tion Program, represents a significant dilution of the position he put forward in October 1985. This was a set of recommendations which proposed two categories for conservation purposes, in the first of which he recommended that no logging or forestry operators be permitted, and in the second, that logging should only occur in accordance with conditions specified by the Australian Heritage Commission in consultation with appropriate authorities.

A potential problem with the proposal for a negotiated solution between the Commonwealth and the States for rainforest conservation is the rapidly diminishing quantity of wilderness rainforest left in Australia to be preserved. For example, according to the Wilderness Society, the taking of such a long term view would result in the destruction of the small pockets of wilderness left in the Daintree Rainforest, all accessible parts of which would be logged by the end of 1986. Of course 'wilderness' means a natural environment unchanged by commercial or other exploitation. Whether or not the National Rainforest Conservation Program will be seeking to conserve remaining wilderness pockets of rainforest untouched is not clear from the statement made by Mr Cohen on 25 August 1986 which did not address this issue. Mr Cohen said that while details of the programs were being discussed with State agencies and organisations, key elements would include 'assistance to the States to increase the holdings of rainforest of high conservation significance in national parks and to improve and supplement the planning and management of rainforest parks and reserves'. He went on, 'I regard the development of the tourism potential of rainforest as a particularly important aspect of this program, especially in the economic sense'. The place for wilderness in all this is unclear.

constitutional commission

Kerr: I'm pulling my Vice-Regal weight, a-a-a-a-ah!
Queen: He ought to be opening a fete, a-a-a-a-ah!
Mal: He's read his Constitution.
Gough: And called for dissolution.
Queen: I dare say it is Our responsibility – No wait! I think Australia's a democracy!
We should not like to interfere – our role was never very clear.
Most amusing, ah ha ha.
So confusing, ah ha ha.
Very funny, ah ha ha.
What's Khemlani?
'Il Dismissale', *The Gillies Report*

current work. The Constitutional Commmission's investigation of the possibility and nature of changes to the Australian Constitution is well under way. The Commission has now produced 7 Background Papers. Each of the 5 Advisory Committees has also produced Issues Papers.

background papers. The Background Papers canvass arguments for and against reform of the Constitution in the following areas:

- the power of the Federal Parliament to legislate in respect of defamation;
- extension of the term of Parliament;
- simultaneous elections of the House of Representatives and Senate;
- nexus between the number of Senators and the number of members of the House of Representatives;
- interchange of powers between the Commonwealth and States;
- outmoded provisions of the Constitution; and
- qualification of Members of Parliament.

In all of these areas except for the nexus between the Senate and the House of Representatives, the Commission advances tentative views for reform of the Constitution.

defamation. The Commission's Background Paper points out that there are 8 different laws covering defamation in the States and Territories. In 1973 the first meeting of the Australian Constitutional Convention in

Sydney forwarded to Standing CommitteeC of the Convention in Sydney the topic of a reference of power to the Parliament of the Commonwealth on the subject of defamation. In 1974, the Standing Committee agreed to recommend to the Convention that

- the subject of defamation was of national concern and
- should be referred to the Commonwealth by the States, or, failing that, given to the Commonwealth by Constitutional amendment.

The meetings of the Convention in Melbourne in 1975 and in Hobart in 1976 adopted this recommendation. The Constitutional Commission has formed the provisional view that the Constitution should be altered to confer the power to make laws with respect to defamation on the Parliament of the Commonwealth.

term of parliament. The Commission's Paper points out that only four of the world's popularly elected Governments have three year terms: those of Australia, New Zealand, Sweden and Thailand. In Australia itself, New South Wales, Tasmania, Victoria and the Northern Territory have four year terms for their Lower Houses.

The proposal to extend the term of Parliament has been supported by the 1929 Royal Commission on the Constitution, the Reid Committee of Review into Commonwealth Administration in 1982 and the 1983 Constitutional Convention held in Adelaide. The Commission has formed the provisional view that the Constitution should be altered to extend the term of the Parliament to four years.

simultaneous elections. There is no requirement in the Constitution that elections for half of the Senate must be held at the same time as elections for the House of Representatives, even though the theoretical term of Senators at six years is double the theoretical term for Members of the House of Representatives. Up to 1953, 19 out of 20 federal elections were simultaneous. However since that date, only half of the 18 elections have been simultaneous.

A proposal for simultaneous elections was made by the Joint Committee on Constitutional Review in 1959 and by the Australian Constitutional Convention in 1976 and 1983. Three referenda have been held on the issue, in 1974, 1977 and 1984. The proposal was rejected on each occasion. Although in 1977 and 1984 a majority of electors supported it, the requisite majority in four out of the six States was not obtained.

The Commission's Background Paper notes the arguments in favour of the proposal (for example, that it would reduce the number of elections, result in large savings and increase the accountability of the Senate) and the disadvantages (that it may reduce the power and independence of the Senate). The Commission has formed the provisional view that the Constitution should be amended to achieve simultaneous elections by making Senators' terms equal to twice the term of the House of Representatives.

nexus between the Senate and the House of Representative. At present, s 24 of the Constitution provides that the number of members of the House of Representatives, must be, as nearly as practicable, twice the number of Senators.

There have been proposals for breaking this nexus.

- In 1959, the Joint Committee on Constitutional Review recommended that the nexus be broken and the number of Senators and Members of the House of Representatives determined by Parliament.
- A referendum to implement such a proposal was defeated in 1967, with New South Wales being the only State to vote in favour.
- The 1976 Hobart Constitutional Con

vention recommended that the nexus be broken.

- A bill for a referendum to break the nexus was introduced into the Senate in October 1983 by Australian Democrat Senator Michael Macklin.
- The Structure of Government Sub-Committee recommended the breaking of the nexus to the 1985 Brisbane Constitutional Convention subject to certain conditions. The most interesting of these was that the present value of a Senator's vote in relation to that of a Member of the House of Representatives at joint sittings of the two Houses should be preserved despite the breaking of the nexus. This would obviously be important if the present provisions for breaking a deadlock between the two houses were to remain.
- The Commission's paper outlines ways in which the nexus might be broken as well as a number of arguments for and against doing so. One argument in favour of breaking the nexus is that it is unnecessarily rigid and removes flexibility from the Parliament. The arguments in favour of retaining the nexus are the possibility of a reduction of the Senate's prestige if the nexus were to be broken, protection of the interests of the less populous States, a safeguard against unnecessary increases in the number of Parliamentarians and preservation of the voting strength of the Senate at joint sittings.

The Commission has not formed a view in favour of or against breaking the nexus.

interchange of powers. The Constitution at present contains a power for a State to refer a power to the Parliament of the Commonwealth. However, some uncertainty surrounds this power. For example, it is uncertain

- whether a State retains power to legislate on a matter which it has referred to the Commonwealth,
- whether a reference may be made subject to conditions as to its exercise or duration, and
- whether the referral can be revoked.

Although judicial decisions seem to indicate that a State does retain power to legislate and can make a reference subject to conditions or revoke it, an amendment would remove the ambiguity. On the other hand, the Parliament of the Commonwealth cannot authorise State Parliaments to exercise powers which are exclusively vested in the Commonwealth (power to levy excise duty and to legislate with respect to certain Commonwealth Government Departments and 'Commonwealth places'). The Commission's Background Paper points out that a complex series of pieces of legislation is necessary to allow State criminal laws to apply to post offices, which are Commonwealth places and therefore entirely within the jurisdiction of the Federal Parliament.

A proposal for interchange of powers has been approved by various meetings of the Constitutional Convention although a referendum on interchange of powers was rejected on 1 December 1984. The Commission has formed the provisional view that there should be clear provision in the Constitution to enable State powers to be referred exclusively or non-exclusively to the Commonwealth, with a power to subject the reference to conditions and to revoke it, and to enable the Commonwealth to refer 'exclusive' powers to the States.

outmoded provisions of the constitution. The Commission has identified four categories of provision which should be removed from the Constitution to produce a more readable, relevant and simple Constitution.

First, the Constitution contains provisions whose purpose has been spent. For example, s5 provides that the Parliament shall be summoned to meet not later than six months after

the establishment of the Commonwealth. There are other such provisions covering such topics as the number of members in the first Parliament, transfer of officers who were at the establishment of the Commonwealth in a State public service to the Commonwealth Public Service and arrangments for the transfer of customs and excise powers from the individual colonies to the Commonwealth.

Secondly, there are provisions which were specified to operate for a fixed number of years or until the Commonwealth legislated to terminate their operation.

Thirdly, there are provisions which are now accepted as being obsolete relating, for example, to a putative role for the Queen in the legislative process.

Fourthly, there is a transitional provision covering the alteration in the method of filling casual vacancies in the Senate. In 1977, a referendum was passed to ensure that, when a State Parliament appoints a Senator to fill a casual vacancy, that Senator should be from the same party as the Senator being replaced.

The Commission has adopted the provisional view that the outmoded and expended provisions of the Constitution should be removed.

qualification of members of parliament. There are provisions in the Constitution which cover both the qualification of people to be members of Parliament and the factors disqualifying people from being members of Parliament. The criteria for qualification can be and have been modified by the Federal Parliament. However, the provisions for disqualification can only be modified by a referendum. One major aspect of disqualification which has attracted attention over the years is the disqualification of a person who holds an office of profit under the Crown. In 1929, three members of the Royal Commission on the Constitution supported the right of public servants to stand for Parliament without resigning from the public service. However, the remaining members of the Commission did not recommend the necessary constitutional amendment. In 1978, Senator Mal Colston introduced a bill into the Senate to enable government employees to stand for Parliament without risking their jobs. The Colston Bill led to an inquiry by the Senate Standing Committee on Constitutional and Legal Affairs which reported in May 1981 and recommended that the provisions governing the qualifications of members of Parliament be clarified and modernised. The 1985 Brisbane Constitutional Convention supported this in principle. On 28 March 1985 Australian Democrat Senator Colin Mason introduced a private member's bill for a referendum to narrow the description of 'offices of profit under the Crown' which would disqualify people from being members and allow the holders of such offices to become candidates without being required to resign.

The Commission favours revising and modernising the provisions covering the qualifications of members but has not determined precise amendments.

issues papers. As well as the Background Papers, each of the five Advisory Committees to the Commission has published detailed Issues Papers which do not make recommendations but raise matters for public discussion. The Issues Papers cover the following areas:

- individual and democratic rights;
- executive government;
- the Australian judicial system;
- distribution of powers; and
- trade and national economic management.

individual and democratic rights. The Issues Paper in this area identifies various individual and democratic rights, the present provisions for protecting those rights both under statute and common law and under the Constitution and the ways in which rights might be constitutionally guaranteed.

The Issues Paper identifies the following six general categories of individual and democratic rights:

- political rights, for example democratic and equal voting;
- civil rights, for example freedom of speech, freedom of conscience and religion, right to liberty and the right to life;
- legal process rights, for example freedom from arbitrary arrest and the right to a fair and speedy trial;
- economic rights, for example the right to own property, the right to work and the right to strike;
- rights of equality, for example the right to equal protection of the law and rights against discrimination; and
- social rights, for example the right to the protection of families and the right to privacy.

The Paper also raises the possibility of making special provision for the rights of Aboriginals in Australia.

The Paper examines the way in which rights may feature in a Constitution, for example:

- stated as a matter of principle;
- stated as a matter of principle, but implemented by further specific legislation to enable enforcement; and
- as a list of guarantees which would prohibit laws and practices which contravened the guarantees.

The Paper raises for discussion the way in which such rights might be enforced (for example by administrative means, or by judicial means resulting in invalidation of the legislation or a claim for damages).

executive government. The Issues Paper on Executive Government investigates the position of head of state and the Prime Minister and the members of the Ministry and Cabinet.

On the topic of head of state, the Paper asks fundamental questions relating to the need for a head of state and whether any of the powers or functions of a head of state could be conferred on another body or person. The Paper then asks whether Australia should be a monarchy or republic and examines the possibilities if Australia were to become a republic and possible reforms of the present monarchical system of government.

Speaking at a public hearing held by the Advisory Committee on Executive Government, the former Governor of New South Wales, Sir Roden Cutler predicted that Australia would eventually become a republic, although probably not for 25 years or more. Sir Roden mentioned the following factors as leading to this result:

- the fact that the Monarch does not live in Australia and has a close identification with the United Kingdom;
- younger people tend to think in terms of a republic;
- there is a growing number of Australians with non-British origins (*Australian*, 5 September 1986).

Assuming the retention of our present form of monarchy, the Paper examines the Royal powers exercisable by the Queen as distinct from those exercisable by the Governor-General.

The Paper also discusses the selection and powers of Governors-General. In particular, the Paper raises the use by the Governor-General of the reserve powers to dismiss a Prime Minister and the sources of advice which a Governor-General may seek. These issues are politically sensitive as a result of the events of 11 November 1975 when the Governor-General Sir John Kerr dismissed the Prime Minister Mr Whitlam after seeking advice on his power to do so from the Chief Justice of the High Court Sir Garfield Barwick. The Vice-Chancellor of the Australian National University, Professor Anthony Low has suggested to a public hearing held by the

Commission's Executive Government Advisory Committee in Canberra that the Governor-General should be able to seek outside advice in a time of constitutional crisis, but not from the Chief Justice of the High Court (*Canberra Times*, 18 September 1986). Professor Low suggested that the group of people from whom the Governor-General might seek advice could include a constitutional lawyer, a political scientist and retired politicians from both sides of politics.

The Paper also raises the following issues, among others, relating to executive government.

- Should the Westminister system of responsible government, by which the head of state appoints as Prime Minister the person who can form a government which enjoys the confidence of the House of Representatives, be retained or should the head of government be elected by the people?
- Should Ministers be required to be members of Parliament?
- If Ministers were not members of Parliament, how could they be made responsible to Parliament?
- Should Senators be eligible to serve in the Ministry?
- Should there be provision for Ministers in one House of Parliament to be questioned directly by Members of the other House of Parliament?
- The decisions of an elected Government are given approval and legal authority by means of the Executive Council, meetings of which are convened by the Governor-General or, in his or her absence, by the Vice-President of the Executive Council with the permission of the Governor-General. Should greater legal recognition be given to Cabinet, and the Executive Council abolished or its powers and functions altered?

australian judicial system. The Commission's Paper on the Australian Judicial System is a comprehensive review of the need for a change in that system and the possible changes.

The Paper examines in detail the various proposals which have been put forward for a unification of State and Federal Courts at levels below the High Court. The various systems surveyed have the common feature of an Appellate Court which would have Australia-wide jurisdiction.

Assuming that the proposals for an alteration to the overall judicial system are not implemented, the Paper examines, among other things, the methods for appointment and removal of High Court judges. In particular, it examines ways in which the States might have a constitutionally defined role in the selection of High Court judges. Since 1979, an Act of the Federal Parliament has given the States the right to be consulted prior to the making of an appointment. The Paper questions the role of Parliament in the removal of judges. It also opens for discussion the use of the term 'proved misbehaviour or incapacity' as a criterion for removal.

In the area of trial by jury, the Paper points out that the apparent guarantee of trial by jury in s80 of the Constitution is illusory since it only applies to crimes actually tried on indictment. This links the guarantee to a technicality of the law: since there is no restriction on legislation providing for summary trial, even for serious offences, there is therefore no guarantee of trial by jury. The Paper raises for discussion ways in which the provision for trial by jury might be linked more closely to the seriousness of an offence.

The Paper also raises other issues such as:

- the inability of the Parliament to appoint acting judges to Federal Courts (as can be done in State Courts);
- lack of security of tenure for judges of the courts of the States and Territories;
- the possibility of conferring on the

High Court a jurisdiction to give advisory opinions;
- the inability of the Parliament to invest a Federal Court with non-judicial powers (the Boilermakers' Doctrine); and
- the apparent loopholes in the Constitution by which appeals to the High Court may be excluded.

distribution of powers. The Paper on Distribution of Powers examines the way in which legislative power is distributed under the Constitution and in particular looks at the powers of the Commonwealth Parliament provided for in s51 of the Constitution. The Paper reviews a number of heads of legislative power not necessarily in the order in which they appear in s51 but in the order in which the Committee ranks their significance to the public. Four in particular will be mentioned here: industrial relations, family law, external affairs and constitutional recognition of local government.

In the area of industrial relations, the Paper points out that the present power in the Constitution only enables the Commonwealth to make laws regarding conciliation and arbitration. It is not able to legislate on terms and conditions of employment or set up wages boards or conciliation committees. The States do, however, have the power to legislate on other matters. This has led to confusion in the work place where, for example, some employees may be covered by Federal awards and others by State awards. Also, the Australian Conciliation and Arbitration Commission can only deal with industrial disputes which extend beyond the limits of any one State. The Committee raises for consideration one or other of the Commonwealth or the States vacating the industrial relations field as well as other measures to alleviate the current problems.

The Committee raises a wide range of family law problems which arise from the current distribution of powers only some of which will be mentioned here.

- Custody, guardianship and maintenance of children outside the context of divorce or a matrimonial cause is dealt with under State law rather than under the Family Law Act. The provisions of the two sets of laws differ significantly. For example, whereas under the Family Law Act, both parents are guardians and have custody of a child of their marriage in the absence of a court order, in Western Australia the mother of an ex-nuptial child has sole custody and guardianship and in Victoria the mother has legal custody until the child turns 16 but the father is the child's guardian. In Queensland and Tasmania the position is unclear.
- The Family Court cannot resolve a dispute between a married couple and a third party over the custody of an ex-nuptial child of one spouse born before the marriage and living in the marital household.
- The Commonwealth has no power to legislate in respect of adoption, parentage or child welfare.

The Committee reviews various proposals for the re-distribution of power in the family law area.

- The Constitutional Conventions of 1975 and 1976 recommended that the Commonwealth should be given power over illegitimacy, adoption and maintenance (other than in divorce proceedings).
- The Commonwealth Parliament's Joint Select Committee on the Family Law Act in 1980 recommended that the States should refer to the Commonwealth power over the custody, guardianship and maintenance of ex-nuptial children and legitimate children of previous marriages.

Agreement has now been reached between the Commonwealth and New South Wales, Victoria, South Australia and Tasmania that those States will refer to the Commonwealth

legislative power over the maintenance of children, the payment of expenses in relation to children and the custody and guardianship of and access to children. The States will however retain their welfare or protective jurisdiction in relation to children in need of care. Although this is a satisfactory remedy in those States, there will be an overall lack of uniformity throughout the country and the reference of powers will be revocable. The Committee therefore advances the possibility of a constitutional extension of Commonwealth powers.

In the area of external affairs, the Committee examines the use of the external affairs power to widen the scope of possible federal legislative activity which has in recent years gained a good deal of publicity. Particularly as a result of the Tasmanian Dams Case in 1983, it is established that the Commonwealth can pass legislation based on the external affairs power to implement the provisions of an international treaty or convention. Such legislation may well be beyond the power which would otherwise exist under the Constitution. The Committee examines the arguments for and against the apparent breadth of the power. It refers to the recommendation of the External Affairs Sub-Committee of the 1985 meeting of the Constitutional Convention held in Brisbane for the establishment of an Australian Treaties Council which would provide advice and reports on the effect of proposed treaties and make non-binding recommendations on the manner in which they could be ratified and implemented in Australia. The Council was envisaged as a body through which the interests of the States could be identified and recognised. The Committee raises for discussion, among other things, the possibility of establishing such a Council, the possibility of giving the States a role in the treaty making process and limiting the power of the federal Parliament to enact legislation for the implementation of treaties and other international agreements.

The Premier of Queensland, Sir Joh Bjelke-Petersen has, in a submission to the Committee on the Distribution of Powers, recommended that the Constitution be amended to prevent the High Court giving an 'expanded interpretation' to the external affairs power (*Australian*, 9 September 1986).

The Committee also raises the issue of constitutional recognition of local government. This matter was first discussed at the inaugural meeting of the Constitutional Convention in Sydney in 1973. The Brisbane meeting of the Convention in 1985 recommended that the Constitution be amended to provide for the recognition of local Government. Such recognition has already been included in the State Constitutions of Western Australia, Victoria and South Australia.

trade and national economic management. The Committee on Trade and National Economic Management, in a very detailed issues paper, examines the legislative and fiscal powers of the Commonwealth together with the ability of the Commonwealth to direct the national allocation of resources and influence the rate of economic growth in particular regions.

Among the issues raised are the following.

- The power of the Commonwealth to regulate trade and commerce does not extend to regulating trade and commerce purely within a State. This restriction has limited the ability of the Federal Government to regulate national economic management. For instance, there is no comprehensive power over prices and incomes. In 1974, a referendum to give the Federal Government such powers was rejected by the electorate.
- The present powers of the Commonwealth do not appear to include secure power to pass comprehensive legislation in areas of such national importance as national companies and se

curities regulation, trade practices and consumer protection.

- The exclusion of the States from the levying of excise duties has limited the possible taxation options particularly due to the wide definition given by the High Court to the notion of an excise duty.
- The Committee raises the operation of s92 in relation to the national management of the economy. The paper points out that, although the section was originally introduced to prevent State protectionism, it has now developed into a guarantee of individual freedom to trade interstate. As a result
  - interstate trade is almost entirely free from taxation,
  - banks and airlines cannot be nationalised,
  - interstate transport cannot be made subject to discretionary licensing, and
  - most marketing schemes have to exempt interstate traders.

  The Committee raises for discussion the consequences for national economic management of interpreting s92 in this way and the need for a section such as s 92 at all.

the future. The Constitutional Commission is required to complete its work by 30 June 1988. It has therefore asked the five Advisory Committees to report by the end of April 1987. Their reports will be made public. The Committees are conducting public hearings, submissions to which will be taken into account in preparing their reports.

odds and ends

■ ***standing rises.*** Although no formal announcement by the federal Government has been made yet on the fate of ALRC's Report, *Standing in Public Interest Litigation* (ALRC27), which was published in 1985, a Bill has now been introduced into the Senate to implement the major recommendations contained in that Report. The Standing (Federal and Territory Jurisdiction) Bill 1986, based largely on the legislation included in ALRC27, was introduced by Senator Vigor (Dem South Australia) on 8 October 1986.

Introducing the Bill Senator Vigor said

> I am now addressing another major problem in our legal system, that of people being excluded from justice because of some obscure doctrine or some previous court finding that they are not fit and proper to bring an action. We have to turn our legal system back to one which is not bound up inordinately by the protection of commercial or property interests, to one in which the ordinary person may rely on the rule of law. . . . We cannot talk about equality before the law or the rule of law if in practice unlawful or illegal behaviour can go unchallenged because no one is in a position to do anything about it.

Senator Vigor acknowledged the assistance afforded to him by his consideration of ALRC27. In only one respect did he fail to follow that Report's recommendations. ALRC27, while abolishing the existing standing rules for public interest litigation, provided a simple test that the court could decline to proceed with the case if it found on application that the plaintiff was 'merely meddling'. According to Senator Vigor

> The negative definition of the concept of 'merely meddling' has been excluded from the Bill, but the formula to determine whether a plaintiff has standing will give effect to the Law Reform Commission's intention to excluded meddlers. . . . any criticism seeking to cut out those people who are 'merely meddling' will continue to switch the energies of lawayers from the substantive issues into unproductive side-tracks. We should be ridding our legal system of as many barriers to achieving justice as are possible to be removed.

The fate of the Bill is unknown at this stage.

■ ***class actions.*** The ALRC has obtained the services of a Canadian lawyer, Mr Andrew Roman, who has been appointed a consultant on the Class Actions Reference. Class actions, a legal device which enables a person