and (2) of the proposed section 124H guarantee distinct components of the general principle of the integrity of the human person.

9.524 ***Cruel, degrading or inhuman treatment or punishment.*** We have noted that a prohibition against treatments and punishments of this sort has a long history in our legal tradition. Basic to it is the view that trespass against the physical integrity of the individual constitutes an abuse of state power. The prohibition extends not only to barbarous methods of treatment or punishment, but also to punishments that are grossly disproportionate, sufficiently so as to outrage the public conscience or to be degrading to human dignity.

9.525 The provision we recommend is not designed to prohibit severe punishment of an offender where severity is appropriate to the case. Rather, it is concerned to ensure that punishments are not inflicted arbitrarily, without due regard either to the legitimate social purposes of punishment or to the objective circumstances pertaining to a case. A sentence is arbitrary where, for example, it punishes a person for what the United States courts have termed that person's 'status', be it a drug addict or a member of a sexual or racial minority. A punishment might also be deemed arbitrary where a mandatory sentence does not permit consideration of the details of a case or allow for the gradation in the offences which a particular statute covers. On the other hand, a sentence of preventive detention for an indeterminate period for a dangerous offender might not infringe the proposed provision, so long as appropriate facilities for dealing with the offender were available.

9.526 In short, the proposed prohibition against cruel, inhuman or degrading punishment gives constitutional expression to the principles of sentencing established under the common law. With regard to these, Street CJ said in *Reg v Rushby:*

> If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine that appropriate amount of punishment.[636]

9.527 As the relevant European jurisprudence shows, the guarantee of the right not to be subjected to cruel, degrading or inhuman treatment or punishment is not restricted to circumstances involving persons in custody. The prohibitions against cruel, degrading or inhuman treatment could relate to a range of experiences including extreme forms of inhuman treatment amounting to torture, or arising from inadequate or restrictive conditions of detention. The terms cruel, degrading or inhuman treatment could, however, extend beyond these circumstances to embrace, for example, discrimination on the ground of race, or certain deportation or extradition orders. They might also relate to medical treatment. In a general sense, they cover at least such treatment as deliberately cause severe suffering, mental or physical. The principle we seek to guarantee here is that treatment of persons by the arms of government should accord with public standards of decency and propriety and should be applied on a rational basis.

636 [1977] 1 NSWLR 594, 598.

9.528 In formulating an appropriate guarantee, we have preferred the words 'degrading and inhuman', which are found in the relevant international and regional instruments, to the word 'unusual', favoured by the United States Constitution and the *Canadian Charter.* This is because 'degrading or inhuman treatment or punishment' incorporates a more precise and modern formulation of the evils we are seeking to eradicate. Where appropriate, the courts in Australia would be able to draw upon the relevant European jurisprudence. We note in this context that the experience of the United Kingdom with respect to Article 3 of the European Convention suggests that the right against cruel, degrading or inhuman treatment or punishment is protected inadequately under the common law.

9.529 Further, taking up a point raised by the Queensland Government, we have expressed the proposed provision in a disjunctive form, preferring 'or' to 'and' in the choice of the connecting words. As we have explained, the Canadian courts have not, in fact, adopted a strictly conjunctive interpretation of section 12 of the *Charter.*[637] In any event, if a treatment or punishment is cruel then it should be prohibited irrespective of whether it is also held to be unusual (or degrading or inhuman in the context of our recommendation).

9.530 ***No medical or scientific experimentation without consent.*** Rationality and autonomy are the essential characteristics of human beings which give rise to the moral principle that persons should be accorded dignity and treated with respect. By rationality we mean the capacity to reason. By autonomy we mean that individuals are directed by their own wills to pursue their self-determined goals.

9.531 The principle of consent to medical or scientific experimentation derives from the properties of rationality and autonomy. Basically, the principle holds that, by the operation of reason and choice, the individual controls whatever use is made of his or her body. If an individual's body is to be used in the course of medical or scientific experimentation then it must be on the basis of his or her free and informed consent. For consent to 'intermeddle' with a person's body to be effective it must be founded on a knowledge of the material facts on the part of the person upon whom the experiment is to be conducted.

9.532 It is well established in law that the principle of consent is contradicted where fraud is used or where there is a failure to fully disclose the risks involved in experimentation. Also, we have said that an Australia-wide network of institutional ethics committees has been established for the purpose of supervising research on human subjects. Our recommendation, therefore, builds on established doctrines and practices, re-affirming the fundamental importance of the principle of consent. We do not believe that the constitutional entrenchment of this principle would inhibit legitimate research.

9.533 Historically, the international concern to formulate acceptable guidelines with regard to consent for medical and scientific experimentation on human subjects developed as a reaction to the atrocities perpetrated in World War II. We note that some people in Australia today and many members of their immediate families were the victims of these infringements against the physical integrity of the human person. Such atrocities constitute the extreme cases which the guarantee we have recommended would prohibit. The guarantee would, however, extend to every sphere of medical and scientific experimentation involving human subjects, including the testing of new drugs in our public hospitals.[638]

637 *Re Gittens and The Queen* (1982) 137 DLR 3d 687 (FCTD).
638 It could extend to other hospitals if the matter at issue was within the scope of proposed section 124A.

9.534 We emphasise that the guarantee we recommend in sub-section (2) of the proposed section 124H does not extend to all forms of medical and scientific procedure, but is limited to experimentation. We acknowledge that there will be occasions when the distinction between medical treatment and experimentation is hard to draw. With this in mind, we do not intend the term 'experimentation' to be interpreted in an artificially narrow way. Experimentation encompasses those acts or operations which have as their object the purpose of discovering something unknown or the testing of a principle or hypothesis. A particular form of experimentation may be therapeutic or non-therapeutic for the individual whose consent is required. Both these forms of experimentation are essential to medical and scientific progress. Our view is that no matter what the purpose of the experiment may be, the principle of consent should be upheld.

9.535 The provision we have recommended is concerned with experimentation on human persons capable of giving consent or for whom consent may be justifiably given. The latter point refers to the question of consent given on behalf of minors and others incapable of giving consent on their own behalf. The question could arise, for example, in an emergency situation, though we do not think this would present difficulties for the law. More problematic would be the need for consent for experimentation on persons suffering the disadvantages of intellectual impairment. The courts would be especially vigilant in these cases. We are not aware of any instances of non-therapeutic experimentation where the participation of intellectually impaired persons or minors would be acceptable to the courts.[639]

9.536 We have said that, primarily as a result of developments in technology, the actual or potential power of the arms of government to interfere in the affairs of individuals has increased in recent times. The argument carries particular force in the context of medical or scientific experimentation. There is a clear duty on the part of those who conduct such experiments to deal with their human subjects in a way that is compatible with the inherent dignity and worth of the human person. The principle of consent is basic to that relationship and we believe it should be entrenched in the Constitution.

Search and seizure

Recommendation

9.537 We *recommend* that the Constitution be altered to provide that:

> 124I. Everyone has the right to be secure against unreasonable search or seizure.

Current position

9.538 The Constitution provides no protection against unreasonable search and seizure.

9.539 Under the common law, police officers have certain limited powers to search persons who are arrested for criminal offences and to enter premises and seize property found on the premises.[640] Today, however, most of the powers given to police and others to make bodily searches, to search premises and to seize property are statutory.

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639 We cite the commentary from the draft New Zealand Bill of Rights in this respect:

> Any challenge to a law which permitted consent to be given on behalf of another to medical or scientific experimentation would certainly see the courts exercising the utmost vigilance to protect the rights of those on whose behalf that consent was sought to be given. *A Bill of Rights for New Zealand: White Paper,* 108.

640 The common law is summarised in NSW Law Reform Commission. *Police Powers of Arrest and Detention* (1987) para 2.31-2.32.

9.540 In some circumstances premises may be searched and property seized without a warrant. In others the power of search and seizure can be exercised only if a magistrate or judge has authorised the search, etc, by warrant. For the purposes of this Report, it is not necessary to examine the statute law in detail. The statutory provisions are numerous and vary both as between jurisdictions and as regards the circumstances in which they apply.[641]

9.541 Some indication of the extent of the statutory powers is given in the Australian Law Reform Commission's Report on *Privacy* in 1983. The Commission stated that, as of 1983, there were no less than 270 provisions in federal statutes alone which conferred powers on government officers to enter and search property.[642]

Position in other countries

9.542 ***United States.*** The Fourth Amendment to the United States Constitution (ratified in 1791) provides that:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

9.543 ***Canada.*** Section 8 of the *Canadian Charter of Rights and Freedoms* provides that 'Everyone has the right to be secure against unreasonable search or seizure'.

9.544 ***United States and Canadian interpretations.*** Judicial interpretations of the constitutional guarantees of these two countries against unreasonable search and seizure indicate that the guarantees apply not only to searches of persons who have been arrested, but also to entry by government officers on to private premises and to seizure of property found within these premises. Search and seizure refer as well to interception of telecommunications;[643] interception of mail;[644] the action of police in stopping a vehicle to conduct an inspection of its passengers or the vehicle itself;[645] the action of police in stopping citizens on the street and frisking them;[646] interception of private communications;[647] compulsory breath tests;[648] taking of blood samples,[649] and surreptitious video surveillance of an individual in circumstances where the person observed has a reasonable expectation of privacy.[650]

9.545 The Canadian Supreme Court has held that in determining the reasonableness of a search or seizure, courts should balance the public's interest in upholding the liberties of citizens, including its interest in the protection of legitimate expectations of privacy,

641 See J Bishop, *Criminal Procedure*, (1983) Chapter 3; Australian Law Reform Commission, *Privacy* (1983) para 151-238; Review of Commonwealth Criminal Law, *Discussion Paper No 3: Arrest and Related Matters* (1987); Review of Commonwealth Criminal Law, *Discussion Paper No 4: Search Warrants* (1987); Review of Commonwealth Criminal Law, *Discussion Paper No 11: Matters Ancillary to Arrest* (1987); The Law Reform Commission, *Criminal Investigation*, (1975) para 188-229; NSW Law Reform Commission, *Police Powers of Arrest and Detention*, (1987) para 2.31.-2.46.

642 para 152.

643 *Olmsted v United States* 277 US 438 (1928); see *Wigmore on Evidence* (1961) para 2184b; *R v Finlay and Grellette* (1985) 23 DLR 4th 532 (Ont CA).

644 *R v Henry* (1987) 1 WCB 2d 480 (FCTD).

645 *United States v Cortez* 449 US 411 (1981); *Delaware v Prouse* 440 US 648 (1979); *New York v Belton* 101 S Ct 2860 (1981); *United States v Ross* 456 US 798 (1982); *R v Parton* (1983) 9 CCC 3d 295 (Alta QB).

646 *Terry v Ohio* 392 US 1 (1968).

647 *Re Atwal and the Queen* 12 Aug 1987 (Fed CA).

648 *R v Holman* (1982) 28 CR 3d 378 (BC Prov Ct).

649 *R v Carter* (1982) 144 DLR 3d 301 (Ont CA); *R v Pohoretsky* (1985) 17 DLR 4th 268 (Man CA).

650 *R v Wong* (1987) 34 CCC 3d 51 (Ont CA).

against its interest in effective law enforcement.[651] But since a primary purpose of the section is to prevent unreasonable searches before they occur, wherever it is practicable to obtain a prior authorisation, by warrant, for a search and seizure, such authorisation is a precondition for a valid search and seizure. Although the person or body from whom the prior authorisation is sought need not be a court, the person or body to whom the application is made should be capable of acting judicially. That person or body will need to assess the competing interests of the individual and the state. But no warrant should be issued to assist in the enforcement of the criminal law unless it has been established on oath that there are 'reasonable and probable' grounds for believing 'that an offence has been committed and that relevant evidence is to be found at the place to be searched.'

9.546 Illegalities of a minor or insubstantial nature will not render a search or seizure unconstitutional.[652] However, where the illegality is so serious as to violate the minimum requirements of the law, the search or seizure will usually be treated as unreasonable.[653] Different standards of reasonableness may apply depending upon whether the search or seizure occurs in the criminal context or some administrative setting relating to public health and safety.[654]

9.547 ***New Zealand.*** Article 19 of the draft New Zealand Bill of Rights 1985 provides:

> Everyone has the right to be secure against unreasonable search or seizure whether of the person, property, or correspondence or otherwise.

International Covenant on Civil and Political Rights

9.548 Article 17 of ICCPR provides:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

Advisory Committee's recommendation

9.549 The Rights Committee recommended that the Constitution be altered to provide that:

> The Commonwealth or a State shall not
> . . .
> cause or carry out unreasonable search or seizure.

Submissions

9.550 There were numerous submissions supporting a constitutional guarantee against unreasonable search and seizure. The Queensland and Tasmanian Governments opposed any such guarantee.[655] The Queensland Government expressed concern that a proposal for alteration of the Constitution as significant as that made by the Rights Committee had been advanced 'without a detailed discussion of the issues and problems which could arise if it was implemented.' It referred to the wide interpretation given to the corresponding provision in the *Canadian Charter on Rights and Freedoms* by the

651 *Hunter v Southam Inc* (1984) 11 DLR 4th 641 (SCC).
652 *R v Haley* (1986) 27 CCC 3d 454 (Ont CA).
653 *R v Donbrowski* (1985), 18 CCC 3d 164 (Sask CA).
654 *Bertram S Miller Ltd v The Queen* (1986) 31 DLR 4th 210 (Fed CA); *Michigan v Tyler* 436 US 499 (1978); *Camara v Municipal Court* 387 US 523 (1967); *See v City of Seattle* 387 US 541 (1967); *Marshall v Barlow's Inc* 436 US 307 (1978); *Donovan v Dewey* 452 US 594 (1981).
655 Queensland Government S3069, 17 November 1987.

Canadian Supreme Court,[656] to the 'artificial techniques' which courts in the United States and Canada had adopted in order to uphold certain searches and seizures without warrant,[657] and to the United States rule that evidence obtained by an unconstitutional search or seizure is not admissible.[658]

Reasons for recommendation

9.551 Constitutional protection against unreasonable search and seizure by officers of government is, we believe, desirable. Such protection is commonly conferred under modern constitutions and is seen by many to be important, particularly as means of safeguarding privacy interests.

9.552 The constitutional guarantee we propose, which is in the same terms as section 8 of the *Canadian Charter of Rights and Freedoms,* does not prevent the conferment of powers of search and seizure. It merely places limits on the circumstances in which such powers can be validly conferred and also on the uses which may be made of those powers on particular occasions. We are confident that, in interpreting and applying the guarantee we propose, courts would be attentive to the need for effective law enforcement and the need to protect the health and safety of members of the public. They would, however, also have to have regard to the countervailing interests of the individuals whose property or privacy would be intruded upon.

9.553 In assessing the constitutional validity of a search and seizure, or of legislation which authorises the search or seizure, the Supreme Court of Canada has emphasised,[659] a court must consider not only the reasonableness of the measure in furthering legitimate government objectives, but also whether the impact of the search or seizure on the individual is reasonable or unreasonable. The Court has left open the question whether a law which violates section 8 of the *Charter* might nevertheless be upheld under the justified limits clause of the *Charter* (section 1). This clause is substantially the same as the limitations clause we have recommended.[660] Although the test of reasonableness in the context of the section we here propose may, in practice, be no different from the test that would be applied under the general limitations clause, we consider that the limitations clause is capable of being invoked in relation to all laws which, *prima facie*, violate the right set out in the proposed new Chapter of the Constitution.

Liberty of the person and the justice system

Recommendations

9.554 We *recommend* that the Constitution be altered to provide that:

124J. (1) Everyone has the right not to be arbitrarily arrested or detained.

(2) Everyone who is arrested or detained has the right:

(a) to be informed, at the time of the arrest or detention, of the reason for it;

(b) to consult and instruct a lawyer without delay and to be informed of that right;

(c) to have the lawfulness of the arrest or detention determined without delay;

(d) to be released if the detention or continued detention is not lawful.

124K. Everyone who is arrested for an offence has the right:

656 *Hunter v Southam Inc* (1984) 11 DLR 4th 641 (SCC).
657 Reference was made to *Harris v United States* 390 US 234 (1968); *Chimel v California* 395 US 752 (1969); *United States v Edwards* 415 US 800 (1974).
658 *Mapp v Ohio* 367 US 643 (1961).
659 *Hunter v Southam Inc* (1984) 11 DLR 4th 641 (SCC).
660 para 9.200.

(a) to be released if not promptly charged;

(b) not to make any statement, and to be informed of that right;

(c) to be brought without delay before a court or competent tribunal;

(d) to be released on reasonable terms and conditions unless there is reasonable cause for the continued detention.

124L. (1) Everyone who is charged with an offence has the right:

(a) to be informed without delay, and in detail, of the nature of the charge;

(b) to have adequate time and facilities to prepare a defence;

(c) to consult and instruct a lawyer;

(d) to receive legal assistance if the interests of justice so require and, if the person does not have sufficient means to provide for that assistance, to receive it without cost;

(e) to be tried without delay;

(f) to a fair and public hearing by a court;

(g) to be present at the trial and to present a defence;

(h) to have the assistance, without cost, of an interpreter if the person cannot understand or speak the language used in the court;

(i) to be presumed innocent until proved guilty according to law;

(j) to examine witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution;

(k) not to be compelled to be a witness against himself or to confess guilt;

(l) if finally acquitted of the offence or pardoned for it, not to be tried for it again;

(m) if finally found guilty of the offence and punished for it, not to be tried or punished for it again.

(2) Everyone convicted of an offence has the right to appeal according to law against the conviction and any sentence.

124M. No one shall be liable to be convicted of an offence on account of any act or omission which did not constitute an offence when it occurred.

9.555 The recommendations set out above are similar to provisions in the *Canadian Charter of Rights and Freedoms* and in the draft New Zealand Bill of Rights 1985, and, to some extent, they draw on the International Covenant on Civil and Political Rights.[661]

9.556 Some matters which are relevant to the concerns of this part of the Chapter are dealt with elsewhere in the Chapter. Jury trial is dealt with in the part on existing rights and freedoms under the Constitution.[662] Cruel and degrading punishment and experimentation with human subjects are considered above.[663] The desirability of including in the Constitution a general guarantee of 'due process' and of a general right of access to courts is considered under the heading 'Other rights and freedoms'.[664]

Current position

9.557 There is nothing in the Federal Constitution which directly safeguards the rights which the provisions set out above are meant to protect. The powers of the Federal Parliament to enact laws which make it possible for individuals to be subject to physical constraint are limited, but only because that Parliament's legislative powers are confined to enumerated subjects. The limitations on federal legislative power prevent the Federal Parliament from enacting comprehensive criminal laws, for example, a national criminal

661 para 9.569, 9.571 and 9.572.
662 para 9.703-9.746.
663 para 9.490-9.536.
664 para 9.835 and para 9.873.

code. But this is not, however, to say that the Parliament cannot enact any legislation which imposes criminal sanctions, which confers powers of arrest and detention, and which affects the rights of persons arrested for or charged with federal criminal offences. Parliament can pass such laws provided they deal with subjects of federal power.

9.558 Indirectly, the Federal Constitution provides some protection to persons who are accused of federal offences because of the requirement that the judicial powers of the Commonwealth may be exercised only by the courts specified in section 71 of the Constitution.[665] Adjudication of criminal liability has always been regarded as involving the exercise of judicial power, so the Federal Parliament cannot entrust the trial of persons charged with criminal offences to bodies other than courts.[666] No such constitutional principle applies in the States and Territories.[667]

9.559 For the most part the matters dealt with in this part of the Chapter are governed by ordinary law. The basic principles are principles of the English common law, many of them antedating British settlement in Australia. But the common law can be, and has been, supplemented and modified by statute law. Legislatures can make and have made laws to augment the list of prohibited activities which attract criminal sanctions and thereby enlarge the range of circumstances in which law enforcement authorities may exercise powers of arrest and detention. Legislatures can also supply powers of arrest and detention which are not available under the common law. Today, the law relating to arrest for criminal offences is largely statutory, as is also the law governing admission to bail. Statute law has also modified common law rules on proof of criminal charges.

9.560 For the purposes of this Report it is not necessary to set out in detail the current law on each of the topics which are considered in this part of the Chapter. We refer briefly to the current law when explaining the reasons for our recommendations.

Position in other countries

9.561 The constitutions of many democratic countries include provisions similar to those we recommend in this part of the Chapter or provisions with similar objects. We reproduce here only the provisions in those constitutions which we have considered especially relevant to our concerns, and extracts from the draft New Zealand Bill of Rights 1985.

9.562 ***United States.*** The United States Constitution originally contained few provisions to protect liberty of the person and to guarantee procedural rights. Section 9 of Article One provided that:

> 2. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.
>
> 3. No Bill of Attainder or ex post facto Law shall be passed.

Paragraph 1 of Section 10 of Article One provided, *inter alia,* that:

> No State shall . . . pass any Bill of Attainder, ex post facto Law . . . .

9.563 Amendments to the Constitution in 1791 introduced additional guarantees. The relevant amendments were the Fifth, Sixth and Eighth Amendments.

9.564 The Fifth Amendment provided:

665 para 6.129-6.138.
666 Courts martial are an exception *The King v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452.
667 para 6.139-6.161.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

9.565 The Sixth Amendment provided:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.

9.566 The Eighth Amendment provided:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

9.567 Section 1 of the Fourteenth Amendment, which was ratified in 1868, provided, *inter alia,* that no State should 'deprive any person of life, liberty, or property, without due process of law . . .'.

9.568 We refer, where appropriate, to judicial interpretations of the above provisions in our statement of reasons for our recommended alterations of the Constitution.

9.569 ***Canada.*** The *Canadian Charter of Rights and Freedoms* includes the following sections:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

9.570 We refer, where appropriate, to judicial interpretation of the above provisions in our statement of reasons for our recommended alterations of the Constitution.

9.571 ***New Zealand.*** The draft New Zealand Bill of Rights 1985 includes the following Articles:[668]

15. Liberty of the person

(1) Everyone has the right not to be arbitrarily arrested or detained.

(2) Everyone who is arrested or detained shall

(a) be informed at the time of the arrest, or detention of the reason for it;

(b) have the right to consult and instruct a lawyer without delay and to be informed of that right;

(c) have the right to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful.

(3) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

16. Rights on arrest

Everyone who is arrested for an offence has the right

(a) to be charged promptly or to be released;

(b) to refrain from making any statement and to be informed of that right;

(c) to be brought promptly before a court or competent tribunal;

(d) to be released on reasonable terms and conditions unless there is just cause for continued detention.

17. Minimum standards of criminal justice

(1) Everyone charged with an offence has the right

(a) to a fair and public hearing by a competent, independent, and impartial court;

(b) to be presumed innocent until proved guilty according to law;

(c) if convicted of the offence and the punishment has been varied between the commission of the offence and sentencing, to the benefit of the lesser punishment;

(d) if convicted of the offence to appeal to a higher court against the conviction and any sentence according to law.

(2) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

(3) No one who has been finally acquitted, convicted of, or pardoned for, an offence shall be tried or punished for it again.

18. Rights of persons charged

Every person charged with an offence has the right

668 *A Bill of Rights for New Zealand : White Paper* (1985).

(a) to be informed promptly and in detail of the nature and cause of the charge;

(b) to have adequate time and facilities to prepare the defence;

(c) to consult and instruct a lawyer;

(d) to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance;

(e) to be tried without undue delay;

(f) to be present at the trial and to present a defence;

(g) except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the maximum punishment for the offence is imprisonment for more than three months;

(h) to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution;

(i) to have the free assistance of an interpreter if the person cannot understand or speak the language used in court;

(j) not to be compelled to be a witness against that person or to confess guilt;

(k) in the case of a child, to be dealt with in a manner which takes account of the child's age.

International Covenant on Civil and Political Rights

9.572 The Covenant provides as follows:

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a

fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order *(ordre public)* or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Advisory Committee's recommendations

9.573 Under the heading 'Legal Procedures', the Rights Committee recommended that section 80 of the Constitution be deleted and the following section substituted:[669]

669 Rights Report, 101.

80. The Commonwealth or a State shall not

(i) provide for or permit trial without jury for an offence which is punishable by imprisonment for 12 months or more but may provide for or permit such a trial if a magistrate or a judge so orders upon the application of the accused;

(ii) deprive any person of liberty or property except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice;

(iii) diminish the presumption that all persons are innocent until proved guilty according to law;

(iv) compel self-incrimination;

(v) twice put a person in jeopardy for the same offence;

(vi) impose excessive bail;

(vii) cause or carry out unreasonable search or seizure;

(viii) impose cruel or degrading treatment or punishment.

80A. The Commonwealth or a State shall not deny to any person-

(i) access to the courts;

(ii) a speedy trial;

(iii) reasonable access to legal representation and to an interpreter;

(iv) reasonable information to enable any proceedings to be understood;

(v) an appeal from a final verdict or judgment.

9.574 The Committee's reasons for its recommendations in relation to trial by jury, deprivation of liberty or property, search and seizure, punishment and access to the courts are summarised in other parts of this Chapter.[670] Its reasons for proposing the other alterations to the Constitution, set out above, are summarised and commented on later in this part of the Chapter, mainly under the heading 'Comments on Advisory Committee's recommendations'.

9.575 On the general issue of whether the Constitution should be altered to guarantee what it termed 'legal process rights', the Committee reported:[671]

> Many submissions which advocated the entrenchment of protections of individual rights within the Constitution referred to the lack of constitutional guarantees in respect of legal process rights. These claims were supported by a range of instances put before the Committee, which it found persuasive.
>
> The Committee therefore believes it is wise to consider the question of constitutionally enshrining the freedoms which have been treasured since *Magna Carta*, and which may be seen as being under threat, in order to prevent further erosions being made. The Committee is of the view that provision, in general terms should be made within the Constitution to ensure that basic legal process rights are preserved. At the same time the development of detailed rules concerning criminal and civil procedures, as well as appropriate provisions governing criminal investigation can be left to the political process.

Submissions

9.576 Numerous submissions were made on the matters considered in this part of the Report. Several were by way of comment on the specific proposals of the Rights Committee.

670 para 9.703 (trial by jury), para 9.835 (liberty or property), para 9.537 (search and seizure), para 9.873 (access to courts).

671 Rights Report, 43.

9.577 Among those who favoured inclusion in the Constitution of more extensive guarantees of individual rights and freedoms, there were many who thought that what may, loosely, be termed 'legal process' rights should be assured by the Constitution.[672] Not all, however, indicated precisely what the assured legal process rights should be.

9.578 The New South Wales Council of Civil Liberties proposed that Articles 9, 10 and 14 of the International Covenant on Civil and Political Rights should be entrenched.[673] Other matters mentioned in the submissions as appropriate and desirable subjects of constitutional guarantees were freedom from arbitrary arrest,[674] the right to bail,[675] the right of accused persons to legal assistance,[676] the right of accused persons to interpreter services,[677] the privilege against self incrimination,[678] and the presumption of innocence.[679]

9.579 Those who submitted that the Constitution should not include guarantees of the kind we recommend in this part of the Chapter were, in the main, persons and organisations opposed to any further guarantees of individual rights and freedoms. In a detailed submission on the recommendations of the Rights Committee, the Queensland Government made the following points about those of the Committee's proposed changes which are dealt with in this part of the Chapter.[680]

(a) The protection which would be given by a provision that 'The Commonwealth or a State shall not ... impose excessive bail' would be illusory. Such a provision would not confer a right to bail and might simply encourage governments to provide that certain offences are non-bailable or that bail shall not be granted in certain circumstances.

(b) A provision that 'The Commonwealth or a State shall not ... compel self incrimination' would introduce all of the problems which have arisen under the Fifth Amendment to the United States Constitution. Such a provision 'is not ... limited to testimonial self incrimination, and could well be used to attack a wide range of long established and accepted police investigation

672 See eg AR Pitt S2585, 23 December 1987; NSW Council for Civil Liberties S3272, 17 February 1988; G Zdenkowski S3374, 24 March 1988; WHJ Phillips S3031, 5 November 1987; I Robertson S2720, 19 October 1987; E Byrne S2937, 31 October 1987; J Jones S2909, 26 October 1987.

673 S3272, 17 February 1988.

674 Republican Party of Australia S3382, 25 October 1986; K Hussein S590, 19 November 1986; V Martin & Co S573, 19 November 1986.

675 Republican Party of Australia S3382, 25 October 1986; WA Levinge S402, 11 October 1986; A Fenbury, Criminal Law Association S3437, 15 November 1986; B Tennant S3438, 15 November 1986.

676 Youth Advocacy Centre S3524, 2 December 1986; Human Rights Sub-Committee, Australian Support Group, LAWASIA S956, 16 February 1987; Humanist Society of Western Australia S987, 21 February 1987; V Martin & Co S573, 19 November 1986; T Young, S3564, 3 December 1986; R Tomasic, S3486, 22 November 1986.

677 Human Rights Group Maltese Guild of Australia S1035, 27 February 1987; B Oliver Ethnic Communities Council of NT S868, 28 January 1987; P Ravalico, S465, 10 November 1986.

678 LJ Barker S465, 10 November 1986; PC Bingham S1138 5 March 1987; WG Nicoll S2608 28 July 1986; Dr D O'Connor S3474 22 November 1986; I Mackinnon S3249, 11 February 1988; G Zdenkowski S3374, 24 March 1988; I Robertson S2720, 19 October 1987; WHJ Phillips S3031, 5 November 1987; S Souter S2656, 7 October 1987, Human Rights Sub-Committee, Australian Support Group, LAWASIA S956 16 February 1987; A Fenbury, Criminal Law Association S3437, 15 November 1986; M O'Callaghan S3439 15 November 1986

679 Republican Party of Australia S3382 25 October 1986; Dr D O'Connor S3474 22 November 1986; V Campisi S2842, 29 October 1987; N Barnfield S2907; 29 October 1987; Cayon Para-Physical Research Centre (Qld) S2480, 7 September 1987; G Zdenkowski S3374, 24 March 1988; I Mackinnon S3249, 11 February 1988; M Hamill S3147, 6 January 1988; E Byrne S2937, 31 October 1987; A Richardson S2915, 29 October 1987; J Jones S2909, 26 October 1987; H Patterson S2734, 20 October 1987; I Robertson S2720, 19 October 1987.

680 S3069, 17 November 1987.

methods.' Were it to be incorporated in the Constitution 'unwitting damage ... could be dealt to the law enforcement agencies and processes of this country ...'.

(c) The need for constitutionally entrenched rights to legal representation has not been demonstrated. The provisions proposed by the Committee are ambiguous and are not apt for judicial enforcement.

(d) It is not necessary to entrench in the Constitution a right to a speedy trial and entrenchment of any such right is not likely to be of any practical benefit.

(e) Entrenchment of the presumption of innocence would disturb numerous statutory provisions which reverse the onus of proof and would frustrate effective law enforcement.[681]

(f) It is not practical to entrench a right of appeal 'from a final verdict or judgment'. Entrenchment of such a right would be to disregard some of the advantages to be had from limiting rights of appeal in certain cases.

Reasons for recommendations

9.580 ***In general.*** The broad purposes of the alteration to the Constitution we propose in this part of the Chapter are, first, to guarantee to individuals certain minimal protections against the use of governmental powers to subject them to physical constraint; secondly, to secure to those who are arrested or charged with criminal offences certain basic rights which law enforcement authorities and those administering the criminal justice system must respect; and thirdly, to enshrine in the Constitution the principle, central to the concept of the rule of law, that no one may be adjudged guilty of a crime if the acts or omissions with which the person is charged were not prohibited at the time they occurred. This principle is summed up in the well known maxim *nullum crimen, nulla poena sine lege.*

9.581 The guarantees we propose would, like the guarantees of freedoms such as freedom of expression, of peaceful assembly and of association, operate not merely as limitations on the uses which may be made of powers and discretions conferred by law on governmental officials and agencies. They would operate also as limitations on the legislative powers of the Parliaments. These limitations would affect not only the power to make laws authorising arrest and detention. They would also affect powers to legislate on processes of criminal investigation generally and on the conduct of trials for criminal offences.

9.582 In formulating the provisions we have recommended, we have endeavoured to give expression to what we believe to be well understood and widely accepted standards, in terms which conform with existing legal concepts. To a large extent, the provisions encapsulate established legal principles. But entrenchment of those principles in the Constitution would ensure that they could not be eroded except by laws which could be shown to be demonstrably justified in a free and democratic society.

9.583 The principles encapsulated in the provisions we recommend mainly concern the criminal justice system, but proposed section 124J is designed to protect not merely the interests of those whose liberty may be curtailed by the processes of the criminal law. It is designed also to protect the interests of persons who are subject to bodily constraint for reasons quite unrelated to the enforcement of the criminal law, for example, persons who are compulsorily detained in psychiatric institutions. A constitution which seeks to inhibit

681 See also C Lloyd S3056, 18 November 1987.

the powers of government by assuring to individuals certain basic rights and freedoms from certain kinds of constraints would, we think, be singularly deficient if it did not include among its guarantees a guarantee of physical integrity. Liberty of the person has ranked high among the freedoms which have received protection under the common law. Under that law, the circumstances in which officials and others are recognised to have authority to impose bodily restraints on others are relatively few. Nowadays authority to impose such restraints mostly derives from legislation, though legislation to confer such authority tends to be construed by courts as narrowly as possible.

9.584 The importance of personal liberty has been recognised in the Declaration of Human Rights,[682] in the International Covenant an Civil and Political Rights[683] and in the European Covenant on Human Rights and Fundamental Freedoms.[684] Its prime importance in Australian society has been underlined by the High Court. In a recent case Mason and Brennan JJ observed:[685]

> The right to personal liberty is, as Fullagar J. described it, "The most elementary and important of all common law rights" . . . . Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable law of nature and had never been abridged by the laws of England "without sufficient cause" . . . .He warned:
>
> > "Of great importance to the public is the preservation of this personal liberty : for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities."

9.585 Where a person has been arrested or detained, whatever the cause, that person should, we believe, be informed without delay of the reason so that, if need be, action may be taken to challenge the legality of the arrest or detention. The alterations to the Constitution we recommend are designed to secure that right to be informed and also to guarantee a right to have the legality of the arrest or detention determined without delay. To ensure that the latter right is effective, we have recommended that the person who has been arrested or detained should have a further right to consult and instruct a lawyer without delay and to be informed of that right.

9.586 We have recommended that certain additional protections be afforded to persons who have been arrested for criminal offences. The nature and purpose of these we explain later.

9.587 The rights which we recommend should be guaranteed to persons who have been charged with criminal offences are, in large measure, rights to natural justice and rights to what, in the jurisprudence of human rights in Europe, is referred to as 'equality of arms', that is, procedural equality as between the accused and the prosecution.[686] The principles of natural justice and 'equality of arms' require, amongst other things, that an accused person shall have a reasonable opportunity of presenting a defence to the trial court under conditions which do not place the defendant at a disadvantage *vis a vis* the prosecution, and that the adjudicating body is above reasonable suspicion of bias. It is to ensure that these requirements are satisfied that we have recommended that the guaranteed rights of those who are charged with criminal offences should include the right to be informed of the nature of the charge; the right to adequate time and facilities to prepare a defence; the right to consult and instruct a lawyer; the right to receive legal assistance and, if needed, interpreter services; the right to a fair and public hearing; the

682 Articles 3 and 9.
683 Articles 9 and 10.
684 Article 5.
685 *Williams v The Queen* (1986) 161 CLR 278, 292.
686 See P Sieghart, *The International Law of Human Rights* (1983) 279.

right to be present at the trial and to present a defence; the right to examine witnesses for the prosecution and to obtain the attendance and examination of witnesses on the same terms as the prosecution.

9.588 In the catalogue of rights to be guaranteed to persons who have been charged with criminal offences we have included as well rights corresponding with a number of other central elements of our criminal justice system, for example, the presumption that an accused person is innocent (or, more accurately, the principle that the prosecution bears the onus of proving each element of the crime charged), the principle that an accused person is not compelled to be a witness against himself or herself, and the principle that a person shall not be tried or punished more than once for the same offence. These principles, too, may be regarded as exemplifications of broader notions of justice. Their rationale we consider later.[687]

9.589 In the ensuing pages we comment on the particular provisions we have recommended and explain why we consider them appropriate for inclusion in the Federal Constitution. We explain also why, in some cases, we have not adopted recommendations of the Rights Committee.

9.590 ***Arbitrary arrest and detention.*** We have recommended that the Constitution be altered to provide that 'Everyone has the right not to be arbitrarily arrested or detained'. This provision is the same as Article 15(1) of the draft New Zealand Bill of Rights 1985 and to the same effect as that part of section 1 of Article 9 of the ICCPR which states that 'No one shall be subjected to arbitrary arrest or detention'.[688]

9.591 For the purposes of this provision, the terms 'arrest' and 'detention' would, we expect, be interpreted broadly to encompass not merely formal arrests for criminal offences, but also the imposition of bodily constraint for any other purpose, for example, internment of enemy aliens, detention pursuant to mental health legislation and legislation to control the spread of infectious diseases, and arrest and detention of persons alleged to be prohibited non-citizens and liable to deportation. Widely construed, the terms 'arrest' and 'detention' are, we think, apt to cover any physical constraint which would give rise to an action for false imprisonment in the absence of lawful authority for the imprisonment.

9.592 There are, we recognise, many situations which could arise in which there may be room for argument about whether what has occurred is relevantly an arrest or detention. Issues of this kind have arisen under the European Convention on Human Rights and Fundamental Freedoms in connection with the Article which declares that 'Everyone has the right to liberty and security of person',[689] under section 10 of the *Canadian Charter of Rights and Freedoms* which guarantees certain rights to persons who have been arrested or detained, and under the 'due process' clauses of the United States Constitution (the Fifth and Fourteenth Amendments).

9.593 The 'right to liberty' proclaimed by the European Convention has been construed by the European Court of Human Rights as referring only to the physical liberty of the person. In determining whether a person has been deprived of liberty in this sense the Court has considered it relevant to have regard to factors such as the duration of the restraint and the type, effects and manner of implementing the measure alleged to amount

687 para 9.628-9.656.

688 cf section 9 of the *Canadian Charter of Rights and Freedoms* which is similar but which refers to imprisonment rather than detention.

689 Article 5(1).

to deprivation of liberty.[690] Canadian courts have adopted a similar approach, notably in cases involving the purported exercise by police of powers conferred by legislation for regulation of traffic, for example, power to stop vehicles.[691]

9.594 A guarantee of a right not to be arbitrarily detained may even apply in cases where a person is already subject to lawful physical constraint and where further measures are taken to impose other and more stringent physical constraints. In *Vitek v Jones,*[692] for example, the United States Supreme Court held that a prisoner's liberty was affected by a compulsory transfer to a mental hospital and that therefore the prisoner was entitled to due process. The prisoner's liberty was affected because, on transfer to the mental hospital, he would be subject to a greater degree of confinement than he would be if he remained in prison and would also be subject to compulsory treatment.[693]

9.595 In proposing that the Constitution should guarantee to everyone a right not to be arbitrarily arrested or detained, it is our intention that limits be imposed on both the uses that are made of lawful powers of arrest and detention and on the capacity of the Parliaments to confer such powers. The arrest or detention may, under the present constitutional order, be perfectly lawful in the sense that it is authorised by law and conforms with all the prescribed requirements for exercise of the power to arrest or detain. For the purposes of a constitutional guarantee against arbitrary arrest or detention, an otherwise 'lawful' arrest of detention may nonetheless be adjudged 'unlawful' because the law under which the arrest or detention is effected permits arbitrary arrest or detention. The law may be defective in that it fails to lay down any clear or objective criteria as to when persons may be arrested or detained.[694]

9.596 ***Rights on arrest and detention.*** We have already explained in a general way our reasons for recommending that certain constitutional rights be accorded to persons who are arrested or detained, whether for criminal offences or for any other cause. We here comment on the provisions we have recommended to secure those rights. Those provisions are modelled on Article 15(2) of the draft New Zealand Bill of Rights 1985, which was, in turn, modelled on section 10 of the *Canadian Charter of Rights and Freedoms.*

9.597 The right 'to be informed, at the time of the arrest or detention, of the reason for it', is, in essence, a generalised version of the principle enunciated by the House of Lords in *Christie v Leachinsky,*[695] which was that an arrest is rendered unlawful if the person arrested is not told of the true reason for the arrest or there is unreasonable delay in informing him or her of the reason. Although this principle was laid down in the context of arrest on suspicion of crime, it is one which is equally applicable to other cases where powers to take persons into custody are exercised. If the reasons why a person has been arrested or detained are not explained immediately, or as soon as practicable, the person has no means of assessing whether there may be grounds for contesting the legality of the arrest or detention. The corresponding guarantee in the *Canadian Charter* has been held to mean that the person who is arrested or detained must be given sufficient information

690 *Guzzardi v Italy* (1978) 3 EHRR 333 (compulsory residence on an island).
691 See also *Ingraham v Wright* 430 US 651, 674 (1977).
692 445 US 480 (1980).
693 cf *X v Switzerland* (7754/77) DR 11, 216 (European Commission on Human Rights) – noted in Sieghart, op cit, 144.
694 See *R v Simon (No 1)* (1982) 68 CCC 2d 86 (NWTSC); *R v Simon (No 3)* (1982) 69 CCC 2d 557 (NWTSC); see also P Sieghart, op cit, 145.
695 [1947] AC 573.

about the reasons for the arrest or detention to enable that person to make an informed decision on whether legal assistance should be sought and on whether release from custody should be sought.[696]

9.598 The duty which is incumbent on those who arrest or detain to convey information about the reasons for the arrest or detention would, we believe, be interpreted flexibly, in the light of existing case law elaborating on the principle in *Christie v Leachinsky*[697] and with regard to the circumstances of the individual case. In the case of detention pursuant to mental health legislation, it may be sufficient to inform a person who represents the interests of the detainee.[698]

9.599 The ancillary right 'to consult and instruct a lawyer without delay and to be informed of that right' should, we believe, be constitutionally guaranteed because, without it, the further right to obtain a judicial determination of the legality of the arrest or detention would be ineffectual. In Canada it has been held that the duty correlative to this right requires that the person who has been arrested or detained be told of the right to counsel in terms that are meaningful to that person[699] and that access to a lawyer should not be impeded or delayed.[700] It has also been held that a person who avails himself or herself of the right to counsel is entitled to consult with counsel in private.[701]

9.600 A constitutionally guaranteed right not to be arbitrarily arrested or detained would not, in our opinion, be effectively secured without a further guarantee of a right 'to have the lawfulness of . . . [an] arrest, or detention determined without delay' and a right 'to be released if the detention or continued detention is not lawful'. The general remedies clause we have recommended[702] would, to some extent, ensure that persons who are arrested or detained could seek appropriate remedy for unconstitutional violations of their guaranteed right to liberty of the person. We nonetheless think it desirable that the general remedies clause be supplemented by provisions to make it clear that persons who have been arrested or detained have a right to have the legality of the arrest or detention adjudicated *without delay,* and to secure their release from custody if the detention or continued detention is found unlawful. The provision we propose would have the effect of entrenching a right to seek habeas corpus or comparable statutory remedy.

9.601 We note that the 'due process' clauses of the United States Constitution have been interpreted as requiring that, where liberty of the person is abridged, there must be fair procedures whereby the legality and factual basis for an arrest or detention may be determined by an independent body.[703]

9.602 A right to adjudication of the legality of arrest or detention would, we consider, mean a right to an adjudication by a body recognisable as a court of law, even though the arrest or detention had itself been ordered or authorised by a court.[704] That right may include a right to a form of judicial review which is somewhat broader in scope than that which now occurs in applications for habeas corpus. The European Court of Human

696 *R v Trudeau* (1986) 17 WCB 19 (Ont Dist Ct).
697 [1947] AC 573.
698 See *X v United Kingdom* (1981) 4 EHRR 188.
699 *R v Nelson* (1982) 3 CCC 3rd 147 (Man QB); *R v McAvena* (1987) 56 CR 3d 303 (Sask CA); *R v Shields* (1983) 6 CRR 194 (Ont Co Ct); *R v Tanguay* (1984) 27 MVR 1 (Ont Co Ct); *R v Kelly* (1985) 17 CCC 3d 419 (Ont CA); *R v Richardson* (1984) 35 Sask R 239 (Sask QB); *R v Baig* (1985) 20 CCC 3d 515 (Ont CA).
700 *Re Regina and Speid* (1983) 3 DLR 4th 246 (Ont CA); *Clarkson v The Queen* (1986) 26 DLR 4th 493 (SCC); *R v Naugler* (1986) 27 CCC 3d 257 (NSCA); *R v Manninen* (1987) 34 CCC 3d 385 (SCC).
701 *R v Jensen* (1987) 1 WCB 2d 277 (NBQB); *R v Rudolph* (1986) 32 CCC 3d 179 (Alta QB); *R v LePage* (1986) 32 CCC 3d 171 (NSCA).
702 para 9.235.
703 See for example, *O'Connor v Donaldson* 422 US 563 (1975); *Addington v Texas* 441 US 418 (1979).
704 See *Winterwerp v the Netherlands* (1979) 2 EHRR 387.

Rights has held in one case that the scope of judicial review on an application for habeas corpus by a person detained under United Kingdom mental health legislation did not satisfy Article 5(4) of the European Convention on Human Rights and Fundamental Freedoms. Article 5(4) is similar to the provision we propose.[705] The requirements of Article 5(4) were said by the European Court not to be satisfied by judicial review which was confined to determination of the formal legality of the detention, determination of whether there had been an abuse of discretion or of whether there was any evidentary foundation for the fact-findings of the person or body responsible for the detention. Although those requirements might be satisfied by something less than full judicial review on the merits, the scope of the review must, the Court ruled, be wide enough to allow for examination of the factual basis of the decision to detain and the reasonableness of the exercise of any official discretion.[706]

9.603 ***Rights on arrest for offences.*** The rights set out in the proposed section 124K of the Constitution are rights to be guaranteed to persons who have been arrested for criminal offences.[707] They are additional to the rights on arrest and detention discussed above.

9.604 When a person has been arrested for a criminal offence, information subsequently obtained may show that, although the initial arrest was lawful, there is insufficient evidence to incriminate the person who has been arrested or to warrant prosecution. It is, in our view, desirable that any constitutional provisions to protect persons who have been arrested for criminal offences should, at the very least, guarantee that a person who has been taken into custody, has a right to be released if not promptly charged with an offence and, if not released, a right to be brought without delay before a court or other tribunal which is competent to decide whether the person should be discharged from custody absolutely or whether bail should be granted.

9.605 Under the common law, there is a requirement that a person who has been arrested for an offence be brought without unreasonable delay before a magistrate. If this requirement is not fulfilled, the continued detention of the person arrested constitutes false imprisonment. Police and others who have exercised powers of arrest are not, at present, prohibited from interrogating persons they have arrested, but they cannot keep those persons in custody indefinitely in the hope that further inquiries may yield evidence to support their suspicions. The position at common law is as stated by Mason and Brennan JJ in *Williams v The Queen*:[708]

> There is nothing to prevent a police officer from asking a suspect questions designed to elicit information about the commission of an offence and the suspect's involvement in it, whether or not the suspect is in custody. But if the suspect has been arrested and the inquiries are not complete at the time when it is practicable to bring him before a justice, then it is the completion of the inquiries and not the bringing of the arrested person before a justice which must be delayed .... The making of inquiries is not a ground for extending the period of custody and denying the subject an opportunity of securing his release either absolutely or on bail by a justice's order.

9.606 The rights which we propose should be guaranteed to persons who have been arrested for criminal offences include the right 'not to make any statement, and to be informed of that right'. The existence of that right would not prevent questioning of the person taken into custody. All it would mean would be that the person could not be placed under any legal compulsion to answer questions and would be entitled to be told

705 *X v United Kingdom* (1981) 4 EHRR 188.
706 See further *R v Home Secretary; Ex parte Khawaja* [1984] AC 74.
707 The question of what is 'an offence' is considered later at para 9.664-9.667.
708 (1986) 161 CLR 278, 300-1.

distinctly of the 'right to silence'. Any legislation purporting to impair that right[709] would be invalid unless it be supported under the justifiable limitations clause (proposed section 124C).

9.607 The right of a person who has been arrested for an offence 'to be released on reasonable terms and conditions unless there is reasonable cause for the continued detention' is intended to establish a presumptive right to bail. The provision we recommend goes beyond that recommended by the Rights Committee, which was that the Commonwealth and States should not 'impose excessive bail'. That provision would do more than give constitutional force to Article 10 of the *Bill of Rights 1689* which declared 'that excessive bail ought not to be required'.

9.608 ***Rights of persons charged with offences (general).*** The section we have recommended to guarantee certain rights to persons who have been arrested for criminal offences would operate from the time of arrest up till the time an application for bail is determined. The section we recommend concerning the rights of persons charged with offences would apply from the time a person is charged until the time the charge is finally disposed of. This section is modelled on section 11 of the *Canadian Charter of Rights and Freedoms* and Articles 17 and 18 of the draft New Zealand Bill of Rights 1985.

9.609 As we have already mentioned,[710] the section we propose (section 124L) is designed in part to give constitutional force to principles of natural justice, but in a form specific to trials in criminal cases.

9.610 ***Notice of charge and time and facilities to prepare defence.*** The principle of natural justice that a person who is at risk of being adjudged guilty of a criminal offence must be given a reasonable opportunity of being heard in defence of the charge clearly requires that the accused be informed, without delay, of the nature of the charge and be given particulars. It requires also that the accused be afforded adequate time and facilities to prepare a defence.[711] The importance of this latter requirement is not diminished by the fact that the prosecution is a private rather than a public prosecution. Nor is it diminished by the fact that the accused has been released on bail pending trial. If, however, the accused has been remanded in custody, the facilities available for preparation of the defence will often be much inferior to those available to persons who have been released on bail.

9.611 Persons who have been remanded in custody are likely to experience greater difficulty in collecting evidence and instructing legal representatives. The custodial regime to which they are subject may also impede preparation of the defence because of, say, limits on the time permitted for consultations with lawyers, censorship of mail, and denial of simple necessities such as writing implements, paper and access to law books. If accused persons have a constitutional right 'to have adequate time and facilities to prepare a defence', that right could be construed as imposing on custodial authorities a positive duty to afford certain minimal facilities.

9.612 ***Right to legal counsel and legal assistance.*** The right to engage and be represented by counsel in the defence of criminal charges is now widely recognised as a right of such great importance that its denial amounts to a miscarriage of justice. But many accused persons cannot afford to pay for the services of counsel. If they are to be legally represented, they are usually dependent on the provision of assistance under publicly

709 See, for example, *Customs Act 1901*, section 195; *Migration Act 1958*, section 42; *Royal Commissions Act 1902*, sections 6 and 6A. See also under the heading 'Self incrimination' below at para 9.643-9.650.
710 para 9.580.
711 See ICCPR, Article 14(3)(b).

funded legal aid schemes. But, as Barwick CJ observed in *McInnis v The Queen*,[712] 'an accused does not have a right to be provided with counsel at public expense. He has . . . a right to be represented by counsel at his own or someone else's expense. He has no absolute right to legal aid.'

9.613 In that case, an application for legal aid had been refused the day before a trial of serious charges, including rape. This left the accused without legal representation. The accused had applied to the trial judge for an adjournment so that he might apply for a reconsideration of the decision to deny him legal aid. An adjournment was refused and the accused was subsequently convicted. On appeal to the High Court, a majority held that the trial judge's decision to let the trial proceed, even though the accused was unrepresented, did not amount to a miscarriage of justice.

9.614 We have concluded that a constitutional guarantee of a right to counsel in criminal proceedings would be meaningless unless it were accompanied by a further assurance that, in cases where the accused lacks financial means to engage counsel, legal assistance must be provided at public expense whenever the accused wishes to be legally represented. It is for this reason that we have recommended that the rights to be guaranteed by the Constitution to persons charged with criminal offences should include the right 'to receive legal assistance if the interests of justice so require and, if the person does not have sufficient means to provide for that assistance, to receive it without cost.' Article 14(3)(d) of the ICCPR so provides.[713] The right accorded under the Sixth Amendment to the United States Constitution to have the assistance of counsel in the defence of a criminal prosecution now includes a similar right. The Supreme Court of the United States held in 1963 that an indigent person who has been charged with a felony has a right to counsel provided by the state.[714] It has since extended that right to all criminal cases in which a sentence of imprisonment may be imposed.[715]

9.615 ***Right to be tried without delay.*** The right of persons who have been charged with criminal offences to be tried without delay is yet another right of such importance as to merit constitutional protection. It is the right which, under the Sixth Amendment to the United States Constitution, is referred to as the right of an accused to a speedy trial, and which Article 14(3)(c) of the ICCPR describes as the right 'to be tried without undue delay.'[716] The longer the period which elapses between the time a person is charged and the time of trial, the longer is the period of uncertainty about the accused's fate and the less reliable is the testimony of witnesses. The period of incarceration of those accused persons who have been remanded in custody (some of whom may be innocent) is also prolonged.

9.616 In Australia, the delays which not infrequently occur between the initiation of criminal proceedings and trial is a matter of current concern.[717] In a number of recent cases, the delay has been of such an order that courts have been moved to exercise their inherent jurisdiction to control abuses of their processes by staying criminal proceedings permanently.[718] Were our proposed alteration of the Constitution to be adopted, that

712 (1979) 143 CLR 575, 579.
713 See also Article 18(d) of draft New Zealand Bill of Rights 1985.
714 *Gideon v Wainwright* 372 US 335 (1963).
715 *Argesinger v Hamlin* 407 US 25 (1972).
716 The jurisprudence on the corresponding Article in the European Convention on Human Rights and Fundamental Freedoms – Article 6(1) is summarised in P Sieghart, op cit, 281-3.
717 See New South Wales Law Reform Commission, *Procedure from Charge to Trial: Specific Proplems and Proposals* (1987) vol 1, Ch 3.
718 See P Byrne, 'The Right to a Speedy Trial' (1988) 62 *Australian Law Journal* 160-3.

course of action would continue to be the most effective sanction against undue delay of trial, though, under the general remedies clause we propose,[719] it would also be open to courts to devise other sanctions, for example, compensatory orders.

9.617 ***Right to a fair and public hearing.*** A constitutionally guaranteed right in criminal cases to a fair and public hearing by a court serves three purposes. It establishes an overarching standard with which the conduct of criminal proceedings must comply: the standard of fairness. It requires that criminal trials be open to members of the public unless very cogent reasons can be shown for precluding or limiting public access to them. It also requires that the adjudication shall be by a body which is recognisable as a court.

9.618 The provision we have recommended gives constitutional expression to the principle enunciated in Article 14(1) of the ICCPR that '[i]n the determination of any criminal charge . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.[720]

9.619 The standard of fairness is, we recognise, open-textured, but it is essentially the same standard that Australian courts already apply in determining whether a criminal trial has involved a miscarriage of justice and in adjudging cases of alleged contempt of court where it is suggested that the right to a fair trial has been prejudiced.[721] There is, moreover, no reason why, in considering what a fair trial requires, Australian courts should not have regard to jurisprudence on relevant international conventions.[722]

9.620 In Canada, it has been held that the right accorded to accused persons by section 11(d) of the *Charter* to a fair hearing in criminal cases was violated when, as a result of deliberate action on the part of police, a potentially important witness for the defence was absent from the jurisdiction and could not be found.[723] But it has also been held that the right to a fair trial is not violated merely because prosecutions are conducted by police rather than by legal counsel,[724] or because the name of an accused person is published before trial,[725] or because legislation requires that evidence of the moral character, reputation or prior sexual history of complainants of sexual offences be excluded.[726]

9.621 In the description of the right to a fair hearing, we have not thought it necessary to stipulate that the hearing must be before an impartial tribunal. In our opinion, the requirement of fairness, and the further requirement that the hearing be before a court are, together, sufficient to guarantee that the adjudication must be by an impartial body.

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719 para 9.235.

720 See also Article 17(1)(a) of draft New Zealand Bill of Rights 1985 and Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms.

721 See *Hinch v Attorney-General (Vic)* (1987) 74 ALR 353 and Australian Law Reform Commission, *Contempt* (1987), Chaps 5 and 6.

722 See P Sieghart, op cit, 278-80. On the relevance of the ICCPR in interpreting provisions of domestic law based on the Covenant see opinion of Dickson CJC in *Reference re Public Service Employee Relations Act* (1987) 38 DLR 4th 161 (SCC).

723 *R v Ross* (1984) 15 CCC 3d 177 (BC Co Ct).

724 *Re Regina and Hart* (1986) 26 CCC 3d 438 (Nfld CA).

725 *R v Robinson* (1983) 148 DLR 3d 185 (Ont HCJ); *R v Several Unnamed Persons* (1983) 4 DLR 4th 310 (Ont HCJ).

726 *R v Le Gallant* (1986) 33 DLR 4th 444 (BCCA); *Re Seaboyer and the Queen; Re Gayme and the Queen* (1987) 2 WCB 2d 341 (Ont CA).

9.622 A constitutional guarantee that criminal trials be held in public would do no more than give constitutional status to one aspect of a general principle of common law which admits of few exceptions.[727] Those criminal trials which are closed to the public are invariably closed because statute law requires it, as, for example, in the case of proceedings before children's courts.

9.623 The Canadian equivalent to the provision we propose has been interpreted as not precluding the enactment of legislation which gives a court a discretion to exclude members of the public from the courtroom.[728] Under the constitutional provisions we propose any exceptions to the general rule that criminal trials be held in public would need to be justifiable under the general limitations clause.

9.624 ***Right to be present at trial and to present a defence.*** To guarantee to a person a right to be present at the trial of that person on any criminal charge and to present a defence is to guarantee a right not merely to be present throughout a trial, but also a right to give evidence – a right which was denied under the common law and which presently exists only by statute[729] – and to present evidence and argument. The provision we recommend is drawn from Article 18(f) of the draft New Zealand Bill of Rights 1985 and Article 14(3)(d) of the ICCPR and it contains elements of the Sixth Amendment to the United States Constitution. The vices against which it is directed are exclusion of an accused from the courtroom and the imposition of unfair limitations on the presentation of evidence and argument by or on behalf of an accused.

9.625 ***Right to interpreter services.*** The right of an accused person 'to have the assistance, without cost, of an interpreter if the person cannot understand, or speak the language used in the court' is already partially recognised by the common law.[730] The constitutional guarantee which we recommend, which is based on Article 18(i) of the draft New Zealand Bill of Rights 1985, and which is similar to section 14 of the *Canadian Charter*, and Article 6(3)(e) of the European Convention on Human Rights and Fundamental Freedoms, would incorporate the common law but would add to it by ensuring that the cost of providing interpreter services should be borne by the state, irrespective of the accused's financial means. Having provided interpreter services, the state could not then recoup the costs from the accused.[731]

9.626 The right to interpreter services would, we believe, extend not merely to translation of oral evidence but also translation of documentary evidence,[732] and would entitle the accused to a full translation rather than a mere summary.[733] On the other hand, a duty to supply the services of an interpreter would not arise merely because an accused claimed a right to them. An accused would need to establish, to a court's satisfaction, that he or she qualified for provision of the service.[734]

9.627 The right to the services of an interpreter, it should be noted, could be relied on not only by non-English speakers but also by persons who can understand and communicate in English but who are deaf. We see this right as one of the incidents of natural justice.

727 *Scott v Scott* [1913] AC 417; see also Australian Law Reform Commission, *Contempt* (1987) para 243.
728 *R v Lefebvre* (1984) 17 CCC 3d 277 (Que CA).
729 *Cross on Evidence* (3rd Aust edn, 1986) para 12.1.
730 *R v Lee Kun* [1916] 1 KB 337; *Cross on Evidence* (3rd Aust edn, 1986) para 17.157.
731 See *Luedicke, Belkacem and Koc v Federal Republic of Germany* (1980) 2 EHRR 433 (ECHR).
732 ibid.
733 *R v Petrovic* (1984) 10 DLR 4th 697 (Ont CA).
734 See *R v Tsang* (1985) 16 WCB 341 (BCCA); *Roy v Hackett* (Ont CA 19 Oct 1987).

9.628 ***Presumption of innocence.*** We have recommended that the rights guaranteed by the Constitution to persons charged with crimes include the right 'to be presumed innocent, until proved guilty according to law.' The formulation of the proposed guarantee is that which appears in Article 14(2) of the ICCPR, in Article 6(2) of the European Covenant on Human Rights and Fundamental Freedoms, in section 11(d) of the *Canadian Charter* and in Article 17(1)(b) of the draft New Zealand Bill of Rights 1985. We have preferred this formulation to that proposed by the Rights Committee, which was: 'The Commonwealth or a State shall not diminish the presumption that all persons are innocent until proved guilty according to law'.

9.629 The presumption of innocence is, in common law systems, no more than a shorthand expression for the general rule that, in criminal cases, the prosecution bears the onus of proving each element of the offence charged, beyond a reasonable doubt, in order to secure a conviction.[735] This rule 'protects everybody against being treated by public officials as if they were guilty of an offence before that is established according to law by a competent court'.[736] It forces the prosecution to gather cogent evidence pointing to the guilt of the accused and it reduces the risk of convictions based on factual error. It serves as a counterbalance to the superior resources of the state and to the inference of guilt that may be drawn the very fact that a criminal charge has been laid.[737]

9.630 What is in issue here is primarily the location of the persuasive burden of proof in criminal cases. The party who bears the persuasive burden of proof is the party who bears the burden of persuading the court of the truth of certain propositions and who, unless that burden is discharged, will lose the case. The persuasive, or legal, burden is distinguished from the evidential burden which is the burden to show that there is evidence sufficient to raise an issue as to the existence of certain facts. The persuasive burden which the prosecution bears in a criminal case always involves an evidential burden because, as a first step, it must show that there is sufficient evidence of the matters which need to be established to secure a conviction. If it does not discharge that burden, the defendant has no case to answer.

9.631 The evidential burden in relation to some issues which may arise in a criminal trial falls on the defendant. For example, if the defences of provocation, self-defence or duress are raised, the defendant must adduce sufficient evidence of relevant facts in support of the defence before the matter can be regarded as a live issue. If the defendant produces sufficient evidence to suggest a reasonable possibility of the alleged matter being true, the prosecution then has the persuasive burden of disproving the matter beyond reasonable doubt. The defendant also bears an evidential burden when proof an offence involves absence of some fact which is peculiarly within the defendant's knowledge. For example, if the offence is doing something without a licence, there is an evidential burden on the defendant to show that he or she was licensed.

9.632 The burdens of proof imposed by common law may be altered by statute. If the persuasive burden is shifted from the prosecution to the defence, the evidential burden also will be shifted. But statutes may do no more than shift the evidential burden. They may do so in several ways, for example by a provision that production of a certain document is *prima facie* evidence of the facts stated therein or is evidence of those facts unless the contrary is shown, or by a provision that averment by the prosecution of a certain fact is *prima facie* evidence of that fact.

735 *Woolmington v Director of Public Prosecution* [1935] AC 462.
736 P Sieghart, op cit, 297.
737 Parliament of Victoria, Legal and Constitutional Committee, *Report on the Burden of Proof in Criminal Cases* (1985) 63.

9.633 In recent years, concern has been expressed about the extent to which the common law rules on burdens of proof in criminal cases have been overborne or qualified by statutes. In 1982 the Senate Standing Committee on Constitutional and Legal Affairs found at least 220 provisions in federal legislation which imposed a persuasive burden of proof on defendants.[738] The Legal and Constitutional Committee of the Parliament of Victoria reported in 1983 that there were over 600 such provisions in Victorian statutes.[739] In its annual report for 1985-86, the Senate Standing Committee on Scrutiny of Bills recorded its concern 'at the increase during the past year of provisions in Government Bills imposing the persuasive onus of proof on defendants (up from 5 in 1984-85 to 15 in 1985-86).'[740] The Committee expressed the view 'that in all but the most exceptional circumstances the persuasive burden of proof should not be imposed on the defendant in criminal proceedings.' The Committee said that it would 'continue to press this view in its Reports to the Senate until . . . persuaded otherwise.'[741]

9.634 The Rights Committee also recorded its concern about the volume of statutory provisions reversing the onus of proof 'so as to place the onus of establishing particular facts upon a defendant.'[742] It conceded that some of these provisions 'may be regarded as purely "procedural".' But others amounted 'to a reversal of the presumption of innocence.'[743]

9.635 Burdens of proof have been reversed for a variety of reasons, for example, to facilitate enforcement of the law, to deter criminal activities which are regarded as very serious, to overcome the practical difficulties and expense of proving a negative and matters peculiarly within the knowledge of the defendant, and to prevent defendants raising spurious defences. While we accept that there are circumstances in which reversal of burdens of proof can be justified, we consider that the general principle that a person accused of a criminal offence should be presumed innocent until proved guilty according to law is of such great importance that it merits constitutional protection. Entrenchment of that principle would give primacy to the rule that the prosecution bears the persuasive burden of proving the elements of the offence with which an accused is charged beyond reasonable doubt. It would mean that if any Parliament enacted legislation to abrogate or modify the rule, the legislation could not be sustained unless those seeking to uphold it were able to establish very good reasons for the departure from the general rule.

9.636 The significance of the general rule has been summed up by the United States Supreme Court thus:[744]

> The accused during a criminal prosecution has at stake interests of great importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt . . . There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account . . . Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin or error is reduced as to him by the process of placing on the other party the burden of persuading the fact finder at the conclusion of the trial of his guilt beyond reasonable doubts.

738 Senate Standing Committee on Constitutional and Legal Affairs *The Burden of Proof in Criminal Cases* (PP 319/1982) 87-92.
739 Legal and Constitutional Committee, Parliament of Victoria *Report on the Burden of Proof in Criminal Cases* (1985) 91-96.
740 PP 447/1986, para 217.
741 ibid.
742 Rights Report, 46.
743 ibid.
744 *Re Winship* 397 US 358 (1970).

9.637 A shifting of the persuasive burden of proof from the prosecution to a defendant is clearly a more serious step that a shifting to the defendant of an evidential burden that would otherwise be placed on the prosecution. The latter may be justifiable when the former would not be. The provision we propose could, however, be violated even though the burden of proof which had been reversed by legislation was merely an evidential burden.

9.638 There have been several cases in the Canadian courts concerning the effect of section 11(d) of the *Charter.* These provide some indication of the impact that the constitutional provision we recommend might have on Australian law.

9.639 The leading Canadian case is *R v Oakes,*[745] where the Supreme Court of Canada held unconstitutional a statutory provision which made it an offence to be in possession of narcotics for the purposes of trafficking and which also provided that, once the prosecution had proved the fact of possession, the onus was on the accused to prove, on a balance of probabilities, the allegation that possession was not for the purpose of trafficking.

9.640 In other Canadian cases it has been held that:

(a) The traditional burden on the accused to make out the defence of insanity does not infringe section 11(d) of the *Charter,* as the presumption of innocence only relates to proof of the ingredients of the offence, not matters which either justify or excuse it.[746]

(b) To require a person charged with being unlawfully at large to prove lawful excuse as a defence is a reversal of the onus of proof, but such a requirement is demonstrably justified in a free and democratic society under section 1 of the *Charter.*[747]

(c) Where there is a sufficient rational connection between proved and presumed fact, the presumption of innocence is not contravened by putting on the accused an onus to rebut the presumed fact, for example, the onus to rebut the presumption that, once a person is proved to have been prowling by night near a dwelling house, he was there with intention to break, enter and commit a felony.[748]

9.641 ***Cross examination and witnesses for the defence.*** We have recommended that the rights of persons charged with criminal offences include the right 'to examine witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence, under the same conditions as the prosecution.' The wording of this proposed guarantee is based on Article 18(h) of the draft New Zealand Bill of Rights 1985 and it closely follows the wording of Article 14(3)(e) of the ICCPR and of Article 6(3)(d) of the European Convention on Human Rights and Fundamental Freedoms.[749]

9.642 The right is already accorded under Australian law, but that is not, in our view, a sufficient reason why it should be excluded from a list of rights to be constitutionally guaranteed to persons charged with criminal offences. The object of the provision we

745 (1986) 26 DLR 4th 200.
746 *R v Godfrey* (1984) 8 DLR 4th 122 (Man CA).
747 *R v Stagg* (1982) 2 CRR 380 (Ont Prov Ct).
748 *R v CDC* (1983) 9 WCB 444 (Ont Prov Ct); *R v Tassou* (1984) 16 CCC 3d 567 (Alta Prov Ct); *R v Szebeledy* (1986) 2 WCB 2d 124 (Man Prov Ct).
749 There is no corresponding provision in the *Canadian Charter.*

propose is simply to give constitutional status to the fundamental notion that, in respect of the attendance and examination of witnesses, the defence is entitled to complete equality with the prosecution.[750]

9.643 ***Self incrimination.*** We have recommended that the constitutionally entrenched rights of a person charged with a criminal offence should include the right 'not to be compelled to be a witness against himself or to confess guilt.' This proposed provision corresponds with Article 14(3)(g) of the ICCPR and Article 18(j) of the draft New Zealand Bill of Rights 1985. It incorporates that part of the Fifth Amendment to the United States Constitution which declares that no person 'shall be compelled in any criminal case to be a witness against himself.' But because it is limited to persons who have been charged, its scope of operation is not nearly as wide as that of the provision recommended by the Rights Committee, which was that 'The Commonwealth or a State shall not . . . compel self incrimination.' It does, however, have a close relationship with the constitutional provision, which we recommended and discussed earlier, to guarantee to persons who have been arrested for an offence the right 'not to make any statement . . . '.[751]

9.644 What we have recommended is a partial entrenchment of the principle known as the privilege against self incrimination. What the privilege means is that where the law imposes a general obligation to furnish evidence or information, a person may decline to answer any question or produce any document or thing, if to do so might 'tend to bring him into the peril and possibility of being convicted as a criminal.'[752]

9.645 The principle became part of the common law of England during the seventeenth century, very largely as a reaction against the practice of the Court of Star Chamber, and some other courts, of requiring accused persons to submit themselves to examination under oath. When, in 1641, these courts were abolished,[753] those of them exercising ecclesiastical jurisdiction were expressly prohibited from administering an *ex officio* oath whereby any person who would or might be obliged 'to confess or to accuse himself or herself of any Crime, Offence, Delinquency or Misdemeanor, or any Neglect, Matter or Thing, whereby or by Reason whereof he or she shall or may be liable or exposed to any Censure, Pain, Penalty or Punishment whatsoever . . .'.[754]

9.646 The common law courts absorbed this rule into the rules governing their own proceedings. By the end of the seventeenth century they had given up the practice of questioning defendants in criminal trials and had extended the privilege against self incrimination to witnesses appearing in any curial proceedings, civil or criminal. Much later, in 1848, the British Parliament prohibited compulsory interrogation of accused persons in committal proceedings before magistrates.[755] This legislation was soon adopted by the legislatures of the Australian colonies. Since that time the privilege against self incrimination has been extended by courts so as to modify all statutory powers to require the giving of evidence and information, whether it be in curial proceedings or non-curial proceedings such as inquiries by Royal commission. The privilege may be abrogated by statute, but only by express words.[756] 'Because the privilege is such an important human right', it has been said, 'an intent to exclude or qualify the privilege will not be imputed to a legislature unless the intent is conveyed in unmistakable language.'[757]

750 On interpretations of the European Convention see P Sieghart, op cit, 302.
751 para 9.606.
752 *Lamb v Munster* (1882) 10 QBD 110, 111.
753 By 16 Car I c 10 and 16 Car I c 11.
754 16 Car I c 11, section 4. This was re-enacted in 1661 by 13 Car II c 12 section 4.
755 Sir John Jervis's Act.
756 *Sorby v Commonwealth* (1983) 152 CLR 281.
757 id, 311 (Murphy J). See also 294-5 (Gibbs CJ).

9.647 In criminal cases, accused persons are not compelled to give evidence, sworn or unsworn, either at their trial or in prior committal proceedings. The provision we recommend would entrench that rule, but it would also render it unconstitutional for a person who has been charged with a crime to be compelled in any circumstance to answer questions having a tendency to incriminate that person in relation to the crime with which he or she is charged. Such compulsion would be unconstitutional even though the law which made it obligatory to answer questions or provide information declared that statements or disclosures were not admissible in evidence against the person who provided them in any civil or criminal proceedings in any court. 'The traditional objection that exists to allowing the executive to compel a man to convict himself out of his own mouth', Gibbs CJ pointed out in *Sorby v Commonwealth,* 'applies even when the words of the witness may not be used as an admission.'[758] The underlying rationale of the privilege against self incrimination he explained thus:[759]

> It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt. Moreover the existence of such a power tends to lead to abuse and to "the concomitant moral deterioration in methods of obtaining evidence and in the general administration of justice" . . .[760].

9.648 In our opinion, it is not enough merely to guarantee to a person charged with a criminal offence the right 'not to be compelled to be a witness in the proceedings against that person in respect of the offence.' That is the extent of the right guaranteed by section 11(c) of the *Canadian Charter.* Section 11(c) of the *Charter* shields the accused only against testimonial compulsion in the case in which he or she stands charged, that is, against compulsion to enter the witness box at the preliminary hearing stage or at the trial.[761] It does not afford any constitutional protection to the accused against compulsion to answer in extraneous proceedings.[762]

9.649 The constitutional right which we recommend would, we think, be limited to a right not to make testimonial disclosures. Like the broader privilege against self incrimination, it would not extend to compulsory provision of real or physical evidence by a person charged with crime, for example, by virtue of a requirement that a witness should 'provide a fingerprint, . . . show his face or some other part of his body so that he may be identified, or . . . speak or write so that the jury or another witness may hear his voice or compare his handwriting.'[763]

9.650 Our reasons for not adopting the Rights Committee's recommendation that there be a general constitutional prohibition against compulsion of self incrimination are set out below under the heading 'Comments on Advisory Committee's recommendations'.[764]

9.651 ***Double jeopardy.*** We have recommended that the Constitution be altered to provide that if a person who has been charged with an offence is finally acquitted of the offence or pardoned for it, that person shall have a right not to be tried for that offence again. We have also recommended that there be a further provision that if a person is finally

758 id, 294.
759 ibid.
760 Citing *Validity of Section 92(4) of The Vehicles Act 1957 (Saskatchewan)* [1958] SCR 608, 619.
761 *R v Altseimer* (1982) 1 CCC 3d 7 (Ont CA); *R v Esposito* (1985) 24 CCC 3d 88 (Ont CA).
762 It should be noted, however that section 13 indirectly affords some protection. It provides that 'A witness who testifies in any proceeding has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.'
763 See *Sorby v Commonwealth* (1983) 152 CLR 281, 292 (Gibbs CJ).
764 para 9.687-9.700.

convicted of an offence and punished for it, that person shall not be tried or punished for the offence again. These two proposed provisions would, if adopted, give constitutional force to the rules of common law on double jeopardy and punishment.

9.652 The nature and purpose of the rule against double jeopardy were described by Gibbs CJ as follows:[765]

> The rule against double jeopardy is an application in the criminal law of the principle expressed in the maxim *nemo debet bis vexari pro una et eadem causa:* a person shall not be twice vexed for one and the same cause. It is, as Blackstone pointed out, the foundation of the pleas of *autrefois acquit* and *autrefois convict*. . . .
>
> The purpose of the rule is of course to ensure fairness to the accused. It would obviously be oppressive and unfair if a prosecutor, disappointed with an acquittal, could secure a retrial of the accused person on the same evidence, perhaps before what the prosecutor "considered to be a more perspicacious jury or tougher judge" . . . .
>
> It might not be quite so obvious that it would be unfair to put an accused upon his trial again if fresh evidence, cogent and conclusive of his guilt, came to light after his earlier acquittal, but in such a case, the facts that an unscrupulous prosecutor might manufacture evidence to fill the gaps disclosed at the first trial, and the burden that would in any case be placed on an accused who was called upon repeatedly to defend himself, provide good reasons for what is undoubtedly the law, that in such a case also the acquittal is final . . . .

9.653 The two provisions we have recommended are based on section 11(h) of the *Canadian Charter of Rights and Freedoms,* Article 17(3) of the draft New Zealand Bill of Rights 1985 and Article 14(7) of the ICCPR. They express basic principles of fairness which are already part of Australian law. To write them into the Constitution would set them apart as principles of the criminal justice system which Parliaments cannot override or impair except for very good cause.

9.654 As Canadian experience has shown, constitutional entrenchment of these principles would still leave it to the courts to decide whether, in a particular case, a person was in jeopardy of being tried or punished for an offence for which that person had previously been tried or punished. Questions would still arise as to whether the principle was even applicable in a particular case in which it was relied upon. Questions which could arise would include: Was the matter for which the accused was previously tried an 'offence'? Is the matter with which the accused is presently charged an 'offence'? Did what was previously done to the accused amount to 'punishment'? Is that with which the accused is now threatened 'punishment'?

9.655 We deal with the concept of 'an offence' later on in this part of the Chapter.[766] That concept is relevant not only to the operation of the principle against double jeopardy and punishment, but also to the scope of operation of all of the constitutional guarantees which we recommend should be extended to persons who are charged with offences.

9.656 'Punishment', for the purposes of a constitutional rule against double punishment, would be construed as meaning 'punishment' in the legal sense and would not encompass each and every possible adverse consequence of a criminal conviction, for example, the liability of a non-citizen to deportation.[767]

765 *Davern v Messel* (1984) 155 CLR 21, 29-30; see also id 55-60 (Mason and Brennan JJ), 62-4 (Murphy J) and 67-8 (Deane J).

766 para 9.664-9.667.

767 *Re Gittens and The Queen* (1982) 137 DLR 3d 687 (FCTD); *Schmidt v The Queen* (1987) 39 DLR 4th 18 (SCC).

9.657 ***Appeals against conviction and sentence.*** We have recommended that the Constitution be altered to provide that 'Everyone convicted of an offence has the right to appeal according to law against the conviction or any sentence.' This provision is based on Article 17(1)(d) of the draft New Zealand Bill of Rights 1985, which in turn is based on Article 14(5) of the ICCPR.

9.658 The effect of this provision would be to give persons who have been convicted of criminal offences a right to judicial review of either conviction or the sentence or both, though not an unrestricted right.

9.659 Under the common law, there is no such thing as a right to appeal against criminal conviction or sentence. Rights of appeal exist only by statute; likewise a jurisdiction to hear and determine appeals. At common law, the remedies available to persons who complained that they had been wrongly convicted were extremely limited. Essentially, judicial review of convictions was limited to determining whether there had been an error of law. The verdicts of juries could be challenged before entry of judgment but they were not likely to be disturbed unless they were patently perverse. Even today, a jury's verdict is reviewable only on limited grounds. An appeal against a conviction in a case tried before judge and jury will often be more likely to succeed on the ground of misdirection of the jury by the trial judge, admission of inadmissible evidence, exclusion of relevant and admissible evidence or some other defect in the conduct of the trial.

9.660 A constitutional right to appeal against conviction and sentence would not guarantee a right to appeal to any particular court. Nor would it operate to invest in any particular court a jurisdiction to hear and determine such appeals. The conferment of jurisdiction would still be a matter for the relevant Parliament. But in the absence of any legislative provision for appeals, a constitutional guarantee of a right of appeal would probably be construed as requiring that the supreme superior court in the State or Territory, as the case may be, to hear and determine any appeal in exercise of the constitutional right.

9.661 The provision we recommend allows scope for legislative regulation of appeals against conviction and sentence. The power of regulation would, however, be impliedly limited. It could not be exercised in a way that would effectively negate the guaranteed right to appeal.

9.662 It is not, in our opinion, necessary to include in the description of the right of appeal a definition of the nature of the appeal. The concept of appeal to a court is already built into the Constitution – sections 73 and 74 – and we have proceeded on the basis that any further provision in the Constitution to do with appeals would, in the absence of express words showing a contrary intention, be construed as importing the same concept of appeal. In the context of sections 73 and 74, the term 'appeal' has been interpreted to mean an appeal in the strict sense, that is, a redetermination of the matter decided by the court below, on the basis of the evidence received by that court and the law in force at the time it handed down judgment.[768] Appeals in the strict sense involve redetermination of questions of fact as well as of law, though in criminal cases tried before judge and jury, the appellate court does not usurp the jury's function. If the ground for appeal is error on the part of the jury, the court of appeal performs what is essentially a supervising role. This role would not be affected by the provision we propose.

768 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73, 85, 87, 106-11, 112-3; *Zarb v Kennedy* (1968) 121 CLR 283, 288.

9.663 We have not thought it necessary or desirable to include in the Consttution definitions of the terms 'conviction' and 'sentence'. The term 'sentence' already appears in section 73 and is not there defined. We consider that the meaning of the terns, for constitutional purposes, is best left to the courts to determine.[769]

9.664 ***The concept of an offence.*** In this part of the Chapter we have recommended a series of alterations to the Constitution to guarantee certain rights to persons who have been arrested for, or charged with, offences. By 'offences' we mean criminal offences, whether they be summary offences or offences triable only on indictment. The term does no cover civil wrongs even though the conduct alleged may give rise to civil as well as crminal liability.

9.665 The provisions we recommend are modelled on provisions in the *Canadian Charter of Rights and Freedoms.* The relevant Canadian provisions are also expressed to apply to cases where persons are arrested for or charged with 'offences'. Canadian courts have interpreted the word 'offence' in its technical sense. A person is, thus, not deened to have been charged with an offence when accused of breach of some rule which nay be visited with disciplinary sanctions, for example, suspension or cancellation of an occupational licence or suspension or dismissal from a public office or from a government service.[770] The term 'offence' has, however, been interpreted as including crminal contempt of court.[771]

9.666 The distinction between criminal offences and breaches of discipline is well recognised in Australia law. It has figured in cases concerning the application of the rule against double jeopardy[772] and in a High Court case concerning the application of the separation of powers doctrine.[773] The distinction does not always depend on the nature of the conduct which is prohibited or on the sanction which may be imposed if a breach of the prohibition is proved. The sanctions for a criminal offence and a breach of discipline may be the same, for example, a fine. A critical factor in determining whether an 'ofence' is criminal or merely disciplinary may be who has authority to decide whether the relevant prohibition has been breached. If it is a court rather than an administrative agency, the 'offence' is more likely than not to be classified as criminal.[774]

9.667 Were the Constitution to be altered to guarantee certain rights to persons clarged with offences, a question could arise as to whether limitations are thereby imposed on (a) the capacity of Parliaments to classify 'offences' as disciplinary rather than crimina, and (b) where the 'offence' in question is both disciplinary and criminal, the exercse of administrative discretions to institute disciplinary proceedings rather than criminal proceedings. These questions have been considered by the European Court of European Rights in connection with Article 6(1) of the European Convention on Human Righs and Fundamental Freedoms which provides, *inter alia,* that 'in the determination of . .. any criminal charge against him, everyone is entitled to a fair and public hearing vithin reasonable time by an independent and impartial tribunal established by law.' The Court has held that the Convention does not permit contracting States 'at their discretion to

769 On what constitutes 'conviction' and 'sentence' see *Griffiths v The Queen* (1977) 137 CLR 293.

770 *Re Law Society of Manitoba and Savino* (1983) 1 DLR 4th 285 (Man CA); *Re Howard* (1985) 4 DLR 4th 147 (FCTD); *Attorney General of Quebec v Laurendeau* (1982) 145 DLR 3d 526 (Que SC); *R v Wigglsworth* (1984) 150 DLR 3d 748 (Sask QB); *Re MacDonald and Marriott* (1984) 7 DLR 4th 697 (BCSC); *Re Trumbley* (1986) 29 DLR 4th 557 (Ont CA); cf *R v B and W Agricultural Services Ltd* (1982) 3 CRR 364 (BC Prov Ct).

771 *R v Cohn* (1984) 13 DLR 4th 680 (Ont CA). See also *Offutt v United States* 348 US 11 (1954); *Cooke v United States* 267 US 517 (1925); *Levine v United States* 362 US 610 (1960).

772 See, for example, *Hardcastle v Commissioner of Police* (1984) 53 ALR 593, 597.

773 *The Queen v White; Ex parte Byrnes* (1963) 109 CLR 665.

774 See *R v Mingo* (1982) 2 CCC 3d 23 (BCSC).

classify an offence as disciplinary instead of criminal, or to prosecute the author of a 'mixed' offence on the disciplinary rather than on the criminal plane . . .'. If they could, they would be able to frustrate the purpose of Article 6.[775] The Court has claimed jurisdiction 'to satisfy itself that the disciplinary charge does not improperly encroach upon the criminal.' In determining whether a charge which has been treated by a contracting state as disciplinary has the character of a criminal charge, it has regard to the nature of the offence, and the degree of severity of the penalty which may be imposed.[776]

9.668 ***Contempt of Parliament.*** In Chapter 4 of this Report we dealt with the privileges of the Houses of the Federal Parliament under section 49 of the Constitution, including their jurisdiction to try and punish breaches of their privileges and contempts. We there expressed the view that, in the exercise of their penal jurisdiction, the Houses of the Parliament should be subject to the new provisions of the Constitution. We here propose to guarantee certain protections against arbitrary arrest and detention and to guarantee certain rights to persons who are arrested for or charged with offences.[777]

9.669 It seems to us that the terms of the provision we propose to protect persons against arbitrary arrest and detention are wide enough to cover arrests and detentions in purported exercise of the powers and privileges of the Houses of Parliament. It is, however, less clear whether the proposed provisions to guarantee certain rights to persons who are arrested for or charged with offences would cover persons who are arrested for or charged with alleged breaches of parliamentary privilege or contempt of a House of the Parliament.

9.670 Having regard to the objects of the constitutional provisions we propose for the protection of persons who are arrested for or charged with offences, the term 'offence' should not, in our opinion, be narrowly construed. Broadly construed, the term could cover acts which are breaches of parliamentary privilege or contempt of Parliament and which the Houses of the Parliament may try and may punish by imprisonment or fine. Some acts which are punishable as contempt of Parliament are, it should be noted, acts which are also offences under the general law.

9.671 The difficulty is that the provisions we propose might be seen as apt to cover only those offences which are triable and punishable by the ordinary courts of law. Particular significance could be attached to the fact that the rights which would be guaranteed to persons charged with offences include a right to a fair and public hearing by a court and a right to appeal against a conviction or sentence.

9.672 When exercising their penal jurisdiction, the Houses of Parliament are exercising judicial power, but it does not follow that they would, for that reason, necessarily be regarded as courts for the purposes of a constitutional guarantee which assures to persons charged with offences a right to a fair and public hearing by a court. On the other hand, the language of the provisions we propose would not be strained were the expression 'a court' to be interpreted as including either House of Parliament in any case in which a person has been charged, and is to be tried, by the House for an act which may be punished by imprisonment or fine.

9.673 To hold that the Houses of Parliament, when exercising their penal jurisdiction, are bound by the constitutional guarantees we recommend would not necessarily mean that the procedures the Houses would be required to follow would have to be precisely the

775 *Engel v Netherlands* (1976) 1 EHRR 647.
776 ibid.
777 para 4.729.

same as those followed in the ordinary courts. The special character of the parliamentary jurisdiction could, we think, be accommodated; likewise the special character of the courts' own jurisdiction to try and punish contempts of court.

9.674 We note that, in the United States, criminal contempt of court has been recognised as a crime for the purposes of certain provisions of the Bill of Rights,[778] yet the Supreme Court has, for reasons based on the history of contempt of court, accepted that it is not a crime for the purposes of the Sixth Amendment which guarantees to the accused in criminal prosecutions a right to trial by jury.[779]

9.675 If there are substantial doubts about whether the guarantees we propose in relation to persons who are arrested for or charged with offences would apply to persons who are arrested for or charged with breaches of parliamentary privilege or contempt of Parliament which are punishable by fine or imprisonment, we would recommend that these doubts be set at rest by a further provision to make it clear that the guarantees do so apply.

9.676 ***Retroactive penal laws.*** We have recommended that the Constitution be altered to provide that 'No one shall be liable to be convicted of an offence on account of any act or omission which did not constitute an offence when it occurred.' This provision is an abbreviated version of Article 17(2) of the draft New Zealand Bill of Rights 1985. It replicates parts of section 11(g) of the *Canadian Charter of Rights and Freedoms* and of sections 1 and 2 of Article 15 of the ICCPR. But it differs from those provisions in that, unlike them, it would not allow a person to be found guilty of an act or omission which, although it was not an offence under domestic law at the time it occurred, was, at that time an offence under international law or the general principles of law recognised by the community of nations.

9.677 The scope of the provision we propose is also much narrower than that of the provisions in the United States Constitution which prohibit the passing of *ex post facto* laws.[780] It is directed only against penal laws which are expressed to operate retroactively.

9.678 To explain why we have confined the scope of the provision we recommend to penal laws, it is necessary to examine first what is meant by retroactive laws and the reasons why such laws may be enacted.

9.679 A law is not necessarily a retroactive law because it operates in relation to or attaches legal significance to events which occurred prior to the making of the law. A law which establishes a scheme for compensation of victims of a natural disaster, say, a bushfire, would operate in relation to past events, but it would not be described as a retroactive law. A retroactive law is rather a law which is expressed to operate from a date prior to the date of its making, or which purports to change the law which operated prior to its making and to require the new law to be applied to past occurrences. True retroactive laws include laws which create new criminal offences and which deem those laws to have been in force from a date preceding that of their making. But they also include laws which, though expressed to operate from a date prior to their making, are not punitive and are designed to correct injustices, for example, a law to alter a statute of limitations to enable the victims of some grievous wrongdoing to pursue actions for

778 para 9.665 and note 771.
779 *United States v Barnett* 376 US 681 (1964).
780 Article One, Section 9, para 3 and Section 10, para 1.

compensation notwithstanding that, under the prior law, their actions would be statute-barred, or a law to extinguish accrued liabilities under a prior law which is now regarded as grossly unfair or obnoxious.

9.680 So not all retrospective laws can be condemned as undesirable. Some are of a kind which most people would immediately recognise as being unjust; some are of a kind which most people would regard as justifiable, or perhaps even necessary in the interests of justice; but there are also some, the desirability of which is highly controversial.

9.681 That there are different types of retrospective legislation and a variety of considerations which need to be taken into account in assessing the rights and wrongs of such legislation has been recognised by the Senate Standing Committee on Scrutiny of Bills. In scrutinising Bills, the Committee is required to consider whether clauses trespass unduly on personal rights and liberties. It has identified three types of retrospective legislation which it does not regard as violating that standard. They are:

(a) corrections or minor drafting errors usually made retrospective to the date of the introduction of the legislation being corrected;

(b) provisions which retrospectively remove obligations or confer benefits unless they excessively interfere with the rights and liberties of those affected; and

(c) retrospective imposition of taxes, charges and the like sanctioned by the Parliament; these would include tariff charges and proposed laws announced on budget night which are deemed to operate from that date.[781]

9.682 At present, there is no constitutional rule which prevents any Australian Parliament from enacting retroactive legislation.[782] There is a presumption against retroactivity which courts apply when interpreting legislation, but it discriminates between procedural laws and laws affecting substantive rights and liabilities. The presumption is applied only to the latter.[783]

9.683 In our view, there is no justification for a general prohibition against *ex post facto* laws. But the case for a specific constitutional prohibition of retrospective penal laws is, we believe, irresistable. The principle expressed in the maxim *nullum crimen, nulla poena sine lege*, meaning, 'there is no crime or punishment except in accordance with law', is a fundamental principle of justice and a central aspect of the rule of law. It is also a principle which the courts seek to enforce in the absence of clear statutory provisions to override it. In our opinion, such a law should not override the prohibition of retroactive penal laws unless good reasons can be shown. To be valid, a retroactive penal law has to fall within the justified limitations clause we have recommended.[784]

9.684 The rule against retroactivity we have recommended is not expressed as a limitation on legislative powers, though, if adopted, it would clearly operate as a limitation of the powers of the Parliaments. It would also serve to inhibit the capacity of the courts to refashion and develop the law so as to enlarge the scope of common law and statutory offences. If a Parliament is debarred from creating criminal offences *ex post facto*, it must follow that courts are debarred 'from achieving precisely the same result by judicial construction',[785] and, in our opinion, from creating new common law offences.

781 *The Operation of the Australian Senate Standing Committee for the Scrutiny of Bills*, PP 317/1985, 23-6.
782 *The King v Kidman* (1915) 20 CLR 425.
783 See DC Pearce, *Statutory Interpretation in Australia* (2nd edn, 1981) Chapter 10.
784 para 9.200.
785 *Bouie v Columbia* 378 US 347, 353-4 (1964).

9.685 We would expect the provision we recommend to be interpreted in the light of the general principle which it seeks to express. Broadly construed, the provision could cover not only laws creating entirely new criminal offences *ex post facto*. It could also cover legislation which removes, after the date of an offence, a defence which was available to the accused at the time of the acts or omissions alleged.[786]

9.686 In the provision we have recommended we have not made an exception for the case where a retroactive law penalises acts which, at the time they were committed, were not offences under Australian law, but were offences under international law or the general principles of law recognised by the community of nations. We do not recommend that there should be such an exception. Laws coming within that exception would most likely be ones designed to enable trial and punishment within Australia of 'crimes against humanity' which were committed outside Australia. The justice of retroactive penal laws of this kind is, we recognise, still a matter on which opinions are sharply divided. We have concluded that a constitutional prohibition of *ex post facto* penal laws is best expressed as an absolute prohibition.

Comments on Advisory Committee's recommendations

9.687 At various points in the explanation of our reasons for recommending particular alterations to the Constitution, we have referred to the recommendations of the Rights Committee and have indicated how its recommendations differ from our own. We here draw attention to significant differences between our recommendations and the Committee's as regards their scope of operation.

9.688 Apart from the recommendations we have made under the heading of 'Arbitrary arrest and detention', all of the recommendations we have made in this part of the Chapter concern the rights of persons arrested for or charged with criminal offences. In contrast, a number of the recommendations of the Rights Committee under the heading of 'Legal procedures' concern legal processes in general, civil as well as criminal. Some also affect non-curial proceedings, for example, before administrative tribunals and boards and commissions of inquiry.

9.689 Those of the Committee's recommendations which deal with access to courts and deprivation of liberty and property, are considered later in this Chapter under the heading 'Other rights and freedoms'. We here confine our attention to the Committee's recommendations that the Constitution be altered to provide that the Commonwealth or a State shall not 'deny to any person ... a speedy trial, reasonable access to legal representation and to an interpreter; reasonable information to enable any proceedings to be understood'; or 'an appeal from a final verdict on judgment'; and shall not 'compel self-incrimination'.

9.690 These recommended alterations to the Constitution are unspecific as regards the circumstances in which the suggested limitations on governmental power would apply. The provisions relating to speedy trials and appeals would clearly apply only to curial proceedings, but they would apply in civil cases as well as in criminal cases. The provisions on 'reasonable access to legal representation and to an interpreter' and 'reasonable information to enable any proceedings to be understood' are not confined to curial proceedings and could cover a wide range of administrative processes.

9.691 We are not persuaded that it is appropriate to include in the Federal Constitution provisions as wide in their potential scope as those the Committee has proposed. We are aware that under Article 6(1) of the European Convention on Human Rights and

786 See *Kring v Missouri* 107 US 221 (1882); *Dobbert v Florida* 432 US 282 (1977).

Fundamental Freedoms, a person is entitled 'to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law', not only when charged with crime but also when the person's civil rights and obligations are at stake. We are also not unmindful of the fact that, these days, the consequences of civil and administrative proceedings against an individual may, in some cases, be no less serious than criminal proceedings. A fine of $200 for a traffic offence is nothing when compared with a liability to pay, say, $20,000 as damages. A criminal conviction and fine for breach of a regulatory law may be of lesser consequence to a trader or professional person than the possibility of suspension or cancellation of a business or occupational licence by an administrative body.

9.692 Our concern, however, has been primarily with the exercise of governmental powers which may result in deprivation of personal liberty. It is mainly for that reason that we have confined the procedural protections which we recommend to persons who are arrested for or charged with criminal offences, and to those arrested or detained for other causes.

9.693 The question of whether the Constitution should be altered, as the Rights Committee recommended, to include a provision which prohibits both the Commonwealth and States from compelling self incrimination in any circumstance is a difficult one.

9.694 As we have already pointed out,[787] the High Court of Australia has held that the common law privilege against self incrimination is not just a rule of evidence applicable in curial proceedings. It applies in any case where a statute imposes a duty to answer questions or furnish documents and it cannot be abrogated except by clear statutory words. The privilege is thus available in cases before administrative tribunals and by Royal commissions and other bodies of inquiry which have been given statutory powers to require the giving of evidence, unless the statute in question excludes it.

9.695 The privilege is clearly excluded if a statute says that a person is not entitled to refuse or fail to answer a question that the person is required to answer on the ground that the answer to the question might tend to incriminate him or her.[788] The privilege is also excluded where the statute which imposes the duty to answer confers on the witness what is termed 'transactional immunity', that is, affords absolute protection against any future prosecution for the offence to which a question relates. In that situation the privilege cannot apply because the answer would have no tendency to incriminate. There has, however, been a difference of opinion in the High Court of Australia over whether the privilege is overridden where the statute confers no more than 'use immunity', that is, provides that a statement or disclosure by a witness, under compulsion, is not admissible in evidence against that witness in any court proceedings.

9.696 In *Sorby v Commonwealth*[789] Gibbs CJ and Murphy J took the view that a 'use immunity' clause was not sufficient to abrogate the privilege.[790] The reason was that the protection afforded by a 'use immunity' clause is not co-extensive with that provided by the privilege. The privilege 'protects the witness not only from incriminating himself directly under compulsory process, but also from making a disclosure which may lead to incrimination or to the discovery of real evidence of an incriminating character.'[791] Although a 'use immunity' clause prevents the answers the witness gives from being

787 para 9.643-9.650.
788 See, for example, *Royal Commissions Act 1902* (Cth), section 6DD.
789 (1983) 152 CLR 281.
790 id, 295-6, 312.
791 id, 310 (Mason, Wilson and Dawson JJ).

admitted in evidence in subsequent court proceedings, it does not render derivative evidence inadmissible, that is, other evidence which has been discovered or procured as a result of the witness's compelled disclosures.[792]

9.697 Justices Mason, Wilson and Dawson considered that a 'use immunity' clause might be sufficient to abrogate the privilege against self-incrimination, but they did not find it necessary to rule on the question because, in the case before them, the relevant clause was coupled with other statutory provisions which said that a witness should not be punished for refusing to answer questions or refusing to produce documents if there was a reasonable excuse for the refusal. The presence of those provisions negated an intention to abrogate the privilege.[793]

9.698 While the privilege against self incrimination is perceived by judges and many others to be of prime importance, apart from the cases which would be covered were our proposed constitutional guarantee to be adopted, there is no consensus on the desirability of entrenching the privilege to the extent that the Rights Committee has recommended. We note that Australian Parliaments have, in recent years, considered that there are sometimes good reasons for abrogating the privilege, albeit with compensatory protection of witnesses through 'use immunity' clauses. An unqualified constitutional prohibition against compulsory self incrimination, such as the Committee recommends, would operate as a substantial restriction on parliamentary powers, and might prevent legislative abrogation of the privilege except where those who were compelled to answer were afforded 'transactional immunity' or, at the very least, immunity from use of their answers, directly or indirectly, in subsequent court proceedings.

9.699 The Rights Committee favoured 'transactional immunity', though it did not consider it 'necessary to provide specific details and consequences of the privilege against self incrimination by way of constitutional amendment.'[794]

9.700 We have not been persuaded that there is yet a demonstrated need for a 'restatement' in the Constitution of the privilege 'in general terms',[795] and without restriction as to the circumstances in which the constitutional guarantee applies.

EXTENSION OF EXISTING RIGHTS AND FREEDOMS

9.701 In this part of Chapter 9 of the Report we consider those provisions of the Australian Constitution which already guarantee individual rights and freedoms. They are:

(a) the guarantee that a person is entitled to trial by jury for the trial on indictment of federal offences (section 80);

(b) the guarantee that where the Federal Parliament makes laws for the acquisition of property it must provide for 'just terms' (section 51(xxxi.); and

(c) the guarantee that the Federal Parliament cannot make laws 'for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion', and the guarantee that 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth' (section 116).

792 cf *Kastigar v United States* 406 US 441, 453 (1972) where it was held that a 'use immunity' clauses does not validly abrogate the constitutionally guaranteed privilege against self incrimination unless both compelled testimony and derivative evidence are declared inadmissible.
793 *Sorby v Commonwealth* (1983) 152 CLR 281, 311.
794 Rights Report, 48.
795 ibid.

9.702 In each case the limitations on the guarantee will be examined and its extension at a federal, State and Territorial level will be considered.

Trial by jury

Recommendations

9.703 We *recommend* that section 80 of the Constitution be altered to provide for a right of trial by jury in all cases where the accused is liable to capital punishment, corporal punishment or imprisonment for more than two years, except in cases of trial for contempt of court or the trial of defence force personnel under defence law.

9.704 This guarantee should apply to trial by jury of offences against laws of the Commonwealth, States and Territories.

9.705 Trial by jury for any offence against a law of the Commonwealth should be held in the State or Territory where the offence was committed. However, the court should have power to transfer the trial to another competent jurisdiction on the application of either the accused or the prosecution. Where such an offence was not committed in a State or Territory, or was committed either in two or more of the States and Territories or in a place or places unknown, the trial should be held where Parliament prescribes.

9.706 The legislatures of the Commonwealth, the States and self-governing Territories should have the express power to make laws relating to waiver by the accused of trial by jury, the size and composition of juries, and majority verdicts.

9.707 These recommendations should be given effect by altering section 80 of the Constitution.

Current position

9.708 Section 80 of the Constitution states:

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

9.709 The High Court held in 1915 that the section did not apply to proceedings for an offence against the law of a Territory.[796]

9.710 The High Court has interpreted section 80 as applicable only to those federal offences which the law requires to be prosecuted on indictment. Federal offences must be created by federal laws which may provide how they are to be prosecuted, for example, on indictment or by summons. The Court has treated section 80 as if it read 'if there is a trial on indictment it shall be by jury'[797] and as leaving it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily.[798] As a result a guarantee has been reduced to a mere procedural provision. In *Kingswell's Case,* for example, sections imposing penalties ranging from life imprisonment to a fine not exceeding $2,000[799] were held by a majority of the Court not to contravene section 80 on the ground that they did not require the trial to be on

796 *The King v Bernasconi* (1915) 19 CLR 629.
797 *Kingswell v The Queen (Kingswell's Case)* (1985) 159 CLR 264, 274.
798 id, 277.
799 id, 271.

indictment.[800] In coming to this conclusion the majority relied on previous decisions ranging from *The King v Archdall and Roskruge; Ex parte Carrigan and Brown*[801] to *Li Chia Hsing v Rankin.*[802] Justice Deane thought the previous decisions were wrong and should not be followed.[803]

9.711 There can be no doubt that the meaning the Court has placed on section 80, while it may give effect to its language, flouts its intention. When deletion of the clause was sought at the 1897 Convention, its retention was supported 'as a necessary safeguard of individual liberty.'[804] In *The King v Snow,* Chief Justice Griffith described section 80 as containing 'a fundamental law of the Commonwealth'.[805]

9.712 ***Waiver of trial by jury.*** The High Court decided in 1986, by a majority of three Justices to two, that where a law of the Commonwealth provides for trial on indictment the accused does not have the right to choose a trial before a Judge alone.[806]

Issues

9.713 The following issues arise with respect to trial by jury:

(a) Should the guarantee of trial by jury be extended to offences against laws of the States and Territories?

(b) To which class of offences should the guarantee of trial by jury apply?

(c) Should the guarantee of trial by jury be able to be waived and, if it should, on what conditions may trial by jury be waived?

(d) Is the current provision in section 80 for the jurisdictional venue of jury trials adequate?

(e) Should section 80 make provision for the size and composition of juries and majority verdicts?

Previous proposals for reform

9.714 ***Australian Constitutional Convention.*** Trial by jury and section 80 of the Constitution have been considered by the Australian Constitutional Convention and Committees advising it. The following are the proposals that have arisen:

1974: Standing Committee B recommended that section 80 be extended to apply to Territories and States with respect to offences alleged under a law relying for its constitutional authority on section 122 of the Constitution made by the Commonwealth or a Territorial legislature for any purposes for which the Commonwealth might enact legislation under sections 51 or 52 independently of its legislative powers under section 122.[807]

1975: The Convention recommended that the provisions of section 80 should be extended to mainland Territories equally with States where the offence alleged is under a section 122 law made by the Commonwealth or a Territorial legislature and so that the Constitution gives the right to the trial on indictment of any offence against any law of a State to be by jury.[808]

800 id, 276-7.
801 (1928) 41 CLR 128.
802 (1978) 141 CLR 182.
803 (1985) 159 CLR 264, 298-322.
804 Quick and Garran, 807.
805 (1915) 20 CLR 315, 323.
806 *Brown v The Queen* (1986) 160 CLR 171.
807 Report to Executive Committee from Standing Committee B (1 August 1974) 14, 16, ACC Proc, Melbourne 1975.
808 ACC Proc, Melbourne 1975, 177.

1976: The Convention recommended that the Constitution be altered in relation to mainland Territories so that the provisions of section 80 should be extended to such Territories equally with States where the offence alleged is under a section 122 law made by the Commonwealth or a Territorial legislature.[809]

1985: The Judicature Sub-committee rejected the options of either (1) making section 80 a real guarantee of trial by jury or (2) repealing section 80, in favour of recommending no change. The Sub-committee suggested that, in any revision of section 80, the 'venue' provision should be omitted.[810]

Advisory Committees' recommendations

9.715 The Rights Committee recommended that section 80 be altered to provide that neither the Commonwealth nor a State shall

> provide for or permit trial without jury for an offence which is punishable by imprisonment for twelve months or more, but may provide for or permit such a trial if a magistrate or a judge so orders upon the application of the accused.[811]

9.716 The Judicial Committee recommended:

(a) trial by jury be guaranteed for offences attracting penalties of either capital punishment, corporal punishment or a maximum term of more than two years imprisonment with the exceptions of contempt of court offences and proceedings against defence force personnel under martial law;

(b) extension of trial by jury to proceedings for offences against the laws of States and Territories subject to the exceptions noted above; and

(c) the legislatures of the Commonwealth, States and Territories be given the power to make laws permitting waiver of jury trial by the accused, laws providing for appeals from convictions and acquittals, and laws regulating the size and composition of the jury and majority verdicts.[812]

Submissions

9.717 The dominant view emerging from submissions received by the Constitutional Commission and Advisory Committees in relation to trial by jury may be summarised as follows:

(a) trial by jury is a fundamental right in a democratic society and a fundamental mode of trial in our system of criminal justice;

(b) trial by jury should be guaranteed in cases of serious offences;

(c) the guarantee should extend to offences against the laws of the Commonwealth, States and Territories; and

(d) the legislatures of the Commonwealth, States and Territories should have the power to make laws with respect to the composition and number of jurors and majority verdicts.[813]

9.718 The following views were contained in a minority of submissions:

(a) section 80 should be repealed;

(b) trial by jury should be abolished; and

809 ACC Proc, Hobart 1976, 209.
810 Second Report of Judicature Sub-Committee to Standing Committee (May 1985) 11-13, ACC Proc, Brisbane 1985, vol II.
811 Rights Report, 45.
812 Judicial Report, 102-3.
813 The Judicial Report collates and analyses relevant submissions: id, 96-103.

(c) section 80 should not be extended to the States and Territories.

9.719 The Commission received two submissions from State Governments in response to the Reports of the Rights and Judicial Committees in relation to trial by jury.

9.720 The Queensland Government stated:

> Whilst recognising the symbolic and practical importance of the jury in the administration of justice, fetters such as those proposed should never be placed on an elected Government which is in the best position to determine how the interests of the People can be safeguarded.
>
> In our view section 80 serves the dual purpose of enshrining in the Constitution the critical role of the jury whilst allowing the Commonwealth sufficient latitude to fulfil its obligations.[814]

As instances requiring latitude, it cites problems involving 'terrorist offenders' and 'major organised crime figures', and major fraud and white collar conspiracy trials.

9.721 The Queensland Government supported the thrust of the Judicial Committee's recommendations relating to venue for trial, majority verdicts, appeals from acquittals, defence force cases and contempt cases.

9.722 The Tasmanian Government did not oppose a constitutional guarantee of trial by jury for serious offences. However, it argued that it should retain the ability to stipulate those crimes which should attract the guarantee. It is unacceptable to the Tasmanian Government to have a constitutional guarantee for offences carrying a penalty of two years imprisonment or more as this would disturb the present statutory regime in Tasmania wherein a maximum penalty of 21 years is provided for all criminal offences except murder and treason.[815]

Reasons for recommendations

9.723 It is manifest that the intention of those who framed the Constitution has, in respect of section 80, profoundly miscarried. What they intended as a necessary safeguard of individual liberty was, it has transpired, no more than a mere procedural provision. Going as far back as at least the *Magna Carta*, trial by jury has for centuries been considered as fundamentally important to the liberty of the subject under the rule of law. An exposition of the literature emphasising the historical growth and central significance of trial by jury in common law systems is contained in the judgment of Deane J in *Kingswell's Case*.[816] He said:

> The guarantee of s. 80 of the Constitution was not the mere expression of some casual preference for one form of criminal trial. It reflected a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases. That conviction finds a solid basis in an understanding of the history and functioning of the common law as a bulwark against the tyranny of arbitrary punishment.[817]

He referred to 'the fundamental importance of trial by jury to the liberty of the subject under the rule of law'[818] and stated:

> The rationale and the essential function of that guarantee are the protection of the citizen against those who customarily exercise the authority of government: legislators who might seek by their laws to abolish or undermine 'the institution of "trial by jury" with all that was

814 Queensland Government S3069, 25 November 1987.
815 Tasmanian Government S1342, 25 March 1987.
816 (1985) 159 CLR 264, 298-307.
817 id, 298.
818 id, 300.

connoted by that phrase in constitutional law and in the common law of England' (per Griffith CJ); administrators who might seek to subvert the due process of law or be, or be thought to be, corrupt or over-zealous in its enforcement; judges who might be, or be thought to be, over-remote from ordinary life, over-censorious or over-responsive to authority.[819]

9.724 Trial by jury in serious cases is a basic right intended to be protected by the Constitution. That intention has been defeated due to a choice of language, the dangers of which were, it seems, anticipated only by Mr Isaacs.[820]

9.725 We think that that failure should now be rectified. We accordingly recommend that section 80 should provide that in the case of all offences punishable by capital or corporal punishment or by imprisonment for more than two years the trial should be by jury. We would exclude trials for contempt of court and the trial of defence force personnel under defence law.

9.726 ***Guarantee of trial by jury for serious offences.*** In coming to the view that the constitutional guarantee of trial by jury should apply to offences carrying a maximum penalty of more than two years imprisonment (subject to exceptions considered below) we had to decide between the recommendation of the Rights Committee that the guarantee apply to offences carrying a maximum penalty of one year or more and the recommendation of the Judicial Committee which was ultimately followed.

9.727 The Rights Committee recommendation, representing the views of many who made submissions, was not rejected lightly. That Committee forcefully argued

> that any case in which a person may be imprisoned for one year or more is a 'serious case' and that no person should be imprisoned, even for a relatively shorter period, without having had the benefit of the right to trial by jury.[821]

9.728 On the same point the Judicial Committee argued:

> Despite submissions which considered that liability to more than 6 or 12 months imprisonment should attract the guarantee, the most practical line to draw is liability to more than 2 years imprisonment, which appears to be the general limit of magistrates' jurisdiction in Australia, with very few exceptions. If a lesser period were selected the number of jury trials would be enormous.[822]

9.729 Our primary aim of providing a constitutional guarantee is to maintain the current level and availability of jury trials. The Judicial Committee recommendation should accordingly be preferred.

9.730 We also recommend that trial by jury be guaranteed for offences carrying the penalties of corporal punishment or capital punishment. This follows the recommendation of the Judicial Committee. We wish to cover the possibility of the return of these forms of punishment but not to endorse them.[823]

9.731 ***Exception to the guarantee.*** We also adopt the recommendation of the Judicial Committee that the guarantee of jury trial should not apply to trials of defence force personnel under defence law and cases of contempt of court.

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819 ibid.
820 Quick and Garran, 808.
821 Rights Report, 45.
822 Judicial Report, 99-100.
823 id, 100.

The 'defence' exception is necessary for discipline of the defence forces in times of peace and war. Contempt of court is better suited to trial before a judge alone rather than by jury.[824]

9.732 ***Guarantee of trial by jury in States and Territories.*** We adopt the recommendations of the Judicial Committee and the Rights Committee that the guarantee of trial by jury be extended to offences against laws of a State or Territory. This also follows early resolutions of the Australian Constitutional Convention.

9.733 The Judicial Committee argues and we accept that:

> Once the view is taken that jury trial is a fundamental individual right there is no reason why it should not extend to trial for serious State and Territory offences, as well as federal offences.[825]

9.734 Differences in criminal procedure for offences committed in federal, State and Territorial jurisdictions are undesirable and could lead to injustice. It would be manifestly unjust were a defendant to be granted a summary trial in State jurisdiction, but a jury trial in the federal jurisdiction, simply because of where the offence is alleged to have occurred. Therefore the guarantee of trial by jury should apply throughout Australia.

9.735 The rationale and essential function of trial by jury is the protection of the individual against government, against administrators who might seek to subvert due process of law or be over-zealous in its enforcement and against judges remote from ordinary life or over-responsive to authority.[826] The right to trial by jury has widespread popular acceptance and no reason exists to confine the guarantee to offences against federal law. If the right to jury trial is sufficiently important to require constitutional protection, then, unless the Constitution is to be mocked, the protection must be complete.

9.736 We have in this connection given close attention to the submissions of the Queensland and Tasmanian Governments and to the careful and thoughtful considerations they advance. Nevertheless, safeguards to due process sanctioned by the practice of centuries must take precedence over both matters of convenience and penalty structures in the criminal statutes of the States.

9.737 ***Waiver of trial by jury.*** The Judicial Committee recommended that the legislatures of the Commonwealth, States and Territories be given an express power to make laws providing for waiver of trial by jury by the accused. No contrary submissions were received. Such an alteration would allow the respective legislatures to overcome the 1986 High Court decision that an accused charged with a federal offence may not waive trial by jury.[827]

9.738 We agree with the Committee that the conditions under which trial by jury may be waived are details which ought not be in the Constitution, being matters more appropriate for the Parliament.

9.739 ***Venue for trial by jury.*** We recommend that section 80 be altered to specify the procedure for determining the venue for trial by jury. There should be no possibility of the Parliament permitting the Crown to choose a venue where it believes that a conviction is most easily secured. Whilst we agree with the Judicial Committee that the present

824 id, 100-1.
825 id, 100.
826 *Kingswell's Case,* (1985) 159 CLR 264, 300.
827 *Brown v The Queen* (1986) 160 CLR 171.

section 80 does not cover offences in more than one place or in a place or places unknown, we disagree with the Committee that the present constitutional provision for venue be altogether omitted.

9.740 In our view the venue provision in section 80 should be altered to:

(a) let Parliament make laws to determine venue where the alleged offence did not simply occur in one jurisdiction such as an offence in two or more jurisdictions or in a place or places unknown; and

(b) provide flexibility for the court to change the venue for trial where appropriate.

9.741 Nevertheless the current provision in section 80 that jury trials should be in the jurisdiction where the offence occurred should be retained subject to a contrary direction from the court.

9.742 ***Composition and size of jury and majority verdicts.*** We agree with the Judicial Committee that, first,

> Criticisms of particular aspects of jury trial, to the extent that they are valid, can be met by specific measures of reform, without abandoning the fundamental principle of jury trial.[828]

and, secondly,

> to recommend changes to s 80 which will allow the Parliament full opportunity to enact laws to overcome present or future problems relating to jury trials . . .[829].

Failure so to provide leaves open the possibility that section 80 will be interpreted to allow only juries in the common law sense, namely, a randomly selected, unbiassed jury of twelve who must be unanimous before a guilty verdict may be entered. Accordingly, section 80 should be altered expressly to allow the legislatures to make laws with respect to the size and composition of juries and majority verdicts.

9.743 ***Trial by jury and the Chapter on rights and freedoms.*** An important feature of our proposals relating to trial by jury is that it is deliberately left outside the Chapter on rights and freedoms which we have recommended.[830]

9.744 The significance of this exclusion is that the Chapter VIA on rights and freedoms includes a provision to the effect that all rights in the Chapter are qualified by any law which is demonstrably justifiable in a free and democratic society. We do not believe that such a qualification is needed in relation to trial by jury because our proposal contains such qualifications as we consider to be appropriate.

Summary of recommendations and reasons

9.745 Section 80 of the Constitution should be altered to guarantee trial by jury for serious offences against laws of the Commonwealth, States and Territories. The section should be altered to ameliorate problems which may arise with respect to the venue for trial. The legislatures of the Commonwealth, States and Territories should have the express power to make laws with respect to waiver of trial by jury, the size and composition of juries and majority verdicts.

9.746 A guarantee of trial by jury would both entrench a fundamental right and be in the interest of justice and the community. It should be extended to the States and Territories.

828 Judicial Report, 98.
829 id, 101.
830 See *Appendix K.*

Property rights

Recommendations

9.747 We *recommend* that the Constitution be altered to ensure that:

(i) a law of a State may not provide for the acquisition of property from any person except on just terms, and

(ii) a law made for the government of any Territory (under section 122) or a law of a Territory may not provide for the acquisition of property from any person except on just terms.

Current position

9.748 Section 51(xxxi.) of the Constitution gives the Federal Parliament power to make laws with respect to 'The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'. The power is subject to two express constraints. First, the Commonwealth can only legislate for the acquisition of property for particular purposes. Secondly, where property is acquired in or from a State the Commonwealth must provide compensation amounting to 'just terms'.

9.749 The provision was included in the Constitution to make certain that the Commonwealth possessed a power compulsorily to acquire property, particularly from the States. The condition 'on just terms' was included to prevent the arbitrary exercise of the power at the expense of a State or a person. Although the provision does not confer upon any person an enforceable right to claim just terms in respect of an acquisition of property, its effect is that a law which provides for an acquisition of property otherwise than on just terms is invalid.[831]

9.750 ***'Just Terms'.*** The expression 'just terms' is not a precise one. The standard to be applied has been described as 'one of fair dealing between the Australian nation and an Australian State or individual'[832] and as whether 'the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property'.[833]

9.751 What is 'just' will depend on a range of circumstances. For example, what is just as between the Commonwealth and a State (that is, two Governments) may depend on special considerations not applicable to an individual. Also, the fact that a law must be fair and just as between an individual or a State and the Federal Government does not mean that the interests of the public or of the Commonwealth must be disregarded. Justice involves consideration of the interests of the community as well as of the person whose property is acquired.[834]

9.752 Where the Parliament does not specify the amount of compensation but provides a procedure for determining what is fair and just, the court will examine the nature and extent of a claimant's entitlement under that procedure and the nature of the procedure itself in deciding whether the acquisition for which the law provides is 'on just terms'.[835]

831 *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1, 289 (Deane J). See also *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 285 (Starke J), 290-1 (Dixon J).

832 *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545, 600 (Kitto J); quoted with approval in *Commonwealth v Tasmania* (1983) 158 CLR 1, 291 (Deane J).

833 *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290 (Dixon J).

834 *id*, 280 (Latham CJ), 291 (Dixon J).

835 *Commonwealth v Tasmania* (1983) 158 CLR 1, 290-1 (Deane J).

9.753 The Federal Parliament has a discretion to enact the just terms which it thinks ought to be part of any law made under section51(xxxi.). If they might reasonably be regarded as just terms, there is no ground for a court to decide that the law is constitutionally invalid, even if the court might have thought that other terms would appear to be fairer.[836]

9.754 ***Acquisition of property under State laws.*** There is no constitutional obligation for State laws to provide just terms for the acquisition of property. As the High Court has said, States 'may acquire property on any terms which they may choose to provide in a statute, even though the terms are unjust'[837] and 'however hard or unjust it may be considered, there is nothing in s. 51(xxxi.) to restrain the power of the State'.[838]

9.755 A recent example of the lack of a guaranteed right of compensation in the States is found in the *Coal Acquisition Act 1981* (NSW) under which all coal[839] in New South Wales was vested in the Crown. Coal had been owned previously by some private land owners. The Act provides that the Governor 'may make arrangements' for 'the determination of the cases, if any, in which compensation is to be payable' and for 'the determination of the amount and method of payment of any such compensation'. Except for those cases, however, the Act provides that 'compensation is not payable as a result of the enactment of this Act.'[840]

9.756 Because the States are free from constitutional restriction, it is at times possible for the Commonwealth to avoid its obligation to provide just terms by making an arrangement with a State. Instead of acquiring the property itself, the Commonwealth may make a financial grant to the State and the State may then use this grant to acquire the property on other than just terms for a purpose which the Commonwealth wishes to foster. This happened in the case of a soldier settlement scheme following World War II.[841]

9.757 ***Acquisition of property in the Territories.*** The limitations of the present provision are also illustrated by reference to the position in the Territories, particularly the Northern Territory. In 1969 the High Court decided that the constitutional power to make laws for the government of a Territory of the Commonwealth (including the Australian Capital Territory, the Northern Territory or any other Territory) includes a power akin to that

836 *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 279-80 (Latham CJ), 290-1 (Dixon J), 294-5 (McTiernan J), and Starke J at 285 restating the view he expressed in *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 291; *Commonwealth v Tasmania* (1983) 158 CLR 1, 289 (Deane J).

837 *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 397-8, also 405 (Latham CJ).

838 id, 412 (Dixon J). See also *Pye v Renshaw* (1951) 84 CLR 58, 79-80 (Dixon, Williams, Webb, Fullagar and Kitto JJ).

839 'Coal' was defined to mean 'coal within the meaning of the *Coal Mining Act, 1973,* that is in a natural state on or below the surface of any land to which the legislative power of the State extends': section 3.

840 Section 6, *Coal Acquisition Act 1981* (NSW).

841 Under a 1945 agreement between the Commonwealth of Australia and the States of New South Wales, Victoria and Queensland, arrangements were made for the settlement of discharged members of the Defence Force and other eligible people on land resumed or otherwise acquired by the States. The States were to acquire the land at a value not exceeding that determined in a ruling in February 1942. The Commonwealth was required to provide for the payment of money to the States and to people settling on the land. The agreement was authorized in the *War Service Land Settlement Agreements Act 1945* (Cth) and in State legislation. A challenge was made to the federal and New South Wales legislation. In 1949 the High Court held, by a majority (Latham CJ, Rich, Williams and Webb JJ; Dixon and McTiernan JJ dissenting) that the federal legislation was invalid because it was legislation with respect to the acquisition of property upon terms which were not just. Consequently the relevant New South Wales legislation, although not invalid, was inoperative so far as it related to the agreement with the Commonwealth: *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382. However, the State amended its legislation so that it no longer referred to the agreement with the Commonwealth. Although the legislation was in substance unchanged, and was still in fact made as part of the agreement with the Commonwealth, it was upheld by the High Court: *Pye v Renshaw* (1951) 84 CLR 58.

possessed by the States to make laws for the compulsory acquisition of property. Because the power is not limited or qualified by section 51(xxxi.), the Commonwealth is not required to provide just terms when acquiring property from a Territory or from a person in a Territory.[842]

9.758 The grant of self-government and the creation in 1978 of the Northern Territory of Australia as a body politic under the Crown was accompanied by a number of changes to the law regulating the acquisition of property there. Because the broad legislative power given to the Legislative Assembly 'does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms',[843] the Northern Territory is obliged (under federal legislation) to provide just terms, even though States are not. The *Northern Territory (Self-Government) Act 1978* also provided that (subject to an exception involving certain pre-existing interests of the Commonwealth in land in the Northern Territory)

> the acquisition of any property in the Territory which, if the property were in a State, would be an acquisition to which paragraph 51(xxxi) of the Constitution would apply, shall not be made otherwise than on just terms.[844]

9.759 Thus, as a matter of policy rather than constitutional necessity, the Federal Parliament has legislated for the Commonwealth to provide just terms where land is acquired in the Northern Territory. In 1978 the *Lands Acquisition Act 1955* (Cth) was amended so that the Northern Territory would be regarded as if it were a State for the purposes of the application of that Act.[845] Statutory exceptions to this general rule have been made for the purposes of the *Aboriginal Land Rights (Northern Territory) Act 1976,* under which title to certain categories of land can be granted by the Commonwealth to Aboriginal Land Trusts for the benefit of relevant Aborigines.

9.760 In 1978 the Land Rights Act was amended to provide that, notwithstanding any law of the Commonwealth or of the Northern Territory, 'the Commonwealth is not liable to pay to the *Northern Territory* any compensation by reason of the making of a grant to a Land Trust of Crown land that is vested in the Northern Territory' (emphasis added).[846] Similarly, where federal legislation was required to vary the boundaries of one Aboriginal Land Trust and to validate the proclamation of the Uluru (Ayers Rock – Mount Olga) National Park before title to the land could be given to another Aboriginal Land Trust, it was provided that 'the Commonwealth is not liable to pay compensation to any *person* by reason of the enactment' of that legislation (emphasis added).[847]

9.761 In summary, the Constitution requires that federal laws made for the acquisition of property must provide for just terms where property is acquired from a State or from a person in a State. The Constitution contains *no* such requirement with respect to:

(a) federal laws for the acquisition of property in a Territory;

(b) State laws for the acquisition of property; or

(c) Territorial laws for the acquisition of property.

Issues

9.762 Two main issues have emerged in the review of section 51(xxxi.), namely:

842 *Teori Tau v Commonwealth* (1969) 119 CLR 564.
843 *Northern Territory (Self-Government) Act 1978* (Cth), sections 6, 50(1).
844 id, sections 50(2), 69, 70.
845 *Lands Acquisition Act 1955,* section 5AA.
846 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), section 3A; see *The Queen v Kearney; Ex parte Japanangka* (1984) 158 CLR 395, 418-21 (Brennan J).
847 *Petermann Aboriginal Land Trust (Boundaries) Act 1985,* section 5.

(a) whether the Constitution adequately protects an individual whose property is acquired by or on behalf of a Government; and

(b) whether the Constitution should provide any exceptions to the rule that the Commonwealth must provide just terms where it acquires property.

Previous proposals for reform

9.763 ***Australian Constitutional Convention.*** At the Melbourne (1975) session of the Australian Constitutional Convention, delegates from the Australian Capital Territory moved that the Constitution be altered in relation to mainland Territories:

(a) so as to ensure that the 'just terms' requirement of section 51(xxxi) should be made to extend to any acquisition of property by the Commonwealth in such a Territory or under a section 122 law or by the government of such a Territory.[848]

The motion was amended, on the motion of delegates from the Commonwealth (Mr Whitlam and Mr Enderby) by adding 'and also to extend to any acquisition of property by a State in the State.'[849]

9.764 Supporters of the original motion argued that, in considering the position of residents of Territories *vis-a-vis* the residents of the States, there was 'no rational basis in law for denying Territory residents the same rights which apply to other Australians.'[850] Such an alteration would reverse the effect of the High Court's decision that the Commonwealth is not required to provide just terms when acquiring property from a person in a Territory,[851] and would also ensure that the Commonwealth would have to provide just terms when acquiring property outside a Territory for a purpose connected with the government of the Territory. It was also argued that if it is fair for the Federal Government and Territorial administrations to be subject to the provision, it is also fair that the provision should apply to State Governments.[852] The Convention voted, by a majority, to recommend that the Constitution be altered to that effect.[853]

9.765 Following reconsideration of the resolution in 1976, the Australian Constitutional Convention in Hobart voted by majority to remove reference to the States and agreed to recommend that the Constitution be altered in relation to mainland Territories in the terms originally proposed.[854]

Advisory Committees' recommendations

9.766 Section 51(xxxi.) was considered by the Rights Committee and by the Powers Committee.

9.767 ***Extension of the requirement to provide just terms.*** The Rights Committee recommended extending the 'just terms' requirement in two ways. First, it recommended that section 51(xxxi.) be altered by adding the words 'including the purposes set forth in section 122'. That is, the Rights Committee recommended that section 51(xxxi.) be altered so that the Commonwealth would have to provide compensation for the acquisition of property in a Territory.[855] Secondly, the Rights Committee recommended the inclusion of a similar section in the Constitution which would apply to the States, namely:

848 ACC Proc, Melbourne 1975, xxxvi, 136-9.
849 id, xxxvi.
850 id, 137.
851 *Teori Tau v Commonwealth* (1969) 119 CLR 564.
852 ACC Proc, Melbourne 1975, 140, 144-5, 150-1.
853 id, 151-3, 176.
854 ACC Proc, Hobart 1976, 209.
855 Rights Report, xvii.

> The power of each State to make laws for the peace, order and good government of the State with respect to the acquisition of property shall be exercised so as to provide just terms for the acquisition of property from any person.[856]

The Rights Committee recommended these alterations so that the Constitution would contain a comprehensive scheme for 'the basic protection from arbitrary deprivation of property without compensation' which constitutes a 'guarantee of an economic right – the right of ownership of property.'[857]

9.768 ***Procedural protections.*** The Rights Committee also recommended a constitutional guarantee that a government should act fairly in the process of acquiring property and referred to many submissions which drew attention to various ways in which people may be deprived arbitrarily of their liberty and management of their property (particularly those involuntarily confined in mental institutions). The Committee recommended a constitutional provision prohibiting the Commonwealth or a State from depriving 'any person of liberty *or property* except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice', (emphasis added),[858] a provision whose origins, the Committee said, can be traced back to *Magna Carta*.[859]

9.769 ***Exception to the requirement to provide just terms.*** Both Advisory Committees recommended an exception to the 'just terms' requirement of section 51(xxxi.) where property is acquired for Aborigines. The Rights Committee took the broader approach, recommending that section 51(xxxi.) provide that 'the Commonwealth shall not be obliged to provide just terms for the acquisition of land from a State for the purposes set forth in section 51(xxvi.).' That is, just terms would not have to be provided where land was acquired for 'the benefit of the Aboriginal people and of the Torres Strait Island people' (section 51(xxvi.) in the altered form recommended by the Rights Committee).[860] The Powers Committee took a narrower view, recommending that the Constitution be altered

> to ensure that the Commonwealth is not required by the Constitution to compensate State governments in respect of the acquisition of Crown land for aboriginal purposes, where that land has, at any time since Federation, been designated as land reserved for Aboriginals under the laws of any State.[861]

9.770 The alteration recommended by the Rights Committee would apply to any land owned by a State. The Rights Report suggests, however, that the Committee was primarily concerned with the 'serious financial burden' which the Commonwealth would have to bear where land which has been occupied by Aboriginal groups as 'reserves' or otherwise for lengthy periods is acquired by the Commonwealth for vesting in such Aboriginal groups.[862] The Powers Committee said that submissions showed support either for an unqualified alteration to exempt acquisitions for Aboriginal purposes from the just terms requirement or for an alteration restricted to the acquisition of non-urban and unalienated Crown land.[863]

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856 id, 102.
857 id, 66.
858 id, 46.
859 *Magna Carta, 1297,* provided: 29 'No free man shall be taken or imprisoned or disseised of his freehold, liberties or free customs or outlawed or exiled or in any way ruined . . . except by the lawful judgment of his peers or by the law of the land.'
860 Rights Report, xvii-xviii, 102-3.
861 Powers Report, para 6.37, 104.
862 Rights Report, 72.
863 Powers Report, para 6.34, 103.

9.771 The arguments in favour of dispensing with the obligation to compensate State Governments where property is acquired for purposes related to Aboriginal affairs were summarised by the Powers Committee as follows:

- the requirement at present operates as a practical restraint on the ability of the Commonwealth to make just provision in favour of aborigines, eg, in the way of recognizing aboriginal land rights;
- the requirement 'rewards' in a sense the States which fail to make provision for the grant of ownership rights to aboriginal communities;
- the transfer of ownership rights in land to aboriginal communities is seen by some as a 'restitution' of their rights since ownership of land was taken away from the aboriginal population as a result of European settlement;
- the ability of the Commonwealth Parliament to provide financial assistance to the States under section 96 is seen as a more flexible and realistic way of providing compensation as between governments.[864]

After considering those and contrary arguments, the Powers Committee concluded that, while a general exemption was not justified, it would be appropriate to exempt from section 51(xxxi.) the acquisition for Aboriginal purposes of land which has been proclaimed an Aboriginal reserve by any State.[865] The Committee mentioned briefly the categories of land which might be brought within the exemption, the links between Aborigines and land and the history of use and occupation of some areas (particularly land reserved for Aborigines by States).

9.772 The Committee noted that, in some cases, States had altered the boundaries of Aboriginal reserve lands and had excised portions of them. Aboriginal occupants had been removed from reserves. Because Aborigines had no legal title to the land, they were not compensated for the loss they suffered as a consequence of such Executive actions.[866]

9.773 The majority of the Powers Committee was of the view that, in respect of lands which at some time since Federation have been reserved for Aborigines under the laws of the States, there can be no reasonable claim by the States to compensation for their acquisition by the Commonwealth for Aboriginal purposes. Moreover, the States should not be in a position to put obstacles in the way of acquisition by the Commonwealth by removing a reservation of the land for Aborigines in order to affect the compensation payable.[867] The Committee recommended the exception to the guarantee in section 51(xxxi.) because it was a matter which was seen as being inextricably connected with the practical operation of the present power to make laws with respect to Aborigines.[868]

Submissions

9.774 A number of submissions were received favouring the inclusion of a guarantee of the right to own property in the Constitution.[869] One person submitted that there should

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864 id, para 6.49, 106; see also para 6.34, 103.

865 id, para 6.51, 107.

866 id, para 6.52-4, 107. The Committee noted, as examples, action taken by the South Australian Government in the case of Point Pearce Reserve in the 1950s and by the Queensland Government in the case of Aurukun and Mornington Island Reserves in 1979. We also note that in 1983 the New South Wales Parliament enacted legislation which deemed the revocation of certain Aboriginal reserves to have been validly effected in order to overcome possible invalidity in actions previously taken: *Crown Lands (Validation of Revocations) Act 1983* (NSW).

867 id, para 6.55, 108.

868 id, para 6.58, 109.

869 eg J Zonius S469, 13 November 1986; S Hamilton S514, 16 November 1986; C Matthews S609, 27 November 1986; Australians for Individual Rights S904, 10 February 1987; PC Bingham S1138, 6 March 1987; G Gower S2808, 6 October 1987; H Veersema S2766, 22 October 1987; GW and IA Potts (who suggested a right to the 'peaceful enjoyment of property') S2863, 31 October 1987.

be no compulsory acquisition of property,[870] while others said that the power to acquire property should be limited to cases of national crisis (such as war) or where property had been illegally obtained,[871] or that the power should be exercised 'under law with the principle of justice and commonsense'.[872]

9.775 Others suggested that the requirement to provide just terms be extended to apply to State and Territorial Governments, Local Government and to any semi-government or statutory body.[873]

9.776 The Freehold Rights Association considered that the power of the Government to acquire private property should be further limited so that a State would have to provide just terms for the acquisition of property from any person, and so that any acquisition could only proceed after an independent inquiry had confirmed the justification for the acquisition.[874]

9.777 ***Aboriginal land rights.*** A number of submissions were received concerning property rights for particular groups, particularly land rights for Aborigines. We will deal with such rights elsewhere in Chapters 9 and 10 of this Report.

9.778 Submissions were made on the two Advisory Committees' recommendations that the Commonwealth should not have to provide compensation where certain land is acquired from a State for Aborigines.[875] The Queensland Government opposed any recommendation to remove the constitutional requirement in cases where the Commonwealth acquires land in a State for Aboriginal purposes.[876] The Queensland Government was particularly critical of the broadly expressed recommendation of the Rights Committee which, it submitted, 'strikes at the very heart of federalism' because it would give the Federal Government power 'to unilaterally deprive another Government of its property without reasons, without compensation, without safeguards and without negotiations.'[877] It endorsed the arguments in favour of retaining the present position set out in the Report of the Powers Committee.[878]

9.779 In its submission,[879] the Northern Territory Government noted that, under the *Northern Territory (Self-Government) Act 1978,* it is bound to pay just terms for the acquisition of private property. The Government said that a similar provision may be included in its constitution if the Northern Territory becomes a State. It submitted that the same requirement should apply 'to the Commonwealth in its acquisition of private property'. Hence the Northern Territory Government supported the recommendation made to that effect by the Rights Committee.

870 C Matthews S609, 27 November 1986.
871 MJ Fitzpatrick S570, 17 November 1986.
872 J Jones S2909, 26 October 1987.
873 eg Soroptomist International of the South West Pacific S3059, 19 November 1987; Citizens for Democracy S2235, 15 June 1987; S Taylour S1386, 2 April 1987; P Philippa S270, 18 September 1986; N Forbes S2591, 20 December 1987; E Mitchell S2594, 22 December 1987; I MacKinnon S3249, 11 February 1988; GM Jones S3291, 23 February 1987; V Guest S3313, 1 March 1988; I Robertson S2720, 19 October 1987; Members of the National Party of Australia, Queensland, Russell Island S2953, 29 October 1987; S Souter S2656, 7 October 1987; RM Smith S3169, 14 January 1987; AC Stewart S2904, 30 October 1987; IC Macpherson S3938, 11 November 1987; WHJ Phillips S3031, 5 November 1987; A Richardson S2915, 29 October 1987; R Chandler S2881, 28 October 1987; JW Bradbury S2869, 2 November 1987; CS Tory S2736, 22 October 1987.
874 S2443, 1 September 1987.
875 eg AC Stewart S2904, 30 October 1987 opposed the proposal; WHJ Phillips S3031, 5 November 1987 supported it.
876 S3069, 17 November 1987; S3172 16 December 1987.
877 S3069, 17 November 1987, 38.
878 Powers Report, 6.50, 107.
879 S2493, 12 September 1987.

9.780 The Government opposed, however, the Rights Committee's recommendation that compensation not be payable where the Commonwealth acquires land from a State Government for the purposes of benefiting Aborigines and Torres Strait Islanders. Its position, it said, 'has long been that all Crown land acquired for Commonwealth purposes (including land acquired for Aborigines) should require compensation to be paid to the Northern Territory Government (or a new State Government).' In its opinion, the Northern Territory should be placed in a similar position as currently exists in the States.

Reasons for recommendations

9.781 ***Extension of the requirement to provide just terms.*** For reasons outlined earlier in this Report[880] we believe that the constitutional requirement of just terms in legislation for the acquisition of property should apply to other laws for the acquisition of property by Governments from any persons wherever they live in Australia. It is only fair that persons should be justly compensated where their property is acquired by a Government, whether it be Federal, State or Territorial.

9.782 Furthermore, we can see no compelling reason why other Governments should not be subject to the same constitutional requirements as apply to the Commonwealth. As we noted earlier, a Parliament would have some discretion in the amount of or procedure for determining 'just terms' and, in deciding whether a law was valid, a court would have regard to the interests of the community as well as of the person whose property is acquired. The interpretations of section 51(xxxi.) to date show that it is flexible enough in its operation to ensure that the Federal Parliament can enact laws which it reasonably thinks are just and that persons whose property is acquired under such laws are not treated unjustly. For that reason, the alterations which we recommend are in substantially the same terms as section 51(xxxi.).

9.783 Our recommendation relating to acquisition in a Territory is confined to acquisition from 'any person'. We have not included acquisition from 'any Territory', where a Government of a Territory as a body politic has been established. The recommended provision is, therefore, in contrast with section 51(xxxi.) which refers to acquisition from 'any State or person'. In contrast with the States, the Territories are dependencies of the Commonwealth and their Governments are the creatures of federal law, made under section 122. The legislative, executive and judicial powers of a Territory are such as federal law provides. Those powers of self-government will vary from Territory to Territory and, in respect of each Territory, from time to time. In most cases, the initial property of the Territory will have been transferred to it from the Commonwealth.

9.784 It is not possible to determine in advance the occasions when 'just terms' would be appropriate for a Federal acquisition of property belong to a Territorial Government. In our view, it is a matter to be resolved between the Commonwealth and a Territory as the Territory moves towards Statehood or acquires a greater degree of self-government. The example of the Northern Territory, referred to above, shows how suitable arrangements can be made under existing constitutional provisions.

9.785 ***Procedural protections.*** We have decided not to recommend the addition of an express provision ensuring that a Government shall not deprive a person of property except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice.[881] In our view, such a provision is not only

880 Chapter 2 under the heading 'The Constitution and State systems of government', para 2.92-2.111.
881 Rights Report, 46.

unnecessary, but inapt to give appropriate constitutional protection to the legitimate interests of persons whose property is compulsorily acquired, or even destroyed, by governmental acts. It is, we believe, far less apt for that purpose than a just terms requirement of the kind found in section 51(xxxi.) of the Constitution.

9.786 The constitutional guarantee proposed by the Committee would inhibit the powers of governments to deprive people of their property only as regards the procedures to be followed in taking or destroying property. So long as those procedures were prescribed by law and complied with the principles of fairness and natural justice, a person would have no constitutional grounds for complaint, even though no compensation was paid or payable to that person. As presently understood, procedural fairness, or natural justice, requires only that certain minimum standards be observed in the processes of reaching decisions of certain kinds. The principal requirement is that a person who stands to be adversely affected, or to have legitimate expectations disappointed, by the exercise of some power shall be afforded an opportunity of being heard before the power is exercised. There is, however, no requirement that the ultimate decision be fair or just.

9.787 It seems to us that the concept of just terms embodied in section51(xxxi.) of the Constitution, as it has been interpreted by the High Court, provides a much more satisfactory solution to the problem with which the Committee was concerned than a constitutional guarantee in the terms the Committee proposed.

9.788 The requirement that federal legislation for the acquisition of property provide for just terms implies not only that the amount payable be fair but also that the procedure by which compensation is determined is also fair. To a large extent it is left to the Parliament to determine what procedures are appropriate. However the court could hold such legislation to be invalid if it is such that a reasonable man could not regard the terms of acquisition as being just.[882] As Deane J said:

> where the Parliament does not specify the amount of compensation but provides a procedure for determining what is fair and just, the Court will examine the nature and extent of the entitlement of a claimant under the procedure established and the nature of the procedure itself in deciding whether the acquisition for which the law provides is 'on just terms'.[883]

9.789 ***Exception to the requirement to provide just terms?*** Having carefully considered the arguments in favour of excluding the 'just terms' requirement in certain circumstances where the Commonwealth acquires land for Aborigines, we have decided not to recommend such an alteration. We consider that such an exception to section 51(xxxi.) would be wrong in principle. In our view the principle in section 51(xxxi.) is important and should be extended to the benefit of all people who own property in each State and Territory. It is a protection against the arbitrary and unjust acquisition of property by Government at any level and should not be diminished.

9.790 In any event, there may be no need for such an alteration. Concern was expressed in submissions to the Rights Committee and to the Powers Committee that the Commonwealth is reluctant to legislate to acquire land in the States for Aborigines, in part, at least, because it fears that the cost of providing just terms would be prohibitive. There has been no judicial decision on this matter. But in our view, bearing in mind the factors mentioned above, a court would be likely to decide that relatively little compensation would be payable to the State if the Commonwealth were to acquire land

882 *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 279-80 (Latham CJ), see also 290 (Dixon J), 295 (McTiernan J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 289 (Deane J).

883 *Commonwealth v Tasmania* (1983) 158 CLR 1, 290. See also 290-2 where he applied the principle to the provisions in that case and decided that they were invalid.

which is reserved for and occupied by Aborigines or Torres Strait Islanders and if the purpose of the acquisition were to ensure that they should use, occupy and even own that land. Similarly, given that what is just between the Commonwealth and a State may depend on special considerations not applicable to an individual, an acquisition of some vacant Crown land in a State may not be subject to substantial compensation requirements.

9.791 On the other hand we do not think it is reasonable to suggest that, where land is now in private ownership or has had substantial improvements made to it by a State, the Commonwealth should be able to avoid paying what is just in all the circumstances only because the purpose of the acquisition is meritorious. Needless to say, the Commonwealth would assert that most, if not all, acquisitions of property by it are for worthwhile purposes. But it would not be seriously suggested that the amount of compensation payable to a person should be substantially diminished, or even that no compensation should be payable, only because the purpose of the acquisition was worthwhile.

9.792 This recommendation and the reasons for it should not be taken to suggest that we oppose a fair and equitable program of land rights for Aborigines. Rather, we consider that such a program can be developed within the existing constitutional framework.

9.793 We note that, had we recommended an alteration similar to that suggested by the Rights Committee and the Powers Committee (for example, that the just terms requirement would not apply where the Commonwealth acquired land in a State which is an Aboriginal reserve for the benefit of Aborigines) the direct benefit to Aborigines would have been limited. While some Aboriginal groups might have been granted more secure title to that land, many other groups, and the majority of Aborigines, could not benefit and the scheme could be seen as arbitrary. Furthermore the potential for its use would, in terms of the land involved, operate quite unevenly around Australia. In some States relatively small areas would be affected, while in other States very large areas would be affected. In practical terms that could add to tensions already apparent in some communities.

Freedom of religion

Recommendation

9.794 We *recommend* the alteration of section 116 of the Constitution so that the guarantees of freedom of religion therein shall apply to the Commonwealth, States and Territories.

9.795 We further *recommend* the omission of the words 'make any law' from section 116 of the Constitution in order to give the provision operation beyond the making of a statute.

9.796 Section 116 as altered would provide:

> The Commonwealth, a State or a Territory shall not establish any religion, impose any religious observance or prohibit the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth, a State or a Territory.

Current position

9.797 Section 116 of the Constitution provides:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

9.798 Section 116 is modelled on provisions in the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .[884]
>
> . . . no religious test shall ever be required as a qualification to any office or public trust under the United States.[885]

9.799 Section 116 applies only to the Commonwealth. Of the States, only Tasmania has a guarantee of religious freedom in its Constitution[886] and this provision may be repealed by the State Parliament.

9.800 ***Historical note.*** Although section 116 restricts only the Parliament of the Commonwealth, it appears in Chapter V of the Constitution which is headed 'The States'. The reason is that the original clause in the 1891 draft Constitution applied only to the States.[887] This prohibition against State legislation was omitted at the Melbourne session of the Convention in 1898, on the ground that it was an unwarranted invasion of the legislative powers of the future States.[888] Henry Bournes Higgins, Victorian delegate and future High Court judge, argued successfully for the restriction on federal power. He maintained, on the basis of what he said was American experience, that without a suitable restriction on the power of the Commonwealth, the mention of 'Almighty God' in the preamble might result in the High Court holding that the Commonwealth could make laws about religion.[889]

9.801 ***The scope of section 116.*** In our view, section 116 of the Constitution is a provision of high importance. It guarantees a fundamental freedom. As Mason ACJ and Brennan J said in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vict) (Scientology Case):*

> Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject-matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.[890]

9.802 Section 116 is concerned with both the toleration of all religions and the toleration of absence of religion.[891] Moreover, it is concerned essentially with the protection of the individual's right to freedom of belief and conscience. Acting Chief Justice Mason and Brennan J went on to say:

> Protection is not accorded to safeguard the tenets of each religion; no such protection can be given by the law, and it would be contradictory of the law to protect at once the tenets of different religions which are incompatible with one another. Protection is accorded to

884 *The Constitution of the United States,* First Amendment.
885 *The Constitution of the United States,* Article 6, Section 3.
886 Section 46 of the *Constitution Act 1934* (Tas).
887 Quick and Garran, 951.
888 CL Pannam, 'Travelling Section 116 with a US Road Map' (1963) 4 *Melbourne University Law Review* 54.
889 JA La Nauze, *The Making of the Australian Constitution* (1972) 229. For a full account of the historical background to section 116 see R Ely, *Unto God and Caesar: Religious issues in the emerging Commonwealth 1891-1906* (1976).
890 (1983) 154 CLR 120, 130.
891 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth (Jehovah's Witnesses Case)* (1943) 67 CLR 116, 123 (Latham CJ).

preserve the dignity and freedom of each man so that he may adhere to any religion of his choosing or to none. The freedom of religion being equally conferred on all, the variety of religious beliefs which are within the area of legal immunity is not restricted.[892]

9.803 Section 116 contains one of the few individual guarantees of rights and freedoms that are expressly provided for in the Constitution. It embodies four separate concepts:

(a) establishing any religion;

(b) imposing any religious observance;

(c) freely exercising any religion; and

(d) requiring any religious test.

9.804 The section restricts only the power to 'make any law'. It does not expressly apply to the exercise of Executive power. Section 116 could apply, however, to a federal law which authorised Executive action to do anything prohibited by section 116.[893]

9.805 In order to come within that purview of section 116 the law must be *'for'* 'establishing' 'imposing' or 'prohibiting'. This has raised some problem as to what Barwick CJ has called 'the purposive content' of the provision[894] and whether the purpose may be determined from its effect or result.[895]

9.806 In the *DOGS Case,* the first prohibition – establishing any religion – was given a fairly narrow meaning, namely the creation of a State religion. The Court (Murphy J dissenting) rejected the broad meaning given to that phrase in the United States, where it has been held to require 'a wall of separation' between church and State. It was held, therefore, that provision for financial assistance for private schools was not in breach of section 116.

9.807 It does not follow, however, that the Court would give a narrow construction to the restrictions against imposing any religious observance or prohibiting the free exercise of any religion. As Gibbs J has pointed out, the latter restrictions, unlike the establishment clause, had the purpose 'of protecting a fundamental human right'.[896] In interpreting the meaning of 'religion' in other contexts, but bearing in mind section 116, a number of High Court judges have been conscious of the need to define the term having regard to the object of section 116 in granting religious freedom.[897]

9.808 Like all freedoms, however, freedom of religion cannot be absolute. It must be qualified at times by other social interests and freedoms.[898]

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892 154 CLR 120, 132.

893 *Attorney-General (Vict); Ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559, 580-1 (Barwick CJ).

894 id, 581.

895 Gibbs J in the *DOGS Case* referred to 'purpose or effect', 146 CLR 559, 604; Mason J referred to 'purpose or result', 615; see also *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association (Lebanese Moslem Case)* (1987) 71 ALR 578, 593 (Jackson J).

896 146 CLR 559, 603.

897 *Scientology Case* (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J), 174 (Wilson and Deane JJ), 151 (Murphy J).

898 *Scientology Case* (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J); *Jehovah's Witnesses Case* (1943) 67 CLR 116. The latter case and some cases before it have been criticised on the ground that the Court adopted rather broad criteria to describe the qualifications that were permissible on religious freedom. As indicated above, however, judges in recent times have indicated that they place greater importance on this guarantee.

9.809 Whether section 116 applies to laws made under section 122 for government of the Territories is doubtful.[899] It is clear, however, that section 116 does not apply to State laws. In *Grace Bible Church v Reedman (Grace Bible Church Case)*,[900] the Supreme Court of South Australia declared that no right of religious freedom existed under the common law. The doctrine of parliamentary supremacy meant that citizens did not have rights which could not be overridden by Parliament.[901] Mr Justice White concluded: 'It takes something as powerful as a constitutional provision such as section 116 to restrict the power of the Parliament.'[902]

Issues

9.810 Five main issues concerning section 116 arise:

(a) Are the religious freedoms of Australians adequately protected under the common law in the States?

(b) Is it appropriate to extend the guarantees in section 116 to the States?

(c) Would the proposed alteration to section 116 produce any problems in the States regarding the distinction between educational and religious activities?

(d) Is it important to include the Territories in the section?

(e) Should the operation of section 116 be extended beyond the making of a statute?

Previous proposals for reform

9.811 ***Constitutional referendum.*** Among the 17 matters put to referendum in the *Post-war Reconstruction and Democratic Rights* proposal in 1944 was that section 116 of the Constitution 'shall apply to and in relation to every State in like manner as it applies to and in relation to the Commonwealth.' The proposed provisions were to continue in force until the expiration of a period of five years from the date upon which Australia ceased to be engaged in hostilities in World War II. The proposal was approved by 45.99% of all electors and by a majority of electors in South Australia and Western Australia.

9.812 ***Australian Constitutional Convention.*** Section 116 was referred to Standing Committee B at Sydney in 1973. It recommended that the section be altered so as to have application in the Territories. At the Melbourne (1975) session, Dr Letts (NT) proposed the motion:

> That this Convention recommends that the Constitution be amended in relation to mainland Territories so as to ensure that the provisions of section 116 apply in such Territories.[903]

The Hon EG Whitlam proposed that the following words be added to the motion:

> and in relation to the States, so as to ensure that the provisions of that section apply to the laws of the States.[904]

Debate on the matter was deferred till the next session of the Convention.

899 The High Court, in *Teori Tau v Commonwealth* (1969) 119 CLR 564 suggested that section 116 did apply to Territory laws, but Gibbs J in the *DOGS Case* (1981) 146 CLR 559, 593 indicated that he found that difficult to accept.
900 (1984) 54 ALR 571.
901 id, 579 (Zelling J), 581 (White J), 585 (Millhouse J).
902 id, 581.
903 ACC Proc, Melbourne 1975, 127.
904 id, 128.

9.813 At the Hobart (1976) session, Mr Pead (ACT) proposed the motion:

> the Constitution be amended in relation to mainland Territories so as to ensure that the provisions of section 116 apply in such Territories and, in relation to the States, so as to ensure that the provisions of that section apply to the laws of the States.[905]

Mr Maddison (NSW) proposed the following amendment to the motion:

> That the words 'and, in relation to the States, so as to ensure that the provision of that section apply to the laws of the States', be omitted.[906]

The uncertainty concerning the application of section 116 to the Territories was discussed. There was wide agreement that the question should be put beyond doubt and that section 116 should be altered accordingly. The proposed extension of section 116 to the States was more controversial. Attorney-General Durack, speaking on behalf of the Federal Government, said he was concerned that the section as altered could be 'interpreted in such a way as to affect the provision of State aid to independent schools.' The fear was that the High Court could give a wide interpretation to the establishment clause.[907] This concern was resolved by the High Court in the *DOGS Case* in 1981. The amendment was negatived. The motion was carried by 45 votes to 33.

Advisory Committee's recommendation

9.814 The Rights Committee recommended that section 116 of the Constitution be altered to read:

> 116. The Commonwealth or a State shall not establish any religion, or impose any religious observance, or prohibit the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth or a State.[908]

The Committee recognised that freedom of religion is generally enjoyed in Australia.[909] But it noted cases, including the *Lebanese Moslem Case* (1987) and the *Grace Bible Church Case* (1984), which in its view highlighted the precarious nature of that freedom under the common law. The Committee recommended the extension of section 116 to the States.

9.815 In doing so, the Committee recognised the possible implications such an extension could have on other legitimate State activities, particularly in the field of education.[910] However, the Committee was confident the courts would resolve any problems that might arise.

9.816 The Committee also recommended that a State Parliament be allowed to pass a law so as to 'opt out' of the limitations on its power embodied in the altered section 116.[911]

9.817 Further, the Rights Committee recommended the extension of section 116 to cover all forms of governmental conduct. It stated:

> in order to make it clear that the actions of departmental officials interfering with the conduct of the religious affairs of a congregation would be clearly prohibited, the restraint on power should not be limited merely to the passing of 'laws'.[912]

905 ACC Proc, Hobart 1976, 178.
906 id, 179.
907 id, 180. Attorney-General Durack also expressed concern regarding the extension of section 116 to the Territories.
908 Rights Report, 53.
909 id, 9.
910 For example, where a State Education Act requires the registration of schools.
911 Rights Report, 37.
912 id, 53.

9.818 The Rights Committee did not recommend the inclusion of express reference to the Territories in section 116. Instead it recommended that the words 'Subject to the Constitution' should be added at commencement of section 122.[913]

Submissions

9.819 Section 116 attracted many submissions. Most of these recognised that the freedom to believe or not to believe in a religion is of fundamental importance. The right should be entrenched in the Constitution. Four main arguments were canvassed:

(a) **Freedom of religion is of the essence of a free society and its constitutional guarantee should be extended to the States.** This view was expressed in many submissions representing a wide range of opinions.[914]

The National Jewish Commission on Law and Public Affairs stated: 'Whatever the rationale of the framers of the Constitution in restricting the ambit of section 116 to the Commonwealth, it is submitted that no valid distinction may be maintained in the latter part of the twentieth century, and that there is no good reason why the States too should not be subject to the constitutional safeguards currently enshrined in the section.'[915]

Some of the submissions contended that the *Grace Bible Church Case* underlined the need for an alteration of this kind.[916] A submission was also received favouring the extension of section 116 to the Territories.[917]

(b) **Australia is a multi-cultural society and it would be appropriate for the Constitution to prohibit discrimination against the religions of ethnic and other minority groups.** Again, many submissions were received to this effect.[918] Several submissions advocated the inclusion of a sub-clause to section 116 guaranteeing the rights of ethnic religions in Australia.[919]

(c) **While freedom of religion is of fundamental importance, it must operate within reasonable limits prescribed by law.** Many submissions were concerned to protect individuals from abuses of religious freedom. It was argued that individuals should be protected from harassment by religious zealots.[920] The right of the community to defend individuals against cruel and degrading treatment was noted.[921]

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913 id, 105. The effect would be to dispel the uncertainty relating to the application of section 116 to laws made by the Commonwealth for the government of the Territories under section 122. It is not clear whether the Advisory Committee intended the amended section 116 to apply also to the legislatures of the Territories. However, as these are subordinate legislatures, created originally under section 122, it can be assumed that the amended section 116 would so apply.

914 Church of Scientology S612, 27 November 1986; Business and Professional Women's Club of Albury S743, 16 December 1986; The Brethren S954, 15 December 1986; Queensland Government S3069, 25 November 1987; Anti-Discrimination Board S3077, 20 November 1987; Action Group for Religious Liberty S3204, 4 December 1987; PH Bailey, Deputy Chairman, Human Rights Commission S190, 22 November 1986; The Standing Committee of the Anglican Church, Diocese of Sydney S1426, 3 April 1987.

915 The National Jewish Commission on Law and Public Affairs S792, 19 December 1986.

916 The Brethren S954, 15 December 1986; Grace Bible Church S442, 4 November 1986; New South Wales Council for Civil Liberties S400, 25 October 1986.

917 S Souter, S1177 8 March 1987.

918 Ethnic Communities' Council of Queensland Ltd S3278, 8 February 1988; Human Rights Group S1035, 27 February 1987; Italian Federation of Migrant Workers and Families S1241, 7 March 1987; Feminist Legal Action Group S2668, 9 October 1987; J Long, Commissioner for Community Relations S694, 4 December 1986.

919 D Kozaki S926, 16 February 1987; NSW ALP, Immigration and Ethnic Affairs Policy Committee S1253, 17 March 1987; Hon F Arena MLC S895, 3 February 1987; Enosis Chios NSW Ltd S1090, 4 March 1987; Ethnic Communities' Council of NSW S849, 27 January 1987.

920 M Sassi S2908, 29 October 1987.

921 J Vander-Wal S905, 5 February 1987.

(d) **Discrimination should not be permitted on the ground of freedom of religion.** In a number of submissions it was argued that the discriminatory attitudes of some religions against women, for example, should not be tolerated,[922] nor should educational standards be compromised for reasons of religious liberty.[923]

9.820 Many of the submissions in support of the Rights Committee's recommendation were qualified. The Queensland Government, for instance, did not agree with the omission of the words 'make any law' on the ground that the Full Federal Court in the *Lebanese Moslem Case*[924] had already dealt satisfactorily with the scope and reach of section 116. The Queensland Government also noted the need for further consideration of the legal ramifications of the proposed extension of section 116 to the States.[925]

9.821 In other submissions it was suggested that the attempt to accommodate all religions, cultures and beliefs could undermine traditional Christian values. The Ascension Life Centre Ministries warned that such an approach could 'lead to confusion and disharmony'.[926] Concern was expressed that too broad a definition of religion could be adopted by the courts.[927] The Council for the Defence of Government Schools proposed an alteration to the establishment clause of section 116 invalidating Government grants to church schools.[928]

9.822 A majority of the submissions favoured an alteration to section 116 of the Constitution broadly in the terms recommended by the Rights Committee. The submissions suggest that many Australians recognise the need for a powerful constitutional guarantee of religious freedom.

Reasons for recommendation

9.823 The values that underlie our political tradition demand that every individual be free to hold and to manifest whatever beliefs and opinions that person's conscience dictates. So long as an individual does not transgress the reasonable limits established in a free and democratic society, his or her freedom of religious belief and practice should not be fettered. Religious freedom is the paradigm freedom of conscience.

9.824 We believe that the guarantee of that freedom should be consistent throughout the federation. The same standards should apply in every place and to every Government. There is no case for variation where such a basic human liberty is concerned. We agree with the view expressed by the Victorian delegation at the Hobart (1976) session of the Australian Constitutional Convention to the effect that it is pressing States' rights too far to say that the States should make their own decisions about religious freedom.[929]

9.825 The reasons the Framers of the Constitution had for limiting section 116 to the Commonwealth are no longer compelling. It should be borne in mind that Australian society has changed markedly since Federation. Its ethnic mixture is now far richer. As a consequence, the need for a constitutional guarantee of religious freedom is arguably

922 Feminist Legal Action Group S2668, 9 October 1987; Western Australia Women's Advisory Council to the Premier S707, 10 December 1986.
923 Rev F Imray S1489, 27 March 1987.
924 (1987) 71 ALR 578.
925 The Queensland Government S3069, 25 November 1987. In view of the *Grace Bible Church Case* (1984), the Queensland Government asked whether the proposed amendment would permit a State to maintain appropriate educational standards.
926 The Ascension Life Centre Ministries S3176, 19 January 1988.
927 Soroptomist International of Cooma S843, 20 January 1987.
928 Council for the Defence of Government Schools S2254, 25 May 1987.
929 ACC Proc, Hobart 1976, 179.

greater. Australian society is mostly tolerant. Widespread religious discrimination is not an imminent or constant threat. However, the common law does not protect religious freedom and section 116, as altered in the way we recommend, would offer to all Australians a powerful safeguard of their right to freedom of religion.

9.826 We have explained that one purpose of the proposed alteration is to clarify areas of uncertainty under section 116. We agree with the Rights Committee that the omission of the words 'make any law' is required to remove any doubt regarding the section's application to governmental actions of an Executive and administrative kind. The proposed alterations would also remove the uncertainty that has existed regarding the operation of section 116 in the Territories.

9.827 Deletion of the word 'for' from the establishment clause would not alter the interpretation adopted by the majority of the High Court in the *DOGS Case* (1981). That ruling also removes the objections of the Federal Government, as expressed at the Hobart (1976) session of the Australian Constitutional Convention, to the extension of section 116 to the States and Territories.[930] Further, omission of the word 'for' from the free exercise clause would, we believe, assist the courts in arriving at a reasonable interpretation of this basic freedom.

9.828 ***Reasonable limits on freedom of religion.*** In our recommendations for the Chapter VIA relating to rights and freedoms, we include a provision declaring that the rights and freedoms in the Chapter 'may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' As section 116 is not in that Chapter, the suggested provision will not directly apply to it. Moreover, as section 116 is not at present so qualified, we considered it inappropriate to suggest anything that might lead some to believe that we would cut down an existing guarantee.

9.829 However, the courts have recognised the need to establish limits to the guarantees embodied in section 116, limits that have regard to the needs of society and other rights and freedoms of individuals. We note in this respect that Mason ACJ and Brennan J, in the *Scientology Case* (1983), ruled that canons of conduct which offend against the law are 'outside the area of any immunity, privilege or right conferred on the grounds of religion.'[931] As Latham CJ suggested in the *Jehovah's Witnesses Case* (1943), this does not mean that the ordinary law may automatically override a constitutional provision.[932] According to Latham CJ, it does mean, however, that the guarantees embodied in section 116 do not extend to religious practices which are cruel, degrading or discriminatory in nature. Protection is not afforded to forms of religious worship which, for example, require human sacrifices or which promote the practice of suttee.[933]

9.830 Under the altered section 116, infringements against an individual's freedom of thought, conscience or movement on the grounds of religion would not be tolerated. The fundamental purpose of section 116 is to preserve the dignity of the individual. A religious code or practice which contradicted that purpose would not be acceptable. The guarantee of freedom of religion is not an invitation to break the law or to flout the positive morality of the community.

9.831 We do not intend the proposed alteration to section 116 to affect the legitimate legislative capacity of the States and Territories. Section 116 would prevent a State or Territory from passing a law to establish an official Church or to impose a religious test as

930 para 9.813.
931 154 CLR 120, 136.
932 67 CLR 116, 129.
933 id, 125-31.

a qualification for any public office. On the other hand, it would not affect the provision of State or Territory aid to independent schools, nor would it prevent a State or Territory from maintaining appropriate educational standards.

9.832 Balanced against the individual's right to freedom of religion is the legitimate right of the State or Territory to maintain adequate standards of instruction. Where conflicts arise we believe that the courts will be able to differentiate between religious activities and those activities which properly become subject to regulation by educational authorities.[934]

9.833 Section 116 of the Constitution is a provision of high importance. It guarantees a fundamental freedom. We recommend the clarification of that guarantee and its extension to the States and Territories.

OTHER RIGHTS AND FREEDOMS

Introduction

9.834 We stated earlier that the alterations of the Constitution which we recommend in this Chapter of the Report do not cover a number of the matters which the Rights Committee recommended as appropriate subjects of constitutional guarantees. In this part of the Report we explain why we do not endorse these recommendations.

Deprivation of liberty and property

Recommendation

9.835 We do *not recommend* that the Constitution be altered to provide that:

> The Commonwealth or a State shall not . . . deprive any person of liberty or property except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice.

Current position

9.836 Under Australian law, and also under the law of many other common law countries, the principles of fairness and natural justice refer to certain principles of procedural justice which governmental agencies, and sometimes private bodies as well, are obliged to observe in exercising powers which may affect the rights and privileges of individuals. The cardinal principles are that those who have the power to make decisions shall be above reasonable suspicion of bias and that those who stand to be adversely affected by exercise of the power of decision shall be afforded an opportunity of being heard, either before a decision is made or before a decision is carried out.

9.837 These principles are sometimes incorporated in legislation but they have been developed mainly by the courts. The courts read certain kinds of statutory powers (and also certain powers conferred by private arrangements, such as contracts) as being subject to a duty to accord natural justice. In recent times they have progressively widened the

934 We note that a case similar to *Grace Bible Church v Reedman* (1984) was heard under the Canadian *Charter of Rights and Freedoms*. In that case it was held by the Canadian Supreme Court that: 'A requirement that a person who gives instruction at home or elsewhere have that instruction certified as being efficient is a demonstrably justified limitation within the meaning of s. 1' of the *Canadian Charter of Rights and Freedoms*. *Jones v The Queen* (1986) 28 CCC 3d 513 (SCC). That section reads:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

range of situations in which duties to accord natural justice will be implied and, although they accept that parliaments may exclude such duties, they usually demand that parliamentary intentions to do so be stated in unequivocal terms.

9.838 Nowadays, duties to accord natural justice are implied not merely where a power to make decisions affecting particular individuals may result in loss of a person's liberty, in the narrow sense, or deprivation of property. Natural justice is also often required where the power of decision is to dismiss a person from public employment, to impose disciplinary sanctions, to revoke, suspend or not renew an occupational or commercial licence, to withdraw social welfare benefits, to affect a non-citizen's status under immigration laws or a person's status as a student in a public educational institution or as a member of a trade union or of another like association.

9.839 Precisely what is required to fulfil an obligation to accord natural justice, and especially the duty to afford to the person to whom the duty is owed a reasonable opportunity of being heard, varies from case to case. Certainly there are no universally applicable rules that require, say, an oral hearing, opportunities for cross-examination of witnesses, or automatic grant of requests to be represented by a lawyer or some other person.[935]

Position in other countries

9.840 The provision recommended by the Rights Committee resembles provisions to be found in the constitutions of several other countries whose constitutional history is linked with Australia's. In considering the Committee's recommended provision we have therefore had regard to judicial interpretations of comparable provisions in the constitutions of those countries and the specific problems which such provisions have raised.

9.841 ***United States of America.*** The Fifth Amendment, ratified in 1791, provides, *inter alia,* that no person shall be 'deprived of life, liberty, or property, without due process of law'. The Fourteenth Amendment, ratified in 1868, provides, *inter alia,* that no State 'shall deprive any person of life, liberty, or property, without due process of law . . . '. The language of these provisions is drawn from successive 'enactments' of England's *Magna Carta* of 1215, notably from the version pronounced in 1354 which declared that

> no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.

9.842 The key concepts in the above quoted clauses in the Fifth and Fourteenth Amendments are 'liberty' and 'due process'. They have been invoked by the United States Supreme Court as bases for pronouncing as unconstitutional both legislation and governmental practices found to be inconsistent with the enjoyment of 'privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.'[936] The reference to 'liberty' in the Fourteenth Amendment has been construed by the Court as embracing all of the particular rights and freedoms guaranteed by the first ten amendments, and, in addition, a series of unspecified rights such as a right to privacy, to pursue a livelihood or lawful vocation, to direct the education and upbringing of children, to marry and procreate and, within limits, to procure an abortion of a foetus.[937]

935 The most recent text-book account of the principles of natural justice, as developed by Australian courts, appears in Chapters 6-8 in M Aronson and N Franklin, *Review of Administrative Action* (1987).
936 *Meyer v Nebraska* 262 US 390, 399 (1923). See also *Board of Regents v Roth* 408 US 564, 572 (1972).
937 RD Rotunda, JE Nowak and JN Young, *Treatise on Constitutional Law* (1986) section 15.7.

9.843 For a period, the United States Supreme Court also invoked the concepts of 'liberty' and 'due process' to strike down what is now commonly accepted as socially and economically beneficial legislation on the ground that it impaired freedom to enter into contracts.

9.844 The expression 'due process' has been relied on to justify judicial enforcement of obligations which, under Anglo-Australian jurisprudence, have been enforced under the rubric of 'natural justice'. 'Due process', for American constitutional purposes, has, however, been construed by the Court in ways that have involved it in censoring legislation and governmental practices on substantive, as well as purely procedural grounds.

9.845 ***Canada.*** The *Canadian Charter of Rights and Freedoms,* on which our proposed new Chapter VIA of the Australian Federal Constitution is largely based, contains the following provision (section 7):

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

9.846 This section, as we have already noted,[938] operates only as a constraint on the exercise of governmental powers.

9.847 It differs from the corresponding provisions in the Constitution of the United States of America in that:

(a) property rights are not included in the list of rights secured against impairment by governmental action; and

(b) the principles according to which the legitimacy of governmental actions are to be adjudged are not those of 'due process' but 'fundamental justice'.

9.848 'Everyone', it has been held, does not include an unborn foetus. So section 7 offers no basis on which to contest the constitutionality of laws permitting abortions.[939]

9.849 What is encompassed by the phrase 'the right to life, liberty and security of the person' is far from settled. On one view, the phrase refers to a single right, a right which relates to matters of death, arrest, detention, physical liberty and physical punishment of the person. This narrow view has been rejected by the Supreme Court of Canada,[940] but the Court has not yet had occasion to determine the precise ambit of the phrase. In one case, the Court was prepared to assume that the rights protected by section 7 include the right of parents to decide how their children should be educated. In the event it found that the law alleged to infringe that right did not violate the *Charter.*[941] In another case it was prepared to assume that the rights protected by the section include a right to free procreative choice, but once again it held that the right had not been violated.[942] But it had no doubt that the right of a person who was granted refugee status under the *Immigration Act 1976* not to be returned to a country where his life or freedom would be threatened was protected by the section. Security of the person, it was said encompasses 'freedom

938 para 9.167.

939 *Borowski v Attorney-General of Canada and Minister of Finance of Canada* (1983) 4 DLR 4th 112 (Sask QB); *Campbell v Attorney-General of Ontario* (1987) 38 DLR 4th 64 (Ont HCJ).

940 *Singh v Minister of Employment and Immigration* (1985) 17 DLR 4th 422; *Jones v Queen: (1986) 28 CCC 3d (SCC) 513.*

941 *Jones v The Queen* (1986) 28 CCC 3d 513.

942 *Re Eve* (1986) 31 DLR 4th 1 (SCC). Cf *R v Morgentaler, Smoling and Scott* (1985) 22 DLR 4th 641 (Ont CA) where the Ontario Court of Appeal held that although section 7 protects the right to marry, take medical advice, have children and to clothe oneself, it does not protect a woman's right to have an abortion, contrary to legislation which forbids abortions except in defined circumstances.

from the threat of physical punishment or suffering as well as freedom from such punishment itself.'[943] A person who merely claimed refugee status had a secured constitutional right to have that claim determined according to proper principles.

9.850 One of the justices of the Supreme Court of Canada, Wilson J, has said that section 7 should be interpreted as generously as the Supreme Court of the United States has interpreted the due process clause of the Fourteenth Amendment to the United States Constitution.[944] The other justices of the Court have not, as yet, expressed such a firm view on the reach of the section.

9.851 In the absence of clear guidance from the Supreme Court on the extent of the rights protected by section, it is hardly surprising that the courts of the provinces have adopted, and continue to adopt, somewhat different interpretations of section7. There have, for example, been differences of opinion about whether economic 'rights', such as rights acquired under an occupational or business licence, are protected by section 7.[945] On the other hand, it has been accepted that the rights protected by section 7 do not include an 'unconstrained right to transact business whenever one wishes'.[946]

9.852 If a right is protected by section 7, what the section requires is that a person shall not be deprived of the right except in accordance with the principles of fundamental justice. According to the Supreme Court of Canada, the principles of 'fundamental justice' go beyond the principles of natural justice. They import notions of substantive justice as well.[947] Legislation imposing strict liability for an offence punishable by imprisonment has been held to be unconstitutional on this ground.

9.853 ***New Zealand.*** Article 14 of the draft New Zealand Bill of Rights 1985 provides:

> No one shall be deprived of life except on such grounds, and, where applicable, in accordance with such procedures, as are established by law and are consistent with the principles of fundamental justice.

9.854 The explanatory comment on the section indicates that the 'main potential application' of the section is 'to statutes authorising and regulating such things as abortion, capital punishment, self defence and the use of deadly force to effect arrest, prevent escapes and control disorder.'[948] The phrase 'fundamental justice' was intended to cover matters of substance as well as procedure.[949] But the phrase 'where applicable' was inserted because it was recognised 'that in some circumstances the prescription of procedures may be quite inappropriate', for example, in cases of self defence.[950]

9.855 In addition to this section, the draft Bill of Rights includes a general provision on the right to natural justice. Article 21(1) provides:

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

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943 *Singh v Minister of Employment and Immigration* (1985) 17 DLR 4th 422, 460 (Wilson J).
944 id, 458; *Jones v The Queen* (1986) 28 CCC 3d 513, 525-7.
945 *Re D and H Holdings Ltd v City of Vancouver* (1985) 21 DLR 4th 230 (BCSC); *Re Branigan and Yukon Medical Council* (1986) 26 DLR 4th 268 (YTSC); cf *Gershman Produce Co Ltd v Motor Transport Board* (1985) 22 DLR 4th 520 (Man CA). For a review of the cases see *Re Wilson and Medical Services Commission of British Columbia* (1987) 36 DLR 4th 31, 52-9 (BCSC).
946 *Edwards Books and Art Ltd v The Queen* (1986) 35 DLR 4th 1, 54 (Dickson CJC); *Parkdale Hotel Ltd v Attorney-General of Canada* (1986) 27 DLR 4th 19 (FCTD).
947 *Reference re Section 94(2) of the Motor Vehicle Act* (1985) 24 DLR 4th 536 (SCC).
948 *A Bill of Rights for New Zealand: White Paper* (1985) para 10.84.
949 id, para 10.89.
950 id, para 10.87.

9.856 The object of this provision is to give 'an enhanced status' to the principles of natural justice, without impairing the capacity of the courts to develop those principles and determine what rights and interests are be accorded the degree of procedural protection which application of the principles entails.[951]

International Covenant on Civil and Political Rights

9.857 Section 1 of Article 9 of the International Covenant on Civil and Political Rights provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

9.858 The Article goes on to define rights of persons who are arrested or detained.

9.859 There are related Articles on the inherent right of human beings to life, on arbitrary deprivation of life and capital punishment, slavery and servitude, and imprisonment on the ground of inability to fulfil contractual obligations.[952] These provisions were incorporated, in substance, in Articles 18, 19 and 20 of the proposed Australian Bill of Rights 1985.

Advisory Committee's recommendation

9.860 The alteration of the Constitution recommended by the Committee, as set out under the heading 'Recommendations', was intended to be a restatement of the 'due process' clause in *Magna Carta.*[953] The Committee made it clear, however, that it had deliberately chosen not to employ the phrase 'due process' or the phrase 'principles of fundamental justice' on the ground that neither is 'familiar to the Australian legal and political community'.[954] It, apparently, desired to limit the proposed constitutional standard to procedural justice.

9.861 The Committee noted that 'serious concerns' had 'been expressed as to the fairness of procedures whereby' persons are confined, against their will, in psychiatric institutions and their property managed.[955]

Submissions

9.862 For present purposes, it is not necessary to canvass the many submissions bearing on the broad subject of constitutional protection of liberty and property rights, for what is in issue is simply whether the Committee's recommendation should be endorsed.

9.863 In its commentary on the Committee's Report, the Queensland Government drew attention to what it regarded as serious deficiencies in the Committee's proposal and it strongly urged us to reject it.[956]

9.864 The Queensland Government drew attention to judicial interpretations of comparable provisions in the United States Constitution and the Constitution of India, and to the different views which have been expressed about the meaning of the term 'liberty' in the context of section 7 of the *Canadian Charter of Rights and Freedoms.* The main problems with the Committee's proposal, it was suggested, were as follows:

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951 id, 109-10.
952 Article 11.
953 Rights Report, 45-6, 61.
954 id, 46.
955 ibid.
956 S3069 17 November 1987.

(a) '[I]t is totally unclear what type of conduct is being protected'. For example, does 'liberty' refer merely to physical liberty or does it refer to free exercise of other human activities?

(b) The inherent vagueness of the concept of 'fairness' was noted, as was the variability of the content of obligations to accord natural justice. Legislators, it was argued, 'would be placed in an almost impossible situation in determining that the content of statutes did not inadvertently fall foul of the floating requirements' of the section recommended by the Committee, 'as interpreted from time to time by courts'. If the Committee's recommendation were to be adopted, the result would be 'an explosion of unnecessary, costly and time-consuming litigation similar to the sterile 'due process' debate in the United States.'

Reasons for recommendation

9.865 We are not persuaded that it is desirable to include in the Federal Constitution a limitation on governmental powers in the terms the Rights Committee has recommended. A constitutional provision that neither the Commonwealth nor States shall 'deprive any person of liberty or property except in accordance with a procedure prescribed by law' which complies with the principles of fairness and natural justice would, we acknowledge, be less restrictive of governmental powers than the due process clauses of the United States Constitution and section 7 of the *Canadian Charter.* The latter, as judicially interpreted, impose substantive as well as procedural limitations on the exercise of governmental powers whereas the provision proposed by the Committee is concerned only with procedural justice. Natural justice would be required on any occasion on which the exercise of governmental power entailed deprivation of a person's liberty or property.

9.866 In our view, however, the Committee's formulation of the circumstances in which natural justice would be due, as a matter of constitutional right, is totally unsatisfactory. It is not an accurate description of circumstances in which natural justice must, under the general law, be accorded. The courts would, we suggest, find that formulation singularly unhelpful in determining when a right to natural justice must be accorded and also in determining the content of the correlative duty.

9.867 How the term 'liberty' would be construed is uncertain. Deprivation of liberty, in the broadest sense, could cover any governmental act, the effect of which was to deny a person freedom to do as he or she would prefer to do. In the context of a provision such as that proposed by the Committee, it is unlikely that 'liberty' would be interpreted in this sense. On the other hand, it may not be limited to freedom from bodily restraint or interference.

9.868 We do not think that the word 'fairness' adds anything to the Committee's proposed provision. Indeed it may be a source of confusion and may even provide courts with a foothold for assessing the constitutionality of governmental acts on substantive grounds.

9.869 In the context of the law relating to judicial review of administrative action, the term 'fairness' is often used as a synonym for natural justice. Some English judges have, however, used it to refer to procedural requirements less stringent than those required when natural justice is due. Others have used it to refer to certain non-procedural standards with which officials must conform in exercising administrative discretions, for

example, a requirement that like cases should be dealt with consistently, a requirement that a sanction should not be disproportionate to the occasion, or a requirement that a discretion not be exercised in breach of a prior undertaking.[957]

9.870 If it were thought desirable to give constitutional force to principles of natural justice, a provision like that in Article 21(1) of the draft New Zealand Bill of Rights 1985 would, in our opinion, be preferable to the provision the Committee has recommended. We do not, however, see any compelling need for such a provision. Whilst a provision of that kind would certainly diminish the power of parliaments to exclude or modify duties of natural justice which would otherwise be implied, the reasonable limitations clause which we have recommended[958] would ensure that the power was not removed altogether. The provision would add little to the powers of the courts and would probably offer them no surer guidance in determining when natural justice is due and what it requires than that they presently derive from sources external to the Constitution. Certainly there could be no assurance that rights to natural justice would be more extensive and more secure than they are at present.

9.871 In considering this whole question, it is, we think, important to bear in mind that in recent times Australian courts, especially the High Court, have not been slow to extend the reach of the application of natural justice principles, partly, we believe, in response to increasing demands within the community for adoption of decision-making processes within government bureaucracies which are more sensitive to the interests of the individuals whose affairs are materially affected by the exercise of governmental powers. Parliaments have, in the main, been content to allow the courts to superimpose duties to accord of natural justice on statutory powers and duties. Rarely have they enacted legislation to countermand duties which courts have held to be implied. In our view, it is safe, prudent and proper to maintain the present, informal constitutional settlement as to who decides when natural justice is due and what it requires.

9.872 We comment further on the Committee's recommendation in that part of this Chapter which deals with compulsory acquisitions of property.[959]

Access to courts

Recommendations

9.873 We do *not recommend* that the Constitution be altered to provide that:

> The Commonwealth or a State shall not deny to any person . . . access to the courts.

Current position

9.874 Under Australian law, access to the courts is governed by legal rules of various kinds. First, there are rules governing capacity to sue. These determine whether a person is able to institute court proceedings in his or her own right, or only by a next friend or trustee or not at all. Generally these rules are satisfactory. A notable exception is the common law rule that a prisoner convicted of a capital offence cannot bring civil actions.[960] The operation of that rule has, however, been much restricted by legislation abolishing capital punishment and dealing with attainder.[961]

957 The cases are reviewed in M Aronson and N Franklin, *Review of Administrative Action* (1987) 106-11.
958 para 9.200.
959 para 9.766-9.773.
960 *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583.
961 See Senate Standing Committee on Constitutional and Legal Affairs, *A Bill of Rights for Australia?* (1985) para 2.27 and notes 22 and 23.

9.875 Then there are rules governing standing to sue and to prosecute. These rules define the kind of interest a person must have in order to be recognised as an appropriate person to institute legal proceedings. The rules about standing were recently reviewed by the Australian Law Reform Commission and recommendations made for their reform.[962]

9.876 Access to courts is regulated in other ways. Courts have an inherent jurisdiction to prevent abuses of their processes and may exercise it 'in any situation where the requirements of justice demand it'.[963] To prevent abuse of court process, a court may, amongst other things, stay or dismiss proceedings. This inherent jurisdiction is reinforced by legislation which prevents persons who have been adjudged to be vexatious litigants from bringing proceedings without a court's leave.

9.877 Australian Parliaments possess considerable powers to restrict the rights of access to the courts which are conferred by the common law. These powers have been most commonly used to exclude or limit judicial review of the exercise of powers given by statute to governmental agencies and officials.[964] Privative or ouster clauses, as they are called, have, however, fallen into disfavour. Courts are apt to read them down; indeed, it seems that no privative clause will be construed as precluding judicial review in cases where there has been a blatant overreaching of power or jurisdiction. Some Australian legislatures have, in recent times, repealed privative clauses in many prior statutes.[965]

9.878 The only substantial constraint on parliamentary power to enact privative clauses is that implicit in section 75 of the Federal Constitution. This section confers original jurisdiction on the High Court of Australia in five classes of matters, including matters in which defined remedies are sought against officers of the Commonwealth.[966] No privative clause can subtract from this original jurisdiction.

9.879 The facility to initiate proceedings before the courts to vindicate both private and public rights is clearly understood by the Australian judiciary to be important. While there is not a great deal that the judges can do to resist deliberate and explicit parliamentary measures to preclude or limit resort to courts to enforce legal rights and to contest the legality of governmental actions, they can resist, and they have resisted, attempts to limit access to courts by means of regulations made pursuant to statutes which delegate legislative powers to the executive, or by exercise of statutory discretions.[967]

Advisory Committee's recommendation

9.880 The Rights Committee recommended that the Federal Constitution be altered by insertion of a provision which would prohibit the Commonwealth and States denying 'to any person . . . access to the courts'. This provision, the Committee said, was 'designed to overcome the rules relating to "standing" which have become complex'.[968]

962 *Standing in Public Interest Litigation* (1985).
963 *Tringali v Stewardson, Stubbs and Collett Ltd* (1966) 66 SR (NSW) 335, 344-5.
964 The arguments for and against statutory provisions of this kind are summarised in NSW Law Reform Commission, *Appeals in Administration* (1973) para 50, 51.
965 See, for example, *Administrative Law Act 1978* (Vic) section 12. An amendment to the Act abolished the common law rule which effectively prevents university students from seeking review of decisions of university authorities when their complaints are of a kind which come within the jurisdiction of the university's Visitor.
966 See Chapter 6 under the heading 'The High Court and federal jurisdiction', para 6.46 and following.
967 *Chester v Bateson* [1920] 1 KB 829; *Raymond v Honey* [1983] 1 AC 1.
968 Rights Report, 49.

Submissions

9.881 While some submissions expressed concern about the costs of litigation and the inadequacy of legal aid, none suggested that there be a constitutional provision in the terms recommended by the Committee.

9.882 The Committee's recommendation was strongly opposed by the Queensland Government which described it as 'nebulous and imprecise' and 'a simplistic and potentially troublesome solution' in 'a most difficult' area which had 'been put forward without proper reasoning'. The Queensland Government queried how the term 'access' would be interpreted. It suggested that the Committee's proposal does not consider problems about standing to sue which were dealt with in the Australian Law Reform Commission's Report on[969] *Standing in Public Interest Litigation* 'and could well add to them'. It queried the effect the proposed provision might have on legislation to control vexatious litigation.

Reasons for recommendation

9.883 The Queensland Government's objections to the provision proposed by the Committee are, we think, unanswerable. If the object of the provision is to liberalise, or perhaps even do away with, rules on standing to sue, it is by no means clear that the provision would achieve it. In any event, we consider that the Constitution is not an appropriate vehicle for bringing about fundamental reforms in these rules.

9.884 The phrase 'access to courts' is capable of being interpreted as covering matters other than rules on standing to sue, for example, rules to control abuse of court processes and vexatious litigation, rules stipulating that certain legal proceedings shall not be instituted without a court's leave, rules giving courts a discretion to dismiss proceedings at an early stage,[970] privative clauses, and perhaps even statutes of limitation. The proposed provision would certainly have a much wider sphere of operation than the provision in the draft New Zealand Bill of Rights 1985 that:

> Every person whose rights, obligations or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply to the High Court, in accordance with law, for judicial review of that determination.

9.885 The proposed provision, it should be noted, has no counterpart in either the *Canadian Charter of Rights and Freedoms* or the International Covenant on Civil and Political Rights.

9.886 It should also be noted that, under our proposed new Chapter VIA of the Constitution, a right of access to courts would be assured in cases where persons allege that their constitutionally guaranteed rights have been infringed.[971]

Civil conscription

Recommendation

9.887 We do *not recommend* that the Constitution be altered to provide that:

> Subject to section 51(vi.), the Commonwealth or a State shall not . . . impose any form of civil conscription . . . .

969 S3069 17 November 1987.
970 See, for example, *Administrative Decisions (Judicial Review) Act 1977*, (Cth) section 10.
971 Proposed section 124B.

9.888 We do *not recommend* that section 51(xxiiiA.) be altered by deleting the words '(but not so as to authorise any form of civil conscription)'.[972]

Current position

9.889 It is now well settled that, under the defence power conferred by section 51(vi.) of the Constitution, the Federal Parliament may enact legislation to require persons to render military service, whether combatant or non-combatant, and whether in peace-time or war-time.[973]

9.890 The only reference in the Constitution to civil conscription appears in section 51(xxiiiA.), which empowers the Federal Parliament to make laws with respect to the provision of certain social benefits and medical and dental services. The power to legislate for the provision of medical and dental services is qualified by the words 'but not so as to authorize any form of civil conscription'.

9.891 Section 51(xxiiiA.) was added to the Constitution as a result of a referendum held in 1946.[974] The rider relating to civil conscription was included in the Government's amending Bill at the instance of the Opposition because of fears that an unrestricted federal legislative power in respect of the provision of medical and dental services might allow the Federal Parliament to nationalise these services.[975]

9.892 The effect of the rider was considered by the High Court in *British Medical Association v Commonwealth (BMA Case) (1949)*,[976] a case concerning the validity of provisions in the *Pharmaceutical Benefits Act 1947* (Cth) – as amended in 1949 – which required that all prescriptions for items in a federal formulary of drugs, to be supplied free of charge, had to be made on government prescription forms. The federal council of the British Medical Association contended that this requirement amounted to civil conscription because doctors were practically compelled to render their services to the Federal Government. A majority of the Court (Latham CJ, Rich, Williams and Webb JJ) agreed. According to Chief Justice Latham, if the law were held valid, it would be open to the Federal Parliament to regulate the practice of medicine to such an extent that 'the whole practice of a doctor could be completely controlled'.[977] In his view, the term 'civil conscription' could be applied to 'any compulsion of law requiring that men should engage in a particular occupation, perform particular work, or perform work in a particular way.'[978]

9.893 Justice Dixon who, with McTiernan J, dissented on this point, drew a distinction between a law which compels a person to render medical service and one which imposes compulsion in relation to what is merely an incident of medical practice. Only the former amounted to civil conscription. The law in dispute in the present case did not make a medical service compulsory. The only compulsion was 'as to the formalities to be observed when the prescription is set down as a direction for the chemist . . .'.[979]

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972 See the discussion in Chapter 10 under the heading 'Social welfare' at para 10.251.
973 *Marks v Commonwealth* (1964) 111 CLR 549, 574; *Krygger v Williams* (1912) 15 CLR 366, 370; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 254.
974 *Constitution Alteration (Social Services).*
975 *Hansard,* House of Representatives, 9 and 10 April 1946, 1214-5.
976 79 CLR 201.
977 id, 251.
978 id, 249. See also 290 (Williams J) and 294 (Webb J).
979 id, 277.

9.894 It is by no means certain that the majority view in this case would now be followed. In the later case of *General Practitioners Society v Commonwealth,*[980] Gibbs, J (with whom Stephen, Mason, Murphy and Wilson JJ agreed) disapproved of the view which had been expressed by Latham CJ and some other members of the majority in the *BMA Case* that civil conscription includes compulsion to perform work in a particular way. Civil conscription, said Gibbs J, 'in its natural meaning . . . does not refer to compulsion to do, in a particular way, some act in the course of carrying on practice or performing a service, when there is no compulsion to carry on the practice or perform the service.' The words 'any form of conscription' , in his opinion, 'extend the meaning of "conscription", and that word connotes compulsion to serve rather than regulation of the manner in which a service is performed.'[981]

International Covenant on Civil and Political Rights

9.895 Article 8 of the International Covenant on Civil and Political Rights provides that:

1. No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour;
   (b) Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
   (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
      (i) Any work or service, not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
      (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
      (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
      (iv) Any work or service which forms part of normal civil obligations.[982]

Advisory Committees' recommendations

9.896 The Rights Committee recommended that the Constitution be altered in the manner set out under 'Recommendation' above. The object was to prohibit any form of civil conscription except in exercise of the federal defence power. The Committee said that such a prohibition 'was supported by a large number of submissions.'[983] Several of the submissions had suggested that Queensland's *Electricity (Continuity of Supply) Act 1985* would offend against a prohibition of civil conscription.[984]

9.897 The Powers Committee advised that no argument had been advanced to alter the present limited ban on civil conscription imposed by section 51(xxiiiA.).[985]

980 (1980) 145 CLR 532.
981 id, 557.
982 Article 20 of the proposed Australian Bill of Rights 1985 provided that 'No person shall be held in slavery or servitude or be required to perform forced or compulsory labour'.
983 Rights Report, 54.
984 id, 14.
985 Powers Report, 136, para 9.4.

Submissions

9.898 The Queensland Government expressed concern about the Rights Committee's proposal, particularly if civil conscription was interpreted as widely as it had been by the High Court in the *British Medical Association Case* in 1949.[986] It was concerned about the effect the proposal would, if implemented, have on 'many occupational licensing and consumer protection laws as well as on many orderly marketing schemes', and on the power of governments to take appropriate action to deal with civil emergencies. It noted that the proposal did not contain the exceptions set out in Article 4 of the ICCPR. It also denied that a power of civil conscription had been conferred by the *Electricity (Continuity of Supply) Act 1985.*[987]

Reasons for recommendation

9.899 Whilst we agree with the general proposition that no person should be required to perform forced or compulsory labour, we are unable to support the Rights Committee's recommendation. It seems to us that, because of the broad interpretation placed on the term 'civil' conscription' by the majority of the High Court in the *British Medical Association Case,*[988] even when confined by the Court's later decision in *Society of General Practitioners v Commonwealth,*[989] a constitutional prohibition in the terms proposed by the Committee could go far beyond forced or compulsory labour, and could impose unnecessary constraints on the power of parliaments to enact regulatory legislation.

9.900 We also see no good reason to entrench in the Constitution a principle which might well preclude any Australian government from seeking to socialise particular services. It is not for us to express any view on the desirability or undesirability of governments acting as exclusive providers of any kind of service. We must, however, recognise that opinions on questions such as the desirability of a national health service have differed and will continue to differ. We are not persuaded that the Constitution should impose any further impediments to the pursuit of policies the implementation of which might be regarded by the High Court as involving civil conscription. Whether or not such policies should be pursued is, we think, a matter for the electors to decide.

9.901 The Rights Committee's recommendation that the ban on civil conscription should be subject to the federal defence power is not, we believe, an appropriate way of modifying the ban. Defence of the nation is not necessarily the only purpose for which civil conscription might be sought to be imposed and which might justify adoption of that expedient. The clause proposed by the Committee could be interpreted, according to the maxim *expressio unius est exclusio alterius,*[990] as meaning that defence is the only purpose which qualifies the guarantee. There would then be little room for exceptions of the kind mentioned in Article 8 of the ICCPR.

Freedom of information

Recommendation

9.902 We do *not recommend* that the Constitution be altered to provide that:

> Subject to section 51(vi.), the Commonwealth or a State shall not . . . unreasonably withhold information.

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986 para 9.892-9.894.
987 S3069, 17 November 1987.
988 (1949) 79 CLR 201.
989 (1980) 145 CLR 532.
990 The express mention of one thing is the exclusion of another.

Current position

9.903 Under Australian law, there is no general right to require governments to disclose information. Statutory duties to give members of the public, upon request, access to documents in the possession of government departments and authorities have been imposed by the federal and Victorian *Freedom of Information Acts,* both enacted in 1982. But, in most other respects, rights to demand production of information in the hands of governments are not legally recognised. It is true that, under the common law, trials in the courts are generally required to be open to the public and what is said or read at a public hearing passes into the public domain and may be freely reported.[991] But courts have an inherent jurisdiction to control publication of reports of their proceedings, for example, by directing that the names of witnesses be suppressed or that documents tendered in open court not be read out.[992]

9.904 There are also statutory requirements that certain court proceedings be conducted in private and statutory restrictions on the reporting of such proceedings. The Houses of Parliament also have power to control reports of their proceedings. They may exclude non-members from the chamber and conduct their proceedings *in camera.*[993]

9.905 The common law recognises no such thing as a public right of access of information in the hands of the Executive branch of government. Courts of law may demand and compel production of such information if it is relevant to determination of issues before them, but they will exclude it as evidence if its production would be contrary to the public interest.[994] The Houses of Parliament also assert power to require officers of the Executive to provide information, but, to date, have not pressed their claims in the face of objections in the name of Crown privilege.[995] There is no common law requirement that administrative tribunals conduct their hearings in public.[996] In the absence of any statutory provision to the contrary, Royal commissions and other bodies of inquiry appointed by the Executive also have a discretion as to whether they will receive evidence in public or in private.[997]

9.906 In appropriate cases, courts may assist governments to preserve the confidentiality of information by applying the general law about breach of confidence. A governmental claim to the protection of this law will not, however, be sustained unless it can be shown to the court's satisfaction that disclosure of the information would be likely to injure the public interest. It is not enough for the government to show that 'publication of material concerning its actions will merely expose it to public discussion and criticism'. Something more is required, for example, prejudice to national security, to relations with foreign countries, or to the ordinary business of government.[998] Different considerations apply where the party seeking to preserve the confidentiality of government information is a private person who complains of breach of confidence in relation to information about his or her affairs.

991 *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 449-50; *Home Office v Harman* [1983] 1 AC 280.

992 *R v Socialist Workers, Printers & Publishers Ltd; Ex parte Attorney-General* [1975] QB 637; *Attorney-General v Leveller Magazine Ltd* [1979] AC 440; *Andrew v Raeburn* (1874) 9 Ch App 522.

993 During World War II the Houses of the Federal Parliament excluded strangers whenever Ministers were about to disclose information which, if made public, would be prejudicial to the nation's defence. See Paul Hasluck, *The Government and the People, 1939-1941* (1952) 420.

994 *Sankey v Whitlam* (1978) 142 CLR 1.

995 See E Campbell, 'Appearance of Officials as Witness before Parliamentary Committees' in JR Nethercote (ed), *Parliament and Bureaucracy* (1982) 179, 204-26.

996 *Re Legal Professions Act* [1927] 4 DLR 195 (BCCA); *Re Penner and Board of Trustees of Edmonton School District No 7* (1974) 46 DLR 3d 222; *Re Millward and Public Service Commission* (1974) 49 DLR 3d 295; cf *Addis v Crocker* [1961] 1 QB 11, 30; *R v Tarnopolsky; Ex parte Bell* [1970] 2 OR 672, 680 (Ont CA).

997 *Clough v Leahy* (1904) 2 CLR 139, 159; *Bretherton v Kay and Winneke* [1971] VR 111.

998 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 51-2 (Mason J).

Position in other countries

9.907 ***United States.*** In the United States, certain claims to access to information have been upheld on the basis of the freedom of speech and press guarantees contained in the First Amendment. In *Richmond Newspapers v Virginia*[999] the Supreme Court held that the First Amendment guarantees the public, and particularly the press, a right to attend criminal trials. In a later case, it held unconstitutional a State law which required judges to exclude the press and public from hearings when a victim under 18 gave evidence at a trial for certain specified sexual offences.[1000]

9.908 A First Amendment right to receive information was also relied on by a narrow majority of the Court when it upheld a challenge to a decision by a high school board to remove certain books, considered offensive, from the school library.[1001] On the other hand, the Court has not accepted claims by journalists, based on the First Amendment, of constitutional rights to require prison authorities to furnish them with information not generally available to the public.[1002]

9.909 It should, however, be noted that the United States has comprehensive freedom of information legislation, and, at federal and State levels, what is known as 'government in the sunshine' legislation which confers on members of the public rights to attend meetings of many multimember government agencies.[1003]

9.910 ***Canada.*** The freedom of expression guarantee in section 2(b) of the *Canadian Charter of Rights and Freedoms* has been interpreted as importing a right of access to court proceedings, principally because, traditionally, they have been open to the public.[1004] This right cannot therefore be abridged except in pursuance of a law which can be justified under section 1 of the *Charter*.[1005] Constitutional rights of access to committal proceedings, bail applications and coronial inquiries have not, however, been recognised.[1006]

9.911 But in one case it was held that the freedom of expression guaranteed by section 2(b) of the *Charter* was impaired by a regulation which prohibited anyone from approaching within one half of a nautical mile of an area in which a seal hunt was being carried out, unless the person had obtained a permit. Freedom of expression, it was said must include freedom of access to:

> all information pertinent to the ideas or beliefs sought to be expressed, subject to such reasonable limitations as are necessary to national security, public order, public health or morals, or the fundamental rights and freedoms of others.[1007]

9.912 The regulation was nonetheless upheld as a legitimate conservation measure.

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999 448 US 555 (1980).

1000 *Globe Newspaper v Superior Court of County of Norfolk* 457 US 596 (1982).

1001 *Board of Education, Island Trees Union Free School District, No 26 v Pico* 457 US 853 (1982).

1002 *Procunier v Martinez* 416 US 396 (1974); *Pill v Procunier* 417 US 817 (1974); *Saxbe v Washington Post* 417 US 843 (1974); *Houchins v KQED* 438 US 1 (1978). See discussion in E Barendt, *Freedom of Speech* (1985) 107-13.

1003 See for example 5 US Code section 55b.

1004 *Re Southam Inc and The Queen (No 1)* (1983) 41 OR 2d 113 (Ont CA); see also *Attorney-General, Nova Scotia v MacIntyre* [1982] 1 SCR 175, 185-7.

1005 *Canadian Newspapers Co Ltd v Attorney-General for Canada* (1985) 16 DLR 4th 642 (Ont CA); *Re Hirt and College of Physicians and Surgeons of British Columbia* (1985) 17 DLR 4th 472 (BCCA); *Re Edmonton Journal and Attorney-General for Alberta* [1987] 5 WWR 385 (Alta CA).

1006 *R v Banville* (1983) 45 NBR 2d 134 (NBQB) (preliminary inquiry); *Re Global Communications Ltd and Attorney-General, Canada* (1984) 44 OR 2d 609 (Ont CA) (bail hearing); *Edmonton Journal v Attorney-General for Alberta* (1983) 5 DLR 4th 240 (Alta QB), affirmed (May 9, 1984, Alta CA) (coroner's inquiry). See P Anisman and A Linden (eds), *The Media, The Courts and The Charter* (1986) 11, 19-20, 355, 405.

1007 *International Fund for Animal Welfare Inc v The Queen* (1986) 30 CCC 3d 80, 93 (FCTD).

International obligations

9.913 Under section 2 of Article 19 of the International Covenant on Civil and Political Rights, the right to freedom of expression is defined to include 'freedom to seek, receive and impart, information and ideas of all kinds . . .'. A similar provision appears in section 1 of Article 10 of the European Convention for the protection of Human Rights and Fundamental Freedoms.

9.914 It is doubtful whether either impose a positive duty on governments to impart information.[1008]

Advisory Committee's recommendation

9.915 The Rights Committee recommended that the Constitution be altered by insertion of the provision we set out above under the heading 'Recommendation'. The main reason why the Committee recommended this alteration was 'that a democracy cannot properly function if governments may prevent any information about their actions or decisions becoming public knowledge.'[1009]

Submissions

9.916 In its lengthy commentary on the Committee's Report, the Queensland Government argued strongly against adoption of the Committee's recommendation.[1010] It did so mainly on the following grounds:

(a) The development of freedom of information legislation in Australia has demonstrated that there are important policy considerations and conflicting interests which have to be taken into account in determining what legally enforceable rights of access to information in the hands of governments should be conferred. These problems the Committee glossed over.

(b) It would be 'wrong to give the judiciary . . . the power to make policy determinations' of the kind which would have to be made by them were the Committee's proposal to be implemented. 'Not only would the judiciary have the right to determine whether an individual should have access to a document in accordance with a statutory provision, but also whether the provision met the constitutional standard of reasonableness'.

(c) The proposed amendment would 'limit to an unwarranted degree the ability of Governments to function properly . . .'.

Reasons for recommendation

9.917 The clause which the Committee has proposed presents many problems. Were it to be included in the Constitution, it would not only inhibit the power of Parliaments to enact legislation which made it illegal to disclose information in the hands of governments. More important, it would probably be interpreted as imposing on the Commonwealth, the States and their agencies a positive duty to furnish information, upon request, unless the withholding of it was, in the circumstances, reasonable. The reasonableness of a withholding of information would ultimately be a matter for judicial decision.

1008 E Barendt, op cit, 112.
1009 Rights Report, 56.
1010 S3069, 17 November 1987.

9.918 In our view, the Constitution is not an appropriate vehicle for the creation of an open-ended public right of access to government information, the content of which would then have to be worked out on a case-by-case basis by the courts.

9.919 The *Freedom of Information Acts* enacted by the Federal and Victorian Parliaments in 1982 clearly show that the conferment of public rights of access to government information involves a careful and considered balancing of a wide range of conflicting interests and also establishment of fairly detailed rules governing the handling of applications for access. Adoption of the provision recommended by the Rights Committee would mean that in those Australian States which do not have freedom of information legislation, the courts would, over time, be forced to develop the kinds of rules which legislatures have devised, and have, in the light of experience, revised. They would also be confronted with the prospect of having to determine a multiplicity of claims by individuals seeking to enforce their constitutional right of access to government information. To inflict these tasks on the judiciary would be to burden them with a function which, we believe, they would regard as preeminently legislative and administrative in character, and one they should not be expected to perform.

9.920 A further point to be noted about the clause proposed by the Committee is that the duty it would impose would be independent of any duties which would arise under freedom of information legislation and could, in some circumstances, override the statutory duties arising under that legislation. The constitutional duty would, moreover, not be confined to provision of information already held in documentary form.

Minority rights

Recommendation

9.921 We do *not recommend* that the Constitution be altered to provide that:

> Subject to section 51(vi.), the Commonwealth or a State shall not . . . restrict any person . . . from participating in the culture, religion and language of a cultural, religious or linguistic group to which they belong.

Advisory Committee's recommendation

9.922 The Rights Committee recommended that the Constitution be altered in the manner set out above. The suggested provision, which formed part of a clause dealing with peaceful assembly, draws on Article 27 of the ICCPR. This provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[1011]

9.923 The Rights Committee reported that concern had been 'expressed both by ethnic and Aboriginal groups about the protection and preservation of ancestral heritages.'[1012] It concluded that 'on balance there was merit in protecting both peaceful assembly and the extension of that freedom, namely freedom for those who wish actively to retain ancestral

1011 See also Article 5 of the proposed Australian Bill of Rights 1985 and Article 13 of draft New Zealand Bill of Rights.

1012 Rights Report, 55.

cultures, religions and languages.'[1013] It advised against reference to minorities since the rights in question could be 'those of a "majority", for example "Anglicans", or "Anglo-Saxons", or in some communities, the Irish'.[1014]

Submissions

9.924 Numerous submissions were received urging that some constitutional protection should be given to minority groups.[1015] A number of these[1016] joined with the Ethnic Affairs Commission of New South Wales in suggesting that section 116 of the Constitution should be altered to include a sub-section along the lines of Article 13 of the proposed New Zealand Bill of Rights, which provides:

> A person who belongs to an ethnic, religious or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or to use the language, of that minority.

9.925 The Queensland Government opposed the particular alteration to the Constitution recommended by the Committee.[1017] It emphasised that it recognises the important role played by the various ethnic groups in Australia 'and that it does not place, nor would it wish to place, any restrictions, direct or indirect, on such persons enjoying or participating in their culture, religion or language'. But it saw no need for the provision recommended by the Committee. It also suggested that adoption of the provision could have 'unintended legal, political and financial consequences'. It might be seen as enshrining in the Constitution 'multiculturalism as a policy of State'. It could 'result in actions by certain minority groups seeking positive governmental action to enable them to participate in, for example, their language'.[1018] It had 'the potentiality to cause divisions in the community'.

Reasons for recommendation

9.926 We are not persuaded that the provision which the Committee has recommended is necessary. It seems to us that the claims that the Committee wished to see recognised and protected by the Constitution would, for the most part, be subsumed under the freedoms which we recommend should be guaranteed, notably freedom of expression, religion, association and assembly, and freedom from discrimination on specified grounds.

A FEDERAL HUMAN RIGHTS POWER?

Recommendation

9.927 We do *not recommend* that the Constitution should be altered to give the Federal Parliament an express power to make laws with respect to human rights or for the enforcement of constitutionally guaranteed rights and freedoms.

1013 id, 56.

1014 ibid.

1015 eg, Ethnic Communities Council of NSW S849, 27 January 1987; Hon F Arena MLC S2505, 15 December 1986; Ethnic Affairs Commission of NSW – Illawarra Advisory Committee S277, 26 September 1986; Anglican Church Diocese of Sydney S3397, 25 October 1986; B Oliver, Ethnic Communities Council of NT S868, 28 January 1987; Women's Network S944, 16 February 1987; Addison Road Community Centre Inc S973, 19 February 1987.

1016 Greek-Australian Welfare Workers Association of NSW S966, 18 February 1987; Lebanese Moslems Association S985, 1 February 1987; Enosis Chios NSW Ltd S1090, 4 March 1987; Italian Federation of Migrant Workers and their Families S1241, 7 March 1987; Ethnic Child Care Development Unit S967, 18 February 1987.

1017 S3069, 17 November 1987.

1018 Reference was made to the *Belgian Linguistic Case No 2* (1968) 1 EHRR 252.

Current position

9.928 The Federal Parliament does not, at present, possess any comprehensive power to make laws for the protection of human rights. The external affairs power conferred by section 51(xxix.) permits it to enact legislation to implement international agreements on human rights to which Australia is a party, for example, the International Covenant on Civil and Political Rights (ICCPR). The *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984* were enacted largely in reliance on this power.[1019]

9.929 Many of the Federal Parliament's other legislative powers enable it to enact legislation for the better protection of individual rights and liberties.

Position in the United States of America

9.930 All of the additions made to the United States Bill of Rights since 1865 have included a clause which provides that 'Congress shall have power to enforce this Article by appropriate legislation'.[1020] The result has been to endow the Congress with express powers to legislate to enforce the prohibition of slavery, the guarantees of due process, of equal protection of the laws and of voting rights.

9.931 Between 1866 and 1875, the Congress enacted five civil rights statutes, principally to enforce the constitutional guarantees of racial equality.[1021] In 1883, however, the United States Supreme Court ruled that the Fourteenth Amendment, which contains the due process and equal protection clauses, applied only to state action, and that the legislative enforcement power conferred by the power was similarly confined. Accordingly, that part of the *Civil Rights Act 1875* which made it unlawful for private proprietors of hotels, restaurants, places of amusement and public conveyances to refuse services to persons on account of their race, colour or previous servitude, was declared invalid.[1022] The effect of this ruling was substantially diminished by a much later decision of the Supreme Court upholding a similar provision in the *Civil Rights Act 1964* on the ground that, in its new form, it was supportable as an exercise of Congress's power to regulate commerce among the States.[1023]

9.932 From 1957 onwards, the United States Congress began to play a much more active role in the creation of institutions and machinery for the enforcement of constitutionally guaranteed rights. Initially, its legislation was designed principally to enforce guaranteed voting rights, but, from 1964, its civil rights legislation sought to implement constitutional guarantees in more comprehensive ways.[1024] As was to be expected, the constitutionality of the new legislation was contested before the United States Supreme Court. Generally, those challenges failed. During the 1960s and 1970s the Supreme Court interpreted the constitutional guarantees in a generous fashion, and, with them, the clauses in the Constitution which endowed Congress with power to enact legislation to enforce them.

1019 The international conventions sought to be implemented by these Acts were, respectively, the International Convention on the Elimination of all Forms of Racial Discrimination, 1966, and the Convention on the Elimination of all Forms of Discrimination Against Women, 1979.

1020 Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments.

1021 These statutes are reproduced in RD Rotunda, JE Nowak and JN Young, *Treatise on Constitutional Law* (1986) Appendix E.

1022 *Civil Rights Cases* 109 US 3. It was held also that the law was not valid under the Thirteenth Amendment because discrimination on the ground of race did not carry with it the 'badge of slavery.'

1023 *Heart of Atlanta Motel Inc v United States* 379 US 241 (1964).

1024 42 *US Code*, sections 1987-1988.

9.933 A critical issue affecting the ambit of Congress's legislative power has been whether the relevant constitutional guarantees constrain only state or governmental action, and, if so, what can be characterised as state action. In 1968, the Supreme Court held[1025] that an Act of the Congress[1026] which provided that 'All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property', was a valid exercise of the power granted to Congress by the Thirteenth Amendment to enact 'appropriate legislation' to enforce the constitutional ban on slavery and involuntary servitude. The legislative power to enforce the Thirteenth Amendment was accepted as embracing a power to enact laws, 'direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.'[1027] A similar legislative provision to do with the making and enforcement of contracts,[1028] was upheld by the Court in 1976, again on the basis of the Thirteenth Amendment.[1029]

9.934 The power to legislate to enforce the Thirteenth Amendment is thus a wider power to legislate than the power to legislate to enforce the Fourteenth Amendment. Whereas the Thirteenth Amendment controls private as well as State action, the Fourteenth Amendment controls State action only.

Advisory Committees' recommendations

9.935 The Rights Committee reported that it had 'reached the tentative view that while the existence of a general Federal power in the area of human rights is an ideal worthy of contemplation, the necessity for such an amendment at the present time has not been demonstrated.'[1030] The Committee noted that the grant of such a power to the Federal Parliament would produce 'a substantial change in the balance of Federal power between States and Commonwealth Parliaments . . .'[1031] It went on to say:

> This is an arena in which the States regard themselves as having an important part to play and a legislative power of this kind may have a very wide and quite unpredictable reach, into other areas traditionally regarded as the preserve of the States. The effect of the entry of the Federal Parliament into this field is likely to be that a number of State statutes cease to operate by reason of the provisions of section 109 which guarantees supremacy of Commonwealth law. Such a proposal involving a transfer of power from the States to the Commonwealth would be highly controversial at the present time.[1032]

9.936 In the course of its examination of the Federal Parliament's power to legislate with respect to external affairs, the Powers Committee considered the uses made of that power to implement Australia's obligations under international conventions on human rights.[1033] After rehearsing the arguments for and against the proposition that the external affairs should not be a vehicle for federal legislation of this kind, the Committee concluded that 'No limits should be placed upon the use of the external affairs power to give effect to international treaties and agreements on human rights'.

1025 *Jones v Alfred H Mayer Co* 392 US 409 (1968).
1026 42 *US Code,* section 1982.
1027 id, section 1982. See also *Sullivan v Little Hunting Park Inc* 396 US 229 (1969); *Griffin v Breckenridge* 403 US 88 (1971).
1028 42 *US Code,* section 1981.
1029 *Runyon v McCrary* 427 US 160 (1976). On 25 April 1988, the Supreme Court decided, by five to four, to reconsider this decision. *Patterson v McLean Credit Union,* No 87-107. See (1988) 56 *United States Law Week* 3735.
1030 Rights Report, 60.
1031 id, 59.
1032 ibid.
1033 Powers Report, 90-3, para 5.95-5.106.

9.937 The Powers Committee did not consider whether there should be a new and separate head of federal legislative power relating to human rights as this matter did not come within its terms of reference.[1034]

Submissions

9.938 Several submissions were received advocating a federal power to legislate in respect of individual rights, equality and the removal of discrimination. The case on its behalf was set out in detail by Justice Elizabeth Evatt.[1035] She was of the opinion that many problems and limitations arise from the Federal Parliament's reliance on the external affairs power when legislating in the field of human rights. By way of example, she noted that the *Sex Discrimination Act 1984* (Cth) 'is not as comprehensive as it could ideally be, because it must comply with the requirements of the United Nations Convention on the Elimination of all Forms of Discrimination against Women'. Thus it does not apply to discrimination against men, unless this can be covered by a head of power other than external affairs, such as discrimination by a trading corporation or in the course of banking or insurance. 'The limitations are obvious', she concluded.

9.939 The difficulties involved in introducing a general 'human rights' power into the Constitution were acknowledged, in particular those relating to its impact on the balance of power between Federal and State Parliaments. But Justice Evatt argued that these difficulties would be reduced considerably if the proposed alteration was limited to a 'specific power in the area of discrimination and equality'. Without abandoning her commitment to a general head of power, Justice Evatt explained that the objections based on States' rights would have less weight if the more specific power was proposed, 'since there is already significant Commonwealth legislation in this field, and it contains provisions which enable it to operate in parallel with State laws.' After analysing the views of the Rights and Powers Committees on this matter, she concluded:

> In the result neither Committee has recommended a new head of power to enable national action to promote equality and prohibit discrimination, or, at a wider level, in regard to human rights. These are significant issues related to the enjoyment of social and economic rights, which these days are of equal importance to civil liberties and democratic rights. They depend on private actions of individuals and organisations as well as on government action. It is desirable that there be power to deal with these matters on a comprehensive and uniform basis nationally, as the need arises.

9.940 Most submissions favouring inclusion of a 'human rights' head of power concurred explicitly with Justice Evatt's views.[1036] Ms Carmel Niland, President of the Anti-Discrimination Board of New South Wales, submitted:

> Discrimination laws give redress for discrimination in our daily lives: work, housing, goods and services, recreation and education. Human rights also encompass protection against abuses in the extremities of existence: imprisonment, pain, punishment, madness and death. It is proper that the Constitution should apply to both, and that the Commonwealth should have the power to legislate directly concerning discrimination and human rights for all Australians.[1037]

1034 id, para 5.101.

1035 S205, 13 October 1987.

1036 NSW Women's Advisory Council to the Premier S3207, 29 January 1988; Women's Electoral Lobby – WA S3188, 27 January 1988; Women's Electoral Lobby – Cairns S3036, 9 November 1987; Women's Electoral Lobby – Newcastle S3073, 9 November 1987; Women Members of the South Australian Parliament S2857, 29 October 1987; National Women's Consultative Councils S2542, 11 December 1987.

1037 S3077, 20 November 1987.

9.941 On the other hand, the Queensland Government said it was against introducing a new head of power of this sort into the Constitution, primarily on the grounds that such a proposal would be 'divisive' and that it would 'severely and deleteriously restrict the States in supplying traditional services to the public'.[1038]

Reasons for recommendation

9.942 If the Constitution is altered by the addition of the new Chapter we propose, there is not, in our view, any need to invest the Federal Parliament with further powers to legislate for the protection of human rights. An unlimited federal power to legislate with respect to human rights would be one of indeterminate scope and would also present unusually difficult problems in relation to how laws would be characterised. It is also unlikely that the conferment of such a general power on the Federal Parliament would be acceptable to most electors.

9.943 A grant to the Federal Parliament of an express power to make laws for the enforcement of particular constitutional guarantees, similar to that possessed by the United States Congress, would not be open to the same objections. Since the constitutional guarantees we propose bind only governments and those exercising public functions, a power to legislate to enforce those guarantees would be considerably less wide than a power to legislate generally with respect to human rights. But it seems to us that it is not necessary to alter the Constitution to give the Parliament that power since the Parliament probably has the power already. Under section 61 of the Constitution, the executive power of the Commonwealth extends to the execution and maintenance of the Constitution. Under section 51(xxxix.) the Parliament may make laws with respect to 'Matters incidental to the execution of any power vested by this Constitution in . . . the Government of the Commonwealth, . . . or in any department or officer of the Commonwealth.' This provision, read with section 61, could well support federal legislation for the more effective enforcement of constitutional guarantees, for example, legislation to provide for administrative remedies for violations of constitutional guarantees, supplementary to the judicial remedies which would be available.

1038 S3069, 17 November 1987.